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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 REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

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Respondent/Cross-Appellant Anthony Akbar respectfully submits this reply brief in support of his cross appeal, in reply to the Respondent's Brief of Appellant/Cross-Respondent Darleen Rash, Individually and as Personal Representative for the Estate of Bronson Harley Rash ("Mrs. Rash"). Mr. Akbar also adopts and incorporates the filings (including the reply brief) of Dominion Energy to the extent its arguments apply to and favor Mr. Akbar.

ARGUMENT IN REPLY

Initially, the "facts" propounded by Mrs. Rash within her Statement of the Case, and throughout her Brief as Respondent, are unsupported allegations which the jury ultimately decided correctly, in Mr. Akbar's favor. Moreover, Mrs. Rash fails to provide citations to the Record on Appeal for most of her statements and characterizations, and this Court should not consider arguments of counsel as fact. *McManus v. Bank of Greenwood*, 171 S.C. 84, 171 S.E.2d 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered"); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are ...not evidence").

Ultimately, there are just two questions in this cross-appeal, both of which may be decided by this Court as a matter of law. Importantly, this Court need not decide these questions if it affirms the trial court in response to Mrs. Rash's appeal. However, if this Court believes that Mrs. Rash's issues on appeal have merit, then this Court should nonetheless find that a new trial is not warranted as to Mr. Akbar. Mr. Akbar was entitled to a directed verdict in his favor for the reasons discussed below and in Mr. Akbar's Initial

Brief as Appellant.

I. The trial court erroneously found the existence of a duty to be a question of fact. As a matter of law, Mr. Akbar has no duty—common law or otherwise—to motorists driving by his property, which is not at the intersection.

This Court should hold that a property owner—and particularly the owner of property that is not located at an intersection—does not have a duty to roadway passerby to insure visibility at an intersection down the road. As a reminder, Mr. Akbar's property line does not even begin until near the red car in this photograph, which was taken from the intersection where Mr. Rash's and Mr. McJunkin's accident occurred:

(R. p. 1501; *see also* R. pp. 1508-1512, p. 1514).

Mrs. Rash's theory of duty is that—despite Mr. Akbar's fence and tree's location well down the street from the intersection and significantly back from the roadway—Mr. Akbar nonetheless owed a duty to roadway travelers "not to obstruct the intersection." (Resp. Br. at p. 3). But neither the common law, nor the City of North Charleston's sanitation or zoning ordinances cited by Mrs. Rash, impose such a duty of care in this instance. Indeed, this Court has specifically held that the imposition of a duty such as the one Mrs. Rash urges here would be contrary to public policy.

A. The existence of a duty is a question of law and not for the jury to decide.

The trial court's error began with its decision that the question of the existence of a duty is one of fact for the jury. (*See, e.g.*, R. p. 1273:12 - 1274:4). This error was the improper basis for the trial court's decision to send the question of negligence to the jury. Correctly Mr. Akbar was entitled to a directed verdict because, as a matter of law, he owed no duty concerning visibility at a distant intersection to the plaintiff motorcyclist, who was passing by on the road. *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."). This Court should so hold.

B. As a matter of law, Mr. Akbar owed no duty under the common law.

Mrs. Rash argues that Mr. Akbar had a duty to passerby on the roadway to trim his trees and bushes to prevent alleged visual obstruction at an intersection down the street from his property (notwithstanding that his tree-line is significantly back from the road itself, and far removed from the intersection, as well):

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

But Mrs. Rash's reliance on the case of *Israel v. Carolina Bar-B-Que, Inc.* as the source of such a duty is misplaced for at least two reasons. First, because the 1986 *Israel* decision is limited in its application to cases in which a rotten tree limb, of which an owner has notice, and which is ominously hanging over the road, actually falls onto a car. 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1986). Second, because this Court—twenty years later—noted that the law had evolved; it thus put the *Israel* decision in a very small box, expressly declining to extend its holding to a situation pertaining to "visual" obstructions, such as the one alleged here. *Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006).

In 1986, the *Israel* Court made its ruling based on an Illinois decision, which held that a landowner "has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on the premises." *Israel*, 356 S.E.2d at 127, "*adopting the reasoning of*" *Mahurin v. Lockhart*, 390 N.E.2d 523, 525 (Ill. App. 1979). Both *Israel* and the Illinois *Mahurin* case involved fact patterns in which falling, rotten tree limbs were the cause of physical damage to property.

In 2006, the plaintiff in the *Underwood* case urged this Court to extend the *Israel* decision to impose a duty on a landowner to maintain tree limbs in a manner that did not visually obstruct a stop sign on the roadway, ostensibly increasing the risk of an accident at the intersection. This Court declined to impose a duty to assure visibility, stating:

> In this case, Taylor's tree was not unsafe or defective. The tree limb did not fall and injure Coponen. **The only effect the tree limb had was that it partially obscured the stop sign** . . . Underwood also claims that because Taylor periodically trimmed the tree on his property, he undertook the duty to keep his tree from blocking the stop sign. . . **. While Taylor did trim the tree occasionally for the purpose of clearing the stop sign and his failure**

> **to trim the tree might have increased the risk that the sign would be obstructed**, neither Underwood nor Coponen knew that Taylor trimmed the tree, and thus they did not rely on his doing so. Therefore, Taylor's occasional trimming of his tree did not create a duty for which he can be held liable. Additionally, even if Taylor had assumed a duty to trim the trees, he could have abandoned the duty at any time so long as his actions did not increase any risk that might have existed.

Underwood, 625 S.E.2d 236 (emphasis added). Importantly, the footnotes in *Underwood* give additional insight into why the Court refused to extend the holding of *Israel* in such a way as to impose a duty on landowners to highway travelers. The Court explained:

> In making their decision, the *Israel* court adopted Illinois' ruling in *Mahurin v. Lockhart*. Therefore, **it is worth noting that subsequent to publishing the *Mahurin* decision, Illinois issued several opinions on visual obstructions**. In *Nichols v. Sitko*, the court refused to extend the *Mahurin* rule, which involved an injury caused by a fallen dead branch, to an alleged visual obstruction from overgrown weeds. The court reasoned that the alleged obstruction was "no different from obstructions which are caused by houses and buildings encountered routinely in daily life." Also, in *Adame v. Munoz*, the court held that there is **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."

Underwood, 625 S.E.2d 236 at fn. 2 (cleaned up; citations omitted; emphasis added).

Moreover, the *Underwood* Court expressed concern over an argument that by occasionally trimming his trees, a landowner could undertake a duty to roadway motorists:

> We further note that <u>not</u> imposing a duty on [landowner] promotes good public policy. 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. The *Underwood* case and its analysis is directly on point in its holding that a landowner does not have a duty to assure visibility for roadway travelers. **The *Underwood* analysis defeats Mrs. Rash's argument on duty.**

Moreover, in *Shelton v. Ls & K, Inc.*, this Court revisited its *Underwood* decision—and further isolated *Israel*—when it found that there was no duty on the part of a landowner whose pear tree allegedly obstructed visibility of a sidewalk, thereby allegedly causing a car driver to hit a pedestrian she claimed she could not to see. *Shelton v. Ls & K, Inc.*, 648 S.E.2d 307, 374 S.C. 294 (Ct. App. 2007). This Court held, "Because the only alleged defect of the tree was that it obscured Suttles' vision at some point before she reached the sidewalk, the *Israel* rule does not apply to these facts." 648 S.E.2d at 309-310 ("the visual obstruction caused by the tree was no different than an obstruction caused by a building or anything else encountered in daily life.").

This Court should not contravene the sound reasoning in its own prior decisions, and it should accordingly reject Mrs. Rash's argument that the common law imposes a duty on Mr. Akbar to assure that the visibility of motorists on the highway is unobstructed. The existence of a duty is a question of law, and duty is an essential element to Mrs. Rash's cause of action for negligence. In the absence of legal duty, directed verdict was required. *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000) ("If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law."). This Court should so hold.

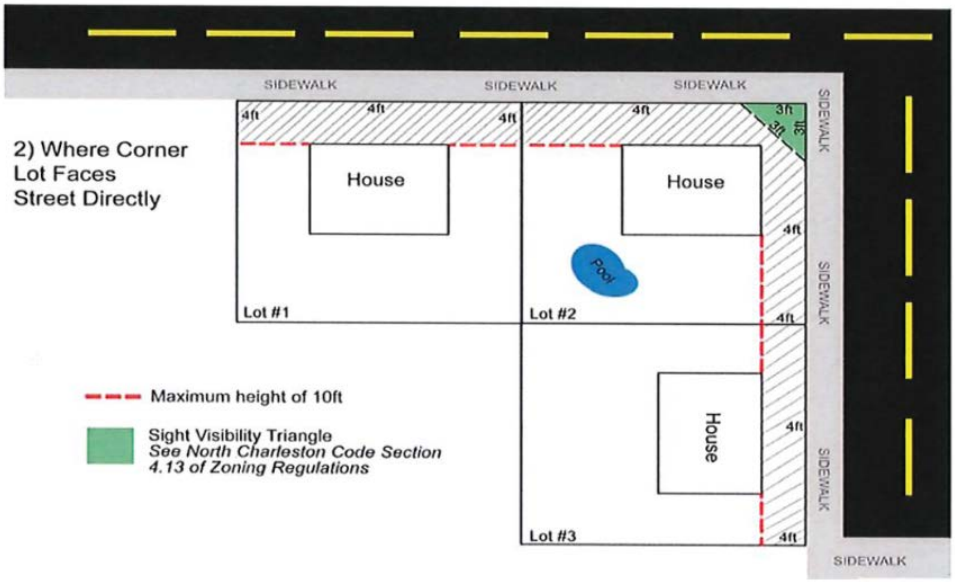
C. As a matter of law, Mr. Akbar owed no duty under the doctrine of negligence per se.

Mrs. Rash wrongly argues that two ordinances enacted by the City of North Charleston lend themselves to a "negligence per se" argument against Mr. Akbar. But a simple reading of the two ordinances shows: (1) they do not apply to Mr. Akbar or his property; and (2) they cannot be extended to create a private tort duty in this case.

1. Ordinance 4-13 plainly does not apply to Mr. Akbar's property.

Section 4-13 of North Charleston's Zoning Ordinance (titled "Visibility at Intersections") clearly does not apply to property owners like Mr. Akbar whose property is located down-the-road from intersections. The zoning ordinance regulates the use of property located "at intersections"—i.e. corner lots. The context of the ordinance is that it is a zoning ordinance, and the City's zoning ordinance defines a "corner lot" as "A lot located at the intersection of two or more streets." City of North Charleston Code of Ordinances, Appendix A, Zoning Reg., Art. III, Definitions (emphasis added). Mr. Akbar's lot is not a corner lot, and it is not located "at the intersection." (R. pp. 651-652, 1514, p. 1503).

Moreover, in case there is any confusion as to what Section 4-13 means as to "Visibility at Intersections," the City promulgates a diagram in Section 4-7 of its Code. The City Code's diagram expressly references Section 4-13 ("Visibility at Intersections"), and it plainly depicts with a green-colored "Sight Visibility Triangle" the scope of the area in which visibility must be maintained:



City of North Charleston Code of Ordinances, Appendix A, Zoning Reg., Sec. 4-7(3)(j), referencing Sec. 4-13.

It is clear from this codified diagram—which depicts a 3ft x 3ft x 3ft area called the "Sight Visibility Triangle"—that the Ordinance urged by Mrs. Rash has no application to Mr. Akbar's down-the-street lot, on which his fence and shrubbery are significantly more than 4-feet back from the roadway. (R. p. ___, Trans. p. 1357: 18-21). **It is undisputed that Mr. Akbar owns no property whatsoever within the green Sight Visibility Triangle.**

Because Section 4-13 does not apply to Mr. Akbar's lot, this Court should find that he has no duty as a matter of law to assure visibility "at" intersections for passerby in the roadway.[1] Therefore, the trial court should have granted his motion for directed verdict on plaintiff's cause of action for negligence.

[1] Additionally, Mr. Akbar's fence and vegetation are expressly ***allowed*** by North Charleston's Zoning Ordinance, which sets a default 20-foot setback from the roadway. *See* City of North

2. Section 9-67 does not apply in this context.

The City of North Charleston's Health and Sanitation Ordinance, Section 9-67, has the express purpose of identifying "common nuisances" which are "declared to be unhealthy and unsightly 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." Thus, on the list of such nuisances is grass and growth "more than one foot in height except when cultivated or maintained." The trial court correctly decided not to charge this health and sanitation ordinance, which is designed to prevent "unhealthy and unsightly" conditions—and not to regulate the visibility for travelers on the roadway. This Court should affirm, including for the reasons set forth in Mr. Akbar's Opening Brief.

3. Neither the zoning nor the sanitation ordinance give rise to a private right of action, and the negligence per se argument fails as a matter of law.

South Carolina's Supreme Court recently discussed at length the negligence per se doctrine in *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 886 S.E.2d 228 (2023). The Court explained, "The fact that a statute imposes a duty is not dispositive of a tortfeasor's liability under a negligence claim, for all statutes impose commands to do or refrain from

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Charleston Code of Ordinances, Appendix A, Zoning Reg., Sec. 6-1. Mr. Akbar's fence is at least 29.5 feet from the roadway. (R. p. 587: 18-21).

Moreover, Mr. Akbar's property—including its fence—was developed prior to the City's enactment of its zoning ordinance, which therefore defines his structures as permitted, non-conforming uses. *See* City of N. Charleston Code of Ord., App. A, Zoning Reg., Sec. 3-2, Sec. 4-5; Trans. p. 1235, p. 654-655.

Mr. Akbar incorporates all his arguments on directed verdict for why the zoning ordinance does not apply to Mr. Akbar and does not impart to him tort duties. *See* R. pp. 697–708; 1158–1170; pp. 1348-1350.

doing something." *Id*. at 231. In a nutshell, the Court explained that there must first exist a common law duty which forms the basis of the negligence action, at which point a statute may set a standard of care. The Court went on to quote Judge Posner at length, which we will unabashedly do, as well:

> Ordinarily the scope of the tort duty of care . . . is given by the common law. And although the legislature can and sometimes does create a duty of care to a new class of injured persons, the mere fact that a statute defines due care does not in and of itself create a duty enforceable by tort law. The distinction is well explained in *Marquay v. Eno*: "whether or not the common law recognizes a cause of action, the plaintiff may maintain an action under an applicable statute where the legislature intended violation of that statute to give rise to civil liability. The doctrine of negligence per se, on the other hand, provides that where a cause of action does exist at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard." Otherwise every statute that specified a standard of care would be automatically enforceable by tort suits for damages—every statute in effect would create an implied private right of action—which clearly is not the law.

Id. (cleaned up). As discussed above, **the common law does not impose any duty on Mr. Akbar to insure that motorists are visible at intersections**. Thus, under the recent *Denson* analysis, the City ordinances cannot be wielded by Mrs. Rash to independently impose such a duty of care by Mr. Akbar to Plaintiff. "[T]he negligence per se doctrine does not ***create*** a duty of care but merely sets a standard of care by which the defendant may be judged in the common-law action, and therefore, the absence of an underlying common-law duty renders the presence of a statutory standard of care irrelevant." *Id*. at 232, *quoting* 57A Am. Jur. 2d Negligence § 683 (2022) (emphasis added).

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 or visibility of highway travelers passing by his house. Therefore, 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.

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

Mrs. Rash's brief goes to great lengths to try to avoid an unavoidable fact: at trial, there was no factual evidence that anything related to Mr. Akbar's property contributed in any way to the accident. The opposite was proven: the only living witness to the accident, Daniel McJunkin, testified that "nothing" obstructed his view at the intersection. (*See* R. pp. 212:3–11; 214:4–19: "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. . . ."). This was supported by photographs of the intersection taken by each the police and Google Earth during the same time-period as the accident. (R. pp. 1497-1501). 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's citation to certain cases does not shake the factual evidence. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996), stands for the well-established proposition that "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence" (citations omitted). *Tobias v. Carolina Power*

& Light Co., 2 S.E.2d 686, 190 S.C. 181 (1939), does not apply to this case or to Mr. Akbar, in that it involved an appeal (in 1939) relating to a "demurrer interposed by the appellant to the complaint" in a case involving an "electric light pole installed and maintained by the appellant near the center of the highway . . . ."[2]

Similarly, Mrs. Rash's citation to snippets from her experts' testimony does not eclipse the actual factual evidence, nor create factual evidence where none existed. Importantly, none of those experts testified that Mr. Akbar's yard caused the accident, or that changes to Mr. Akbar's yard would have prevented the accident. They merely testified that changes might (or might not) have changed the probability of an accident. *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."). For example, Rushton Hunt testified only about "mitigation" and "possibility," not about causation. (R. p. 558:8–10). Mark Teague agreed that a person could see "way past" the second utility pole. (*see* Supplement to Record on Appeal).

Mrs. Rash's final point in this section on supposed constructive notice under an inapplicable ordinance does not salvage her argument. She cites to no admitted evidence showing causation by anything on Mr. Akbar's property. The actual evidence permits

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[2] Mrs. Rash also cites to the testimony of a Shirley Richardson. Mrs. Richardson did not testify about the cause of the accident. (R. p. 635:1-2 "I did not see anything regarding the accident and the crash itself.").

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

Mrs. Rash failed to satisfy essential elements of her negligence claim. 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. Therefore, this Court should find that the trial court erred when it denied Mr. Akbar's Motions for Directed Verdict.

Respectfully submitted,

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