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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

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.

ANTHONY AKBAR'S FINAL RESPONSE BRIEF AS RESPONDENT

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TABLE OF CONTENTS

Table of Authorities i

Counter-Statement of the Case 1

Counter-Statement of the Issues on Appeal 7

Standard of Review 7

Argument 9

III. The trial court correctly denied Appellant's Post-Trial Motions. 9

I. The demonstrative video of visibility at the intersection was properly shown to the jury. 13

A. The video was relevant. 16
B. The video was fair and accurate. 17
C. The video was not more prejudicial than probative. 18

II. The trial court properly excluded Bronson Rash's uncle, Paul McCullough, from testifying as an expert in line of sight. 18

IV. The trial court correctly excluded from evidence the Notices to Mr. Akbar from the City of North Charleston. 20

Conclusion 25

TABLE OF AUTHORITIES

Cases

Austin v. Stokes-Craven Holding Corp.,
387 S.C. 22, 691 S.E.2d 135 (2010) 8

Bivens v. Watkins,
313 S.C. 228, 437 S.E.2d 132 (Ct. App. 1993) 11

Clark v. Cantrell,
339 S.C. 369, 385, 529 S.E.2d 528 (2000) 15–16

Conner v. City of Forest Acres,
363 S.C. 460, 611 S.E.2d 905 (2005) 8, 13, 24

Fields v. Reg'l Med. Ctr.,
363 S.C. 19, 609 S.E.2d 506 (2005) 8

In re Bilton,
432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020) 8

Norton v. Norfolk Southern Ry. Co.,
350 S.C. 473, 567 S.E.2d 851 (2002) 10–11

Seabrook Island Property v. Berger,
365 S.C. 234, 616 S.E.2d 431 (2005) 22

State v. Black,
319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995) 24

State v. Colf,
332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) 24

Townes Assoc. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976) 7

Vinson v. Hartley,
234 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996) 7–8, 10

Webb v. CSX Transp., Inc.,
364 S.C. 639, 615 S.E.2d 440, 448 (2005) 18

Rules

Rule 401, SCRE 23

Rule 403, SCRE 23

Rule 703, SCRE 23

Rule 802, SCRE 23

Rule 803, SCRE 23

COUNTER-STATEMENT OF THE CASE[1]

This is a very sad case involving an accident in which a motorcycle collided with a pick-up truck as the truck was making a left turn into an intersection. The motorcyclist lost his life. The motorcyclist's mother, Appellant Darleen Rash, filed this lawsuit on his behalf and as the representative of his estate. Respondent Mr. Akbar owns property down the street from where the accident occurred.

A. Abbreviated Facts[2]

The accident occurred in the City of North Charleston, at the intersection of Hedgewood Drive and Old Meeting Street Road. Mr. Akbar's property is not the corner lot—it is one lot down the road from the intersection:

(*See* R. p. 1486) (annotations added); (*see also* R. p. 1508, subdivision plat).

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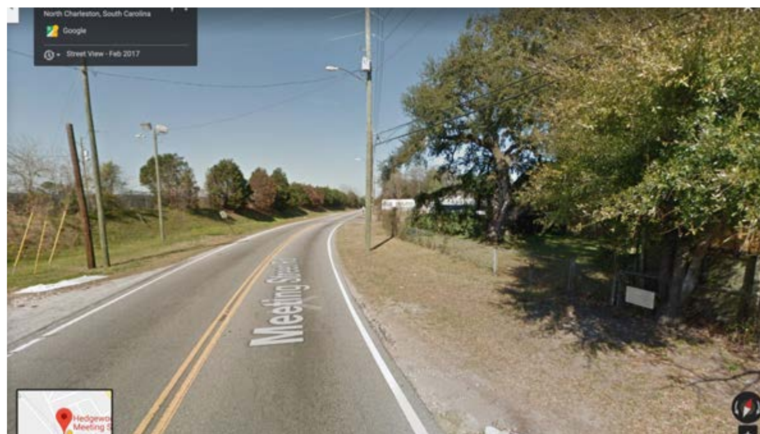
[1] Mr. Akbar incorporates herein by reference the Brief of Respondent Dominion Energy, filed on March 28, 2024, to the extent its arguments apply to and favor Mr. Akbar.

[2] Mr. Akbar incorporates herein by reference the Statement of Facts within his brief on cross-appeal, as well as within the briefs of Dominion Energy.

Central to Mrs. Rash's issues on appeal is the factual question, which was at issue at trial, of whether a chain-link fence and vegetation on Mr. Akbar's property caused the accident.[3] Appellant's argument at trial was that the chain-link fence and vegetation on Mr. Akbar's property impeded the "line of sight"[4] from Hedgewood Drive looking down Meeting Street Road.

The evidence on the question of visibility was conflicting. Both Mrs. Rash and Respondents, including Mr. Akbar, presented exhibits and testimony, including expert testimony by both sides, going to this disputed question of fact. Photographs of the intersection, dated contemporaneously with the accident, were introduced to depict the condition of the road, fences, and vegetation at the time of the accident:



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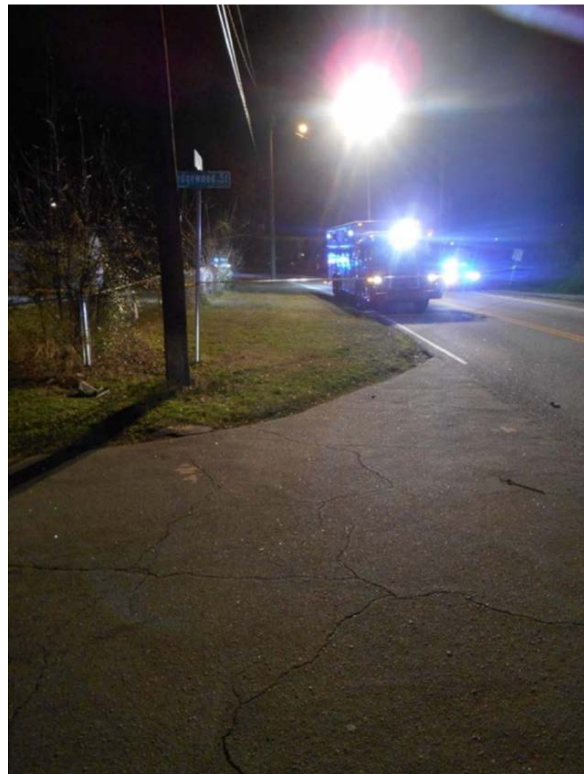
[3] Mrs. Rash also made substantially similar claims against Mr. Quattlebaum; Mr. Quattlebaum owns the property at the corner of Hedgewood Drive and Meeting Street Road, whereas Mr. Akbar owns the property farther down the road. Mrs. Rash also made claims against Dominion Energy, as discussed in its briefs.

[4] The question of visibility goes largely to causation — but there is the prerequisite question of the existence of a duty. As additional sustaining ground, Mr. Akbar argued repeatedly that neither the common law nor the City of North Charleston's health or zoning ordinances imposed on him any duty to drivers on the roadway passing by his house to keep his fence or vegetation in a particular way. (*See* Mr. Akbar's briefing on Cross Appeal and R. pp. 98-119; pp. 139-143; pp. 697–708; 1158–1170).

(R pp. 655-656; 1504-1506).

(R. p. 1501) (Mr. Akbar's property is near the red car in the photo). Photographs were also introduced into evidence which showed the intersection on the night of the accident, including the visibility of oncoming headlights from the intersection:



(R. p. 1497).

In addition to photographs, there was voluminous, conflicting testimony about visibility at the intersection. Although all of the parties made motions for directed verdict, the trial judge made it clear that the evidence, and the inferences to be drawn from it, gave rise to a question of fact on visibility for the jury to decide:

> And for the reasons that I will go through, I find that there is more than one—the **evidence is susceptible to more than one inference** and directed verdict is not appropriate. All the issues raised by the arguments are **factual in nature** . . . [Mrs. Rash's] experts Hunt and Teague testified as to the sight line, and they testified that the poles, as well as the vegetation and other circumstances, did in fact create an impediment, and occlusion of the view of the intersection such that it contributed to this accident. **And all of those are factual issues which you can argue to the jury that there is not support for**. It will be for the jury to decide whether, in fact, they have met their burden of proof. But at this juncture, there is a question of fact regarding that issue.

(R. pp. 721) (emphasis added) (*see also* R. p. 1205:18-25, "Whether there was visibility, whether there was some obstruction to the sight line **are also all questions of fact**. And you all are free to—it's a chain link fence . . . y'all can argue you can see through it. I mean, all these things are questions of fact for the jury within their province to decide . . . ") (emphasis added).

B. Procedural History[5]

Mrs. Rash brought claims for wrongful death and survival against Respondent Mr. Akbar and numerous other defendants. As to Mr. Akbar, the Complaint alleges that he was negligent because there was a "dangerous condition" on his property that was hazardous to motorists. (R. p. 46). The theory tried was that a chain-link fence and

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[5] Mr. Akbar incorporates by reference the Procedural History within his brief on cross-appeal.

shrubbery on Mr. Akbar's property, which is not at the intersection, nonetheless block the view from the intersection.

The trial proceeded before a jury, which heard the testimony of 28 witnesses, including several expert witnesses, over the course of more than two weeks. (R. pp. 180-190). All parties moved for directed verdict, on various theories. Mr. Akbar argued, *inter alia*, that Mrs. Rash had failed to prove causation and that he does not have a duty—common law or otherwise—to ensure the visibility of highway passerby. (R. pp. 697-708, 1158–1170). The trial judge denied directed verdict, holding that the issues were factual, the evidence was susceptible of more than one reasonable interpretation, and thus the questions were for the jury. (R. pp. 721, 1205-1206).

After deliberation, the jury returned a defense verdict. The jury found that Mr. Akbar was not negligent:

> 2. Do you find that the Defendant Anthony M. Akbar was Negligent and that such Negligence proximately caused the Plaintiff's injuries?
>
> ___________ YES: If you answer yes, **GO TO QUESTION 3**
>
> _____✓_____ NO: If you answer no, **GO TO QUESTION 3**

(R. p. 20). Mrs. Rash made post-trial motions, including a motion invoking the Thirteenth Juror Doctrine and a Motion for Judgment Notwithstanding the Verdict, which the trial judge denied. (R. pp. 4, 1470-1485).

This appeal ensued.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court properly exercise its discretion when it allowed the jury to view a demonstrative video during the testimony of Respondents' expert Mike Sutton?

II. Did the trial court properly exercise its discretion when it excluded expert testimony by Appellant's witness Paul McCullough, due to his lack of qualifications sufficient to render an expert opinion?

III. Did the trial court properly deny Appellant's post-trial motions?

IV. Did the trial court properly exercise its discretion when it excluded from evidence certain notices to Mr. Akbar from the City of North Charleston, which were dated years before the accident and were thus confusing, misleading, and prejudicial?

STANDARD OF REVIEW

Appellant has four issues on appeal, every one of which pertains to matters that are within the sound discretion of the trial court. This was a jury trial, in which the jury rendered a defense verdict after hearing two weeks' worth of testimony and considering more than 250 exhibits. "In an action at law, on appeal of a case tried by a jury, this Court may only correct of errors of law." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). "The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings." *Id*.

Appellant's Issue III is the question of whether the trial court correctly denied Appellant's Motion to Invoke the Thirteenth Juror Doctrine and Appellant's Motion for Judgment Notwithstanding the Verdict ("JNOV"). "Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts."

Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 722 (Ct. App. 1996). On appeal, the trial judge's decision to deny a new trial on the facts "will not be disturbed unless [her] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Id.* Similarly, the appellate court will not reverse the denial of a JNOV unless "there is no evidence to support the ruling or when the ruling is governed by an error of law." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010).

Appellant's remaining three issues (Issues I, II, and IV) are each questions going to the admission of evidence and the qualification of an expert witness. Each of those issues is to be reviewed by this Court only for clear abuse of discretion by the trial judge. *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 609 S.E.2d 506 (2005); *see also In re Bilton*, 432 S.C. 157, 161, 851 S.E.2d 442 (Ct. App. 2020) ("The standard of review for evidentiary rulings is very deferential."). Each of those issues requires Appellant to demonstrate not only abuse of discretion, but also (a) resulting prejudice, and (b) that "there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Conner v. City of Forest Acres*, 611 S.E.2d 905, 363 S.C. 460 (2005).

ARGUMENT

From a structural standpoint, Appellant's brief is out of order. Appellant makes a number of evidentiary and admissibility arguments, but the brief buries the real question—***the only question that really matters***—toward the end. The material, significant question for this Court on appeal is whether the trial judge correctly denied Appellant's post-trial motions for a new trial and judgment notwithstanding the verdict. (*See* App. Br., Issue III, pp. 17–19). Mr. Akbar therefore responds to that issue, first, because this Court's analysis on that question must dictate the lens through which it views every other issue on appeal. The other issues, each of them fact-driven, admissibility questions, fall under the umbrella of whether Appellant was entitled to a new trial or a JNOV, and the trial court properly answered them: No.

This Court should affirm the trial court.

III. The trial judge correctly denied Appellant's Post-Trial Motions.

As the 3,313-page-long trial transcript portends, this was a lengthy trial. Over the course of more than two weeks, Appellant presented twenty-one (21) witnesses; Respondents had seven (7) witnesses; there were more than 250 exhibits. (R. pp. 182-192). In short, there was a massive amount of evidence and testimony to be evaluated by the jury. The jury deliberated for six hours, asking for instruction on several matters. (R. pp. 1448-1467; 1559-1561). Ultimately, after careful consideration, the jury returned a defense verdict. In post-trial motions, Appellant demanded a new trial, under several theories, including the thirteenth juror doctrine and judgment notwithstanding the verdict. The trial judge denied these motions, both from the bench and again in a

subsequent written order. (R. pp. 4; 1481-1485). The question of whether the trial judge correctly denied Appellant's post-trial motions is Appellant's Issue III.

Appellant's Brief offers a single, six-line-long, conclusory argument on this issue, after reciting by rote the standards for reversal of the trial court's decisions not to grant a new trial, and not to invoke the thirteenth juror doctrine. (App. Br. p. 19). A trial judge's order denying a new trial must be affirmed unless the decision is "controlled by error of law" or "wholly unsupported by the evidence." *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Initially, Appellant fails to show or argue *any* error of law, let alone an error of law which *controlled* the trial court's findings, and this Court should therefore affirm the trial court for that reason. As to the three evidentiary decisions to which Appellant cursorily refers, those decisions were just a few of the myriad, well-deliberated rulings which Judge Jefferson properly made in her role as the gatekeeper for the evidence at trial. Each of these rulings is discussed herein, and <u>none</u> rose to the level of abuse of discretion nor dictated the ultimate outcome in this case.

Appellate courts must give "great deference" to the trial judge, "who heard the evidence and is more familiar with the evidentiary atmosphere at trial." *Vinson*, 477 S.E.2d at 722–723. It bears repeating that Judge Jefferson carefully observed more than two weeks of evidence, exhibits, and testimony in this lengthy and emotional trial. She was in the best position to assess the credibility of witnesses and the weight of the evidence, and ***she declined*** to act as a thirteenth juror and order a new trial. "South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,'

and then to grant a new trial based solely 'upon the facts.'" *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851 (2002).

Respectfully, the decision by Judge Jefferson—that the facts did not warrant a new trial—should drive this Court's consideration of Appellant's remaining evidentiary arguments. "The judging of the credibility of witnesses and the weighing of evidence in a law case are uniquely functions of the trial court, not this Court." *Bivens v. Watkins*, 437 S.E.2d 132, 313 S.C. 228 (Ct. App. 1993). Further, Appellant's evidentiary arguments fall short for the reason that Appellant has failed to show that the trial court's decision was "wholly unsupported by the evidence." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (denial of motion for JNOV will not be reversed unless there is no evidence to support the jury's verdict). Indeed, the facts were very much disputed—the differing evidence was subject to more than one reasonable inference, and the conflicting testimony was to be evaluated by the jury. (*See* Trans. p. 3274:16–20). As Judge Jefferson held from the bench:

> And there was much testimony presented regarding the visibility of Mr. McJunkin and Mr. Rash as they traveled Old Meeting Street Road. In addition, there was testimony regarding sight line regarding what could best be described as a bare tree that came at the intersection of the property. Preceding the property there was greater vegetation, probably had a greater opportunity to obscure the road, which the jury simply could have looked at as well.
>
> But in terms of visibility, it was well within the ambit of their fact-finding to determine that that vegetation at the intersection of those fences did not prove any obscurity of vision or sight line of those using the highway, as well as the poles that were located on the highway. So there is more than substantial evidence which amply supports the jury's verdict.
>
> It is not for this Court to substitute its judgment for the 12 who listened to the case, who deliberated over five hours, almost six hours. They

> deliberated three hours and 17 minutes last night and two hours and 41 minutes today. They were just two minutes shy of having deliberated six hours. And I think they very clearly, more than adequately considered the issue. They asked the Court to re-instruct them regarding the state laws as well as the ordinances as well as common-law duties . . .
>
> All the issues raised by the motion for judgment notwithstanding the verdict are factual. The Court will not disturb the fact -finding province of the jury.
>
> Now, so the motion for direct—for JNOV is denied.

(R. pp. 1483:8 – p. 1484:17) (*see also* p. 1472:16–20) (The COURT: "I did not make a finding that the duty was breached. I found that the evidence was susceptible of more than one inference. That's a very different finding. If I had found that there was a breach, I would have directed the verdict on liability, and I did not.").

As discussed next, it is significant for purposes of Appellant's appeal that the evidence was susceptible of more than one inference. As the trial judge repeatedly held, there was sufficient evidence for the jury to find in either plaintiff's or defendants' favor. Thus, additional evidence one way or the other would not have changed the ultimate outcome—be it the video demonstration discussed in Issue I, or the qualification of a single witness as an expert as discussed in Issue II, or the remote-in-time notices discussed in Issue IV. Appellant has simply failed to demonstrate that—even ***if*** the trial judge abused her discretion on admissibility questions (which she did not)—there was any resulting prejudice (which is disputed) on a matter which would somehow have changed the ultimate outcome.

Because there was evidence (and law)[6] to support both the jury's and the trial

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[6] As to the facts and law, Mr. Akbar incorporates herein his briefing on cross-appeal, including his Statement of the Facts and the record citations therein.

judge's decisions, this Court must affirm the trial court's denials of Appellant's post-trial motions.

I. The demonstrative video of visibility at the intersection was properly shown to the jury.

Appellant is wrong about the standard of review for this evidentiary issue. The question for this Court is not one of relevance—although there is no question the video was relevant—it is ***whether the trial judge, in her discretion, properly allowed the jury to view Defendants' expert's video***. This Court should review her decision for abuse of discretion; further, Appellant "must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Conner,* 363 S.C. 460, 611 S.E.2d 905.

Defendants' accident reconstruction and mechanical engineering expert, Mike Sutton, testified about visibility at the intersection where the accident occurred, *inter alia*. To assist in presenting that testimony, Sutton took video of the location of the accident. The video was provided to Plaintiff's counsel weeks ahead of the trial. (R. p. 925, lines 15–23). The purpose was to illustrate the view from the intersection, "what it would look like if you were sitting in a pickup truck on Hedgewood and watching a motorcycle come around the curve." (R. p. 855:20–22; R. p. 942:24 – p. 943:2). The video was not presented to show what actually happened at the collision. (R. p. 854:2–5).

The video was not admitted into evidence. Instead, it was a demonstrative video to aid the testimony of an expert witness. (R. p. 926:1–2).

Sutton went to great lengths to replicate in the video the conditions present before

the collision.[7] To recreate the lighting conditions, Sutton took the video on the same day of the year as the accident: February 19, 2023. (R. p. 843:7–15). Three videos were taken at the time of day of the accident: 6:35 p.m., 6:37 p.m., and 6:39 p.m. (R. p. 845:1–2).

Sutton used a similar motorcycle and pickup truck as those involved in the accident: a 250 Suzuki[8] and 2011 Toyota Tundra.[9] Sutton used the same BMW headlight as was on Bronson Rash's motorcycle, mounted at the same height as on Bronson Rash's motorcycle. This was because a core issue was the visibility of the *headlight* at that intersection. (R. p. 844:15–16).

In the video, the truck pulled up to where the old stop bar would have been, so the driver's head was at the position of the old stop bar. (R. p. 860:18–20). This location was based on the driver's (McJunkin's) trial testimony. (R. p. 860:21–23). To recreate the 2017 vegetation (which had been removed in the years since the accident), Sutton clipped out the vegetation from the trooper's pictures from the night of the accident and inserted it into the video. (R. p. 863:22–23):

> Then what we did to get the correct vegetation—because the vegetation was different in 2019—we clipped out the trooper's pictures of the vegetation. Then we went into the point cloud and put it exactly where the vegetation would have been and in a position to offer the most obscuring view.

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7 Sutton's summary to the jury about to the conditions used for the video is at R. pp. 937–940:16.

8 Because the exact model motorcycle could not be located, a smaller (less visible) bike was used. (R. p. 844:13–14). As discussed above, the identical BMW headlight was used and mounted at the identical height as on Bronson Rash's motorcycle.

9 This Toyota Tundra was substantially similar vehicle to McJunkin's vehicle. (R. p. 844:18–19). As Sutton testified, "They're both substantially similar as far as driver position. I mean, it's the same truck with minor differences because of change in model year. But as far as putting a person in position inside a window frame looking to the south, they're substantially similar." (R. p. 863:2–7).

> And then what we did was we took those trooper photos where you could see the police car behind that vegetation, and we changed what's called the "opacity," how much you could see through the vegetation. And we ran it up to 90 percent. So a hundred percent would be totally blocking. We put it at 90 percent just for the benefit of the doubt. In other words, in our video, you can't see through the bushes as well as you can see in the trooper's pictures. [R p. 864:5–18.]
>
> . . .
>
> And our video attached perfectly to the point cloud. There is no distortion. There was some talk about distortion and not being corrected; that is not correct. There was no distortion, and I could get into that more. But that vegetation that's represented in the videos that you've been playing on the motorcycle approach is in the proper location based on the point cloud, which is an accurate representation of the fence.

(R. p. 2266:9–16).

After lengthy argument by counsel, the trial judge issued a thoughtful ruling allowing the video to be used for demonstrative purposes. (R. p. 925:24–930:13). Plaintiff's counsel had the opportunity to extensively cross examine Sutton. (R. p. 950:24 –1040).

Although the video was just that—a video—to the extent it is considered a "computer animation," as alleged by Appellant, "the trial court, as with other evidence and testimony, has broad discretion in whether to admit a computer animation, and its decision will be overturned only for an abuse of discretion." *Clark v. Cantrell*, 339 S.C. 369, 385, 529 S.E.2d 528 (2000).

In this section of her brief, Appellant essentially makes the same argument three times: first as to relevancy, second as to fair representation, and third as to prejudice.

A. The video was relevant.

Visibility from the intersection indisputably was relevant to the issues before the jury—whether or not a driver stopped at this intersection was able to see a motorcycle,

including with Akbar's fence and vegetation present. In this section of her brief, Appellant argues that the video was not relevant because it purportedly differed from McJunkin's testimony. However, McJunkin marked where he stopped at the intersection and testified that he believes he pulled forward. Sutton testified that he based the video on McJunkin's trial testimony. (R. p. 206:1–22; p. 860:21–23). There is no indication that the video was inconsistent with McJunkin's testimony. And just as importantly, the legal standard is not perfection, and it "need not be exact in every detail." Instead, the important elements must be "very similar to the scene as described in other testimony and evidence . . . ." *Clark*, 339 S.C. at 386. As discussed above, Sutton testified (*inter alia*) that the video was taken on the same day of the year, at the same time of day, at the same location, using similar vehicles, using an identical headlight mounted at an identical height as on Bronson Rash's motorcycle. There is no serious dispute that the important elements in the video were very similar to the conditions at the time of the event. Appellant's counsel extensively cross-examined Sutton. The video was not admitted into evidence and did not go into the jury room with the jury. In sum, the trial court did not abuse its discretion in allowing the jury to see the video.

As a parting point in this section of her brief, Appellant also notes that McJunkin testified that he never saw the motorcycle. But McJunkin never testified that his vision was blocked, or that something obscured his view in any way (including Akbar's property). McJunkin's testimony is not inconsistent with the demonstrative video. As indicated, a purpose of the video was to show visibility at the intersection, and how far down the road a person *can* see a motorcycle headlight, if they are paying attention.

B. The video was fair and accurate.

In this section of her brief, Appellant largely tracks the arguments from the previous section, arguing again that (a) the vehicles used in the video were not identical to those in the accident, (b) the placement of the truck was not identical, and (c) the vegetation was not identical. As discussed above, each of those complaints is minor and does not merit reversing this two-week jury trial: (a) the vehicles were substantially similar to those present in the accident, and the identical headlight was mounted at the identical height on the motorcycle; (b) the placement of the truck was based on the testimony of the driver of the actual truck; and (c) the vegetation was based on photographs from the night of the accident, and were portrayed with 90% opacity—more than in the photos taken by the trooper the night of the accident:

> And then what we did was we took those trooper photos where you could see the police car behind that vegetation, and we changed what's called the "opacity," how much you could see through the vegetation. And we ran it up to 90 percent. So a hundred percent would be totally blocking. We put it at 90 percent just for the benefit of the doubt. In other words, in our video, you can't see through the bushes as well as you can see in the trooper's pictures.

(R. p. 864:11–18). As discussed above, Appellant's counsel extensively cross-examined Sutton on the video, which had been produced to Appellant's counsel weeks ahead of the trial.

The trial court's ruling here was consistent with her discretion and with case law. For example, in *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440, 448 (2005), the appellant CSX argued that the trial court erred in admitting a computer animation of an accident "because the animation shows the car stopped for only 4.8 seconds while the

victim said she stopped for ten seconds, and because the vegetation is enhanced in the video." The Court of Appeals rejected these arguments, noting that the alleged discrepancies were "extensively explored before the jury." *Id.* at 449. Similarly, here the alleged discrepancies were, at best, minor, and Appellant had the ability to explore them before the jury. As in *Clark* and *Webb*, this Court should "find no abuse of discretion in the admission of this animation." *Webb*, 615 S.E.2d 440 at 449 (citing *Clark*).

C. The video was not more prejudicial than probative.

This section of Appellant's brief repeats the case law and points from her previous two sections. For the reasons set forth above, the trial court did not abuse her discretion in admitting the video. This Court should affirm.

II. The trial court properly excluded Bronson Rash's uncle, Paul McCullough, as an expert in line of sight.

Appellant next argues that Bronson Rash's uncle Paul McCullough, who is a civil engineer, should have been qualified as an expert witness to testify about line of sight. Most of this section of Appellant's brief is recitation of general legal principles from case law. Putting aside generalized recitals, the actual argument as to McCullough is found in two cursory paragraphs: the first, on page 14, discusses McCullough's training ("Mr. McCullough is a civil engineer . . . ."); the second, on page 17, claims that Appellant was prejudiced ("The Appellant was prejudiced . . . ."). Neither rises to the standard that Appellant admits she must meet: "the trial court's ruling will not be disturbed absent [1] an abuse of that discretion and [2] a showing of prejudice." App. Br. pp. 12–13 (*citing*

Strange v. S.C. Dep't of Highways & Pub. Trans., 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992)).

As an initial matter, McCullough was not excluded as a witness. McCullough testified at great length to the jury: his direct and cross examinations in front of the jury span more than 160 pages of the trial transcript. (R. pp. 312 - 474). McCullough was permitted to testify about his collection of data at the accident scene (done three days after the accident) and multiple other matters. *See, e.g.*, R. p. 1475:1–4: "[THE COURT:] I think all of Mr. McCullough's scan data came in and it was used demonstratively [by] a witness. It would not need to come in twice.").

However, the trial judge correctly found that McCullough was not qualified to testify as an expert in accident reconstruction or about line of sight in a motor vehicle accident.[10] McCullough has inadequate expertise in those areas—he is a civil engineer in the area of building construction; his master's degree emphasized "reinforced concrete." (R. p. 233:3–5). In practice, he generally does construction management and primarily focuses on construction defects. (R. p. 232:15–20). McCullough previously had been qualified as an expert in structural engineering, and in one arson case. (R. p. 271:13–18). His biography for his firm offers only expertise in construction and construction defects and construction management issues. It does not mention accident reconstruction or line

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[10] After many dodges and obfuscations about the specific area of expertise on which McCullough would be testifying, Appellant's counsel finally acknowledged it was line of sight:

THE COURT: So again I ask, in what area are you seeking to admit him as an engineer?
MR. WILLEY: Line of sight. . . .
MR. WILLEY: Right, with respect to the line-of-sight analysis will be the substance of that testimony.

(R. p. 290:3 – p. 291:4).

of sight. (R. p. 272:15–17). McCullough does not perform vehicle-accident reconstructions. (R. p. 274:16–21). He had never done a line-of-sight analysis for a motor vehicle accident. (R. pp. 275:24 – 276:1). He had never taken an accident reconstruction course. (R. p. 276:6–10). He had never evaluated a vehicle's speed in a lawsuit. (R. p. 276:17–19). Although McCullough attempted to have more qualified members of his firm get involved in this lawsuit, the firm refused. (R. p. 279:12–17). As was argued at trial, the primary reason McCullough was offered as an expert was because he was Bronson Rash's uncle and Appellant's brother, and Appellant was trying to bootstrap in a family member under the guise of an expert. (R. p. 294:2–7). In sum, McCullough was not adequately qualified, and the trial court properly exercised its discretion in excluding McCullough as an expert in the proffered field of line of sight and similar motor vehicle accident matters.

Appellant also fails to show prejudice sufficient to reverse this jury trial. On the prejudice prong, Appellant's argument is paper thin and conclusory. In fact, Appellant had multiple liability experts. (R. p. 218:25); *see also* R. p. 221:15, "We have two accident reconstructionists."). Each of Appellant's other experts were qualified by the trial court and permitted to offer opinions. For example, Appellant's expert Ruston Hunt testified about visibility and sight distance, including that:

> I believe the sight line from the stop bar goes to just over 300 feet, so from 200 to 300, which obviously at the speeds we're talking about here, that's a couple extra seconds for both Mr. McJunkin and Mr. Rash to see one another and/or perceive, react, and respond. That's huge in vehicle control.

(R. p. 533:7–12); (*see also* R. pp. 519:2–10; 522:2–3, "So now we've talked about the sight distance here relative to gap acceptance."). Meaning, Appellant <u>did</u> present testimony

about line of sight and visibility, from an expert qualified by the trial court, and therefore Appellant was not prejudiced by the exclusion of McCullough. Moreover, at trial Appellant did not make an offer of proof as to what McCullough would have testified, had he been qualified. (*See* R. p. 1477:18–21: "As to Mr. McCullough's exclusion, I don't think the plaintiffs ever made an offer of proof as to what testimony he would have given had the Court qualified him as an expert. So there's no prejudice to that.").

Finally, Appellant's argument about McCullough at the JNOV stage was so conclusory as to waive the issue on appeal. (*See* R. p. 1474:1–4).

In sum, Appellant does not establish abuse of discretion by the trial court, or prejudice to Appellant, sufficient to reverse this two-week jury trial.

IV. The trial judge correctly excluded from evidence certain notices to Mr. Akbar from the City of North Charleston, which were dated years before the accident and were thus more confusing, misleading, and prejudicial than they were probative.

Appellant's fourth issue on appeal is another challenge to an admissibility decision made by Judge Jefferson. "As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court." *Seabrook Island Property v. Berger*, 365 S.C. 234, 616 S.E.2d 431 (2005). "On appeal, therefore, this Court will not disturb a trial court's evidentiary rulings absent a clear abuse of discretion." *Id.*

Appellant's argument on this issue is that—three years prior to the accident that is the subject of this litigation—Mr. Akbar received "Official Inspection Notices" from the City of North Charleston's code enforcement officer, for violations of certain health and

sanitation ordinances.[11] The notices required Mr. Akbar to do things like cut his grass, remove a broken-down vehicle from his yard, trim bushes, and remove items from his back porch. The notices gave Mr. Akbar 15 days to correct the violation, or further legal action would be taken. Notably, no further legal action was taken, and Mr. Akbar received no further notices over the course of the several years between the issuance of the notices and the accident that is the subject of this lawsuit. (*See* R. p. 642: 3–21) ("And 4/6/15 in the notes also says, 'Thank you for cutting the bushes,' which indicates a remediation of the original violation regarding bushes, brush, or limbs.").

On appeal, Appellant focuses only on the question of remoteness (*i.e.*, was the trial court correct that the notices from 2014 were too remote in time to be considered relevant on the question of the state of Mr. Akbar's property in 2017). Appellant acknowledges that remoteness is a matter of discretion for the trial court, whose discretion will not be disturbed absent an abuse of discretion. (App. Br. p. 20). Importantly, Mr. Akbar made multiple legal arguments as to why the Notices should be excluded, in addition to remoteness, including pursuant to Rules 401 ("Definition of 'Relevant Evidence'"), 403 ("Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time"), 703 ("Bases of Opinion by Experts"), and 802/803 ("Hearsay Rule/Hearsay Exceptions") of the South Carolina Rules of Evidence. Mr. Akbar filed a motion *in limine* to exclude the citations from evidence, and he argued the question each time that

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[11] The trial court's rulings on this point should be affirmed for the additional sustaining grounds that health and sanitation ordinances are public health/nuisance ordinances, and they do not as a matter of law give rise to a duty to ensure visibility for passerby on the highway. (*See* R. pp. 1166:5–1170:9). This issue is fully briefed in Mr. Akbar's Cross-Appeal, and he incorporates his arguments on the issue herein by reference.

Appellant sought to admit the Notices. (R. pp. 144-147; pp. 477–512, 513). These arguments are additional sustaining grounds for the trial court's proper, reasoned, discretionary decision to exclude the evidence.

Judge Jefferson looked at the citations *in camera,* and she heard and considered arguments on their admissibility, several times. (R. pp. 477–512, 513, 576, 639–642). She ultimately decided not only that the notices were too remote in time, but also that they should be excluded because their probative value was far outweighed by the danger of unfair prejudice, confusion, and potential to mislead the jury:

THE COURT: But [the Notices are] problematic on a lot of levels. It's problematic because these things are—these violations were issued back in 2013 and '14 and this happened in 2017. And I'm of the mind that it's more prejudicial than probative. It runs the risk of the jury making a decision on notice based on things more on a tangential time period when these things are alleged to have occurred versus what was actually—what the condition of the property actually was on the date of this incident.

And we have pictures of what it looked like at the time of the incident.[12] And as we know, in February—you

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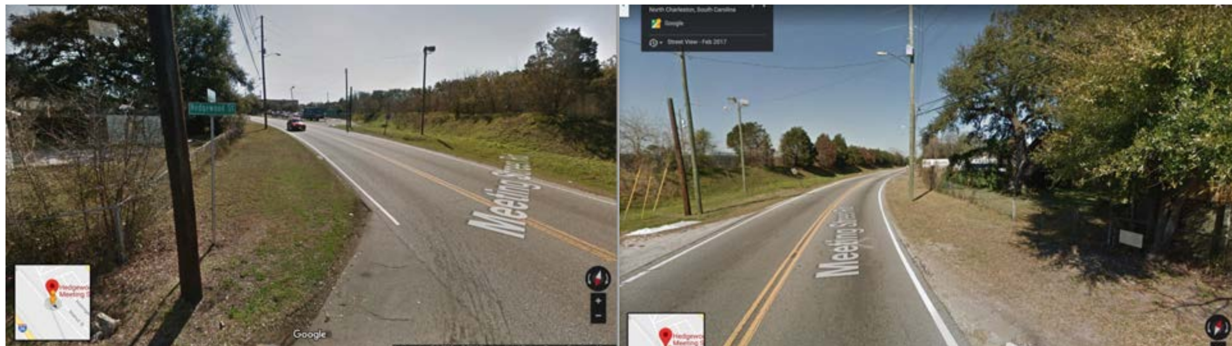
[12] Judge Jefferson was referring to numerous pictures of the actual intersection, at the time of the accident, including these Exhibits:



> know, even though we don't have a whole lot of co[ld], our trees are bare in February. Bushes are bare in February. I mean, they may have a few leaves on them, but generally they're bare, unless you're talking about shrubs.
>
> And I think the pictures, you all have agreed to those . . .You've agreed that they're an accurate representation of how the property existed at the time [of the accident].

(R. p. 511:3 – 21) (*see also* R. p. 576: 3–11) ("it was completely improper to attempt to offer them to this witness, especially when I made a—in essence, told you they're too remote.").

This Court should affirm Judge Jefferson's discretionary decision—not only because she was in the best position to judge the evidence—but also because Appellant has failed to give any argument on resulting prejudice. "To warrant reversal based on the . . . exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was

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(R. pp. 1497, 1498, 1501, 1504).

influenced by the wrongly . . . excluded evidence." *Conner* 363 S.C. 460, 611 S.E.2d 905. This Court should therefore find the issue has been abandoned.

In sum, this Court should not reverse Judge Jefferson's discretionary, carefully-reasoned decisions on this or any other evidentiary issue. Moreover, this Court should hold that Appellant abandoned this issue by arguing it in a conclusory, unsupported fashion. *See State v. Colf*, 332 S.C. 313, 321, 504 S.E.2d 360, 364 (Ct. App. 1998) (holding that an issue is deemed abandoned if argument in brief is merely conclusory); *State v. Black*, 319 S.C. 515, 518, 462 S.E.2d 311, 313 (Ct. App. 1995) (finding a conclusory argument of an issue by appellant amounts to an abandonment of the issue).

CONCLUSION

For the reasons set forth herein and in Mr. Akbar's briefs on Cross-Appeal, as well as for the additional sustaining grounds raised, as well as for the reasons set forth in the briefing by Respondent Dominion, this Court should ***affirm*** the jury's verdict and the trial court's decisions.

Respectfully submitted,

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October 30, 2024
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