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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Martha M. Rivers, Circuit Court Judge

Appellate Case No. 2025-000150
Case No. 2022-CP-02-2323
Case No. 2022-CP-02-2324

Heather Crespo.....Respondent/Appellant,

v.

Rhett Riviere, Josee Riviere, Chase Enterprises, LLC
and R.C. Riviere Properties, LLC..... Defendants,

AND

Gabriel Crespo .....Respondent/Appellant,

v.

Rhett Riviere, Josee Riviere, Chase Enterprises, LLC
and R.C. Riviere Properties, LLC,..... Defendants,

Of which

Rhett Riviere, Chase Enterprises, LLC and
R.C. Riviere Properties, LLC, are the.....Appellants/Respondents,

and

Josee Rivere is the .....Respondent/Appellant.

APPELLANTS/RESPONDENTS RHETT RIVIERE, CHASE ENTERPRISES, LLC AND R.C. RIVIERE PROPERTIES, LLC'S FINAL APPELLANTS BRIEF

James M. Griffin, SC Bar No.: 9995
Margaret N. Fox, SC Bar No.: 76228
8906 Two Notch Road, Suite 200
P.O. Box 999 (29202)
Columbia, South Carolina 29223
Telephone: 803-744-0800
jgriffin@griffinhumphries.com
mfox@griffinhumphries.com

Joseph M. McCulloch, SC Bar No.: 3760
Kathy R. Schillaci, SC Bar No.: 17248
1116 Blanding Street
P.O. Box 11623 (29211)
Columbia, South Carolina 29201
Telephone: 803-779-0005
joe@mccullochlaw.com
kathy@mccullochlaw.com

Attorneys for Appellant/Respondent Rhett Riviere, Chase Enterprises, LLC and R.C. Riviere Properties, LLC

February 9, 2026
Columbia, South Carolina

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STATEMENT OF THE CASE

On October 10, 2022, Respondents Heather and Gabriel Crespo filed complaints in two separate actions alleging: Negligence and/or Gross Negligence (against all Appellants); Invasion of Privacy – Wrongful Intrusion into Private Affairs (against Appellant Rhett Riviere); Intentional Infliction of Emotional Distress (against Appellant Rhett Rivere); Constructive Fraud/Misrepresentation (against Appellants Rhett Rivere and Josee Rivere); Negligence Per Se (against Appellants Rhett Rivere and Josee Rivere); and Violation of the South Carolina Unfair Trade Practices Act (SCUPTA) (against all Appellants). (**R. pp.94-123).**

On November 14, 2022, Appellants Rhett Rivere, Chase Enterprises, LLC of South Carolina, and R.C. Rivere Properties, LLC filed an Answer denying each and every allegation of the Complaint, except those specifically admitted, and asserting various defenses, including the

statute of limitations, doctrine of laches, doctrine of waiver, failure to state a claim, and that Respondents' South Carolina Unfair Trade Practices Act claim is barred because Appellants' conduct did not adversely affect the public interest in this State. **(R. pp. 124-137).**

On September 12, 2024, the court granted Respondents' motion to consolidate the actions, and the consolidated case was tried before a jury from September 16, 2024, through September 25, 2024. On September 24, 2024, the jury returned a verdict in favor of Respondents Heather Crespo and Gabriel Crespo, awarding each actual damages in the amount of $11,000,000 against Rhett Rivere, $500,000 against Josee Riviere, $1,000,000 against Chase Enterprises, LLC, and $1,000,000 against R.C. Rivere Properties, LLC, for a total of $26 million in actual damages against these Appellants and $1 million in actual damages against Appellant Josee Riviere. On September 25, 2024, the jury awarded each Respondent $4,000,000 in punitive damages against Rhett Rivere, and $500,000 in punitive damages against each corporate defendant, for a total punitive damage award of $10 million. **(R. pp. 13-48).**

On October 4, 2024, Appellants Rhett Rivere, Chase Enterprises, LLC of South Carolina, and R.C. Rivere Properties, LLC moved for judgment notwithstanding the verdict (JNOV) pursuant to Rule 50(b), SCRCP on all causes of action. **(R. pp. 398-407).** Appellants also moved for a reduction in the punitive damages award pursuant to S.C. Code Ann. § 15-32-530. **(R. pp. 408-410).** Additionally, Appellants moved for a new trial absolute pursuant to Rule 59, SCRCP, on the grounds that the verdict was grossly excessive and inconsistent. In the alternative, they moved for a new trial nisi remittitur. **(R. pp. 411-417).** On October 10, 2024, Appellants filed a supplemental motion for a new trial and a motion for election of remedies, or, in the alternative, for a new trial, new trial nisi remitter, or to set aside the verdicts. **(R. pp. 471-485).**

On November 13, 2024, the court held a hearing on all pending post-trial motions. These

included the motions for judgment notwithstanding the verdict, new trial nisi remittitur, reduction of punitive damages, and a motion to stay the execution of the judgment pending the ruling. The court also considered Respondents' petition for attorney's fees and Josee Rivere's separate motion for judgment notwithstanding the verdict, or in the alternative, a new trial nisi remittitur.

On January 3, 2025, the court issued an order denying the motions for judgment notwithstanding the verdict, new trial, and new trial nisi remittitur. **(R. pp. 49-61).** The court found sufficient evidence supported the jury's verdicts, including evidence of property damage and other injuries to the Respondents. On the negligence per se claim based on the Realtor Protection Statute, the court held that it could not speculate on what might have occurred had the South Carolina Real Estate Commission investigated Appellant Rhett Rivere or required him to renew his license. As to the claim for intentional infliction of emotional distress, the court found a sufficient evidentiary basis to support the jury's verdict. However, with respect to the SCUTPA claim, the court found damages were limited to the amount of the rental payment—$2,400—and reduced the award accordingly. The Court also found that the violation was willful and awarded treble damages totaling $12,960, including $7,575 to Gabriel Crespo. On the constructive fraud claim, the court held that damages must reflect the difference between the value as represented and as received. The court found the jury could reasonably assign a value of $0.00 without expert testimony and reduced the constructive fraud award to $2,400. The court also denied the motion to reduce punitive damages under S.C. Code Ann. §§ 15-32-510 and 15-32-530, finding that the jury's award did not exceed the statutory cap.

On January 27, 2025, Appellants Rhett Rivere, Chase Enterprises, LLC of South Carolina, and R.C. Rivere Properties, LLC filed a separate Notice of Appeal as to both Respondents Heather Crespo and Gabriel Crespo's judgments. **(R. pp. 653-682).**

STANDARD OF REVIEW

The standard of review from a trial court's decision to admit or exclude evidence is abuse of discretion. "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *State v. Williams*, 430 S.C. 136, 149, 844 S.E.2d 57, 64 (2020); *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

When reviewing the trial court's ruling on a motion for a directed verdict, this court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *First S. Bank v. S. Causeway, LLC*, 414 S.C. 434, 444, 778 S.E.2d 493, 498 (Ct. App. 2015).

The standard of review from a denial of a motion for new trial is abuse of discretion. A trial judge's refusal to grant a new trial absolute when the verdict is grossly inadequate or excessive is an abuse of discretion. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993). However, when the verdict is so grossly excessive or so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence it becomes the duty of the trial judge and this appellate court to set aside the verdict absolutely. *Id.*

FACTS

Respondents Heather and Gabriel Crespo rented a cottage located on Grace Avenue in Aiken, South Carolina, (hereinafter "Grace Avenue Cottage") during the polo season for three months, beginning in April 2001. Gabriel was an Argentinian professional polo player. **(R. pp. 1793, ll. 8-10; R. pp. 1799-1802; R. p. 1803, ll. 1-3; R. p. 1807, ll. 9-25; R. p. 1808, ll. 1-6).** On the day of their departure in July 2001, Respondent Heather Crespo discovered some type of

computer equipment on the other side of a wall adjacent to the bathroom and informed Gabriel. Heather was so concerned about the equipment that she asked a friend, Gina Salatino, to inspect it. Gina Salatino testified that she immediately suspected it was video recording equipment and observed a peephole in the wall. She also spoke into what she believed to be a camera and expressed her displeasure. Heather advised Ms. Salatino that she would inform Gabriel. **(R. p. 1979, ll. 5-25; R. p. 1980, ll. 1-25).** Gabriel and Heather Crespo took no action in response to discovering this equipment.

Twenty-one (21) years later, on July 16, 2022, Gabriel Crespo was contacted by his current attorneys, who advised him that they had discovered videos of Gabriel and Heather Crespo on computer devices seized from Appellant Rhett Riviere during a criminal investigation. The following Monday, an attorney showed Gabriel a videotape of him and Heather taken inside the Grace Avenue Cottage. The videotape included four (4) separate scenes.[1] In one scene, both Respondents were in the bathroom, partially nude; in another, Heather Crespo was shown masturbating Gabriel Crespo. **(R. p. 1982, ll. 9-15; R. p. 2493; R. p. 1281).**

The criminal investigation began in 2019, when Riviere's former fiancée, Katherine Thomas, delivered two SD cards she claimed to have found in one of his residences. (**R. pp. 1029-1030, ll. 10-25; R. p. 1031, ll. 1-17; R. p. 1034, ll. 10-25; R. p. 1035, ll. 1-7, 18-25; R. p. 1036, ll. 18-25).** Law enforcement obtained a search warrant to review the SD cards. *Id.* at **(R. pp. 1037, ll. 3-9; R. p. 1054, ll. 6-22).** Agent Busbee testified that after viewing the SD cards, he obtained a search warrant for properties associated with Appellant Riviere. *Id.* **(R. p. 1059, ll. 19-22)**. During

[1] Per testimony, the videotape file was created in 2007 and later copied to an external hard drive in 2012. **(R. pp. 1281-1282).**

the search, SLED seized approximately 40 electronic devices. *Id.* **(R. pp. 1092-1096).** These devices were examined by SLED's computer forensics lab. *Id.* **(R. p. 1117, ll. 2-4).**

The trial court overruled Appellants' objection to the introduction of videos other than the one depicting the Crespo's and permitted Respondents to introduce up to ten videotapes for the jury's review. The court also allowed testimony regarding thousands of other videos and images of evidentiary interest. *Id.* **(R. pp. 1192, ll. 2-25; R. p. 1193, ll. 1-3).** Specifically, Agent Busbee was permitted to testify that the SD cards contained videos of five (5) different people—two unclothed and three clothed—taken at two different locations. **(R. pp. 1035, ll. 6-7; R. p. 1055, ll. 19-20; R. p. 1057, ll. 20-23).** Agent Busbee further testified—again over objection—that the images and videos obtained from devices seized from Appellant Riviere depicted "people that were clothed, people unclothed, sexual activity, people using the restroom, and shower," and that these materials dated back to the early 2000s. **(R. pp. 1136-1137).**

SLED Agent Rhett Dove, a computer crimes investigator, testified that he examined 40-41 devices and obtained four terabytes of data. **(R. pp. 1185-1191).** Over objection, Agent Dove testified that some of the material was sexually graphic and that there were "thousands" of images and videos of evidentiary interest. **(R. pp. 1192-1193).** Agent Dove testified that one of the files was labeled "Heather and Gabriel." **(R. p. 1193, ll. 12-14).** After being contacted by their attorneys, Respondents met with Agent Busbee to review the recordings. Busbee testified that Gabriel Crespo was "pretty upset and somewhat angry about the whole situation." **(R. p. 1116, ll. 8-12).** He stated that Heather Crespo was also "upset…and shocked." **(R. p. 1117, ll. 1-4).**

Gabriel Crespo contacted a therapist he had seen previously during his divorce with Heather and participated in a single telehealth session on August 1, 2022. **(R. pp. 1596-1599)**. The therapist diagnosed Gabriel with acute post-traumatic stress disorder. Gabriel's total medical

expenses were $125. **(R. p. 1600, ll. 2-7; R. p. 2492).** The therapist, having seen Gabriel only once, could not predict how long the PTSD symptoms would last. **(R. pp. 1616-1617).** Gabriel did not present evidence of lost wages or diminished future earning capacity.

Heather Crespo also resumed therapy with a therapist she had been seeing for years, attending sixteen (16) sessions in the fall of 2022. **(R. pp. 1400,1404,1408; R. p. 2485).** When asked whether this was the type of trauma that "stays with you for the rest of your life," Heather's therapist responded, "possibly." **(R. 1406, ll. 14-18).** Heather's total therapy charges were $1,920. Like Gabriel, she presented no evidence of lost wages or impaired future earnings.

Respondents called Appellant Rhett Rivere to testify, knowing he was under indictment for voyeurism and would invoke his Fifth Amendment rights, which he did. The trial court permitted Respondents' counsel to ask a multitude of questions about alleged recordings of individuals other than the Crespos, including young girls, at other locations and during time periods unrelated to the April-July 2001 rental. **(R. pp. 1554-1555).**

The court had earlier ruled that witnesses could not testify about other "bad acts" by Appellant Riviere. **(R. pp. 852-857; R. p. 961, l. 11 to 963, l. 20; R. p. 965, ll. 8-13).** However, the court later allowed such testimony, finding that co-defendant Josee Riviere's counsel opened the door by eliciting testimony from a witness who said she "did not like" Appellant Riviere. **(R. p. 1167, lines 6-8; R. pp. 1169, l. 10 to 1182, l. 21).** Specifically, Sue Hook, a local real estate broker, was called to testify about Riviere's rental properties. Before her testimony, the Court ruled she could not discuss an incident from the early 1990s. Nevertheless, when Josee Rivere's counsel asked Hook if she disliked Rivere, she was permitted on redirect to explain why. Over counsel's objection, she testified that she once observed Riviere climbing out of a tree adjacent to her

bedroom window. Riviere claimed he was retrieving his mother's peacocks, but Hook stated there was no sign of any peacocks. **(R. pp. 1169-1183).**

Another witness, Christina Neuhaus, testified that she, her husband, and her stepdaughter rented a cottage from Riviere in 2017. She noticed a modem in a bedroom corner that lacked a coaxial cable connection and unplugged it. Days later, she found it plugged back in. She testified that she became "extremely uncomfortable" after learning from Katherine Thomas about the SD cards, especially given that her 11-year-old stepdaughter had stayed in the cottage. **(R. pp. 1443-1444; 1452, ll. 1-13; R. p. 1454, ll. 11-16).**

Carrie Emerson, a former girlfriend of Rivere, testified that she discovered old video equipment in a garage, and Riviere commented, "the FBI didn't find that." **(R. p. 1419, ll. 13-20).** Emerson also found a bag containing thumb drives, which later disappeared. **(R. pp. 1420-1421).**

Even Gabriel Crespo's therapist, William Trezza, referenced other alleged misconduct. He testified that Gabriel learned of the tape from an attorney in Columbia "*who was prosecuting related cases*." **(R. 1601, ll. 15-25).** This prompted another motion for mistrial, which the court denied. Immediately afterward, Gabriel testified that Riviere "*needs to be stopped. He has been doing this for four decades*." Looking at the jury, Gabriel said, "*It could be any of you*." **(R. p. 1819, ll. 11-15).** Appellants again moved for a mistrial, citing the violation of the "golden rule,[2]" but the motion was denied.

[2] The Golden Rule Argument is one that suggests to the jurors they put themselves in the shoes of one of the parties. Such an argument is improper because it asks the jurors to place themselves in the victim's place and tends to destroy all sense of impartiality of the jurors. Its effect is to arouse passion and prejudice, thereby encouraging the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. *State v. Harris*, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009)

In closing argument, Respondents' counsel was permitted to suggest a per-diem damages calculation based on a $1,000 daily loss, despite no evidentiary support for that amount or for permanent injury. The trial court submitted a verdict form requiring separate damages findings for each cause of action—even though the damages measure was identical. This resulted in an inconsistent and irrational verdict: $26 million in actual damages and $10 million in punitive.

The jury awarded $500,000 to each Respondent for a total of $1 million on the negligence cause of action. On the negligence per se cause of action, the jury awarded $1 million to each Respondent, for a total of $2 million. Although the only difference between negligence and negligence per se is the method of establishing breach, the jury awarded a higher amount for the latter, even though the measure of damages is the same. The jury also awarded $3 million to each Respondent for a total of $6 million for intentional infliction of emotional distress, and $5 million to each Respondent for a total of $10 million on the invasion of privacy claim. These claims arose from the same underlying facts, and the jury was instructed to apply the same measure of damages. Nevertheless, the jury awarded different amounts on each. In addition, the jury awarded $500,000 in actual damages for constructive fraud, even though the court instructed that the proper measure of damages was the difference between the value of the property as represented and the value received, plus any consequential damages. The only evidence of value was that Gabriel Crespo paid $2,400 for three months' rent.

ARGUMENTS

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING NINE ADDITIONAL SEXUALLY GRAPHIC VIDEOTAPES OF UNIDENTIFIED INDIVIDUALS IN DIFFERENT LOCATIONS AND TIME PERIODS, AND ALLOWING TESTIMONY ABOUT THOUSANDS OF OTHER VIDEOS AND IMAGES FOUND ON APPELLANT RIVIERE'S DEVICES DURING A WARRANTED SEARCH OF HIS PROPERTIES.

"In order to admit evidence of bad acts not resulting in conviction, the trial court must, '[a]s a threshold matter, . . . determine whether the proffered evidence is relevant.'" *See State v. Scott*, 405 S.C. 489, 497-98, 748 S.E.2d 236, 241 (Ct. App. 2013) (quoting *State v. Clasby*, 365 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)); *see also* Rule 402, SCRE ("Evidence which is not relevant is not admissible"). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)." *Scott*, 405 S.C. at 497-98, 748 S.E.2d at 241 (alteration in original and internal quotation marks omitted). While evidence of prior bad acts generally inadmissible to prove character or conformity therewith, it may be admitted "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. However, admissibility requires that the bad act "logically relate to the crime with which the defendant has been charged," and be supported by clear and convincing evidence. *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (quoting *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)).

In the seminal case *State v. Lyle*, the South Carolina Supreme Court explained that courts must apply "rigid scrutiny" to evidence of other distinct crimes and exclude it unless its logical relevance is clearly established. 125 S.C. 406, 118 S.E. 803 (1923). The Court held:

> Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime

> charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected. *Id.* at 125 S.C. 406, 118 S.E. at 807 (emphasis added).

Motive and intent are rarely issues in sex crimes cases, rendering these two exceptions under Rule 404(b) and *Lyle* inapplicable. *State v. Fonseca*, 383 S.C. 640, 647-49, 681 S.E.2d 1, 4-5 (Ct. App. 2009), *aff'd*, 393 S.C. 229, 711 S.E.2d 906 (2011). In *Fonseca*, the Court of Appeals explained:

> [a]lthough *Lyle* does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the *Lyle* exceptions differently to sexual offenses. . . .. [T]he motive for the alleged crimes . . . [is] apparent. A person commits or attempts to commit [a sexual offense] for the obvious motive of sexual gratification. Since motive cannot be deemed to have been a material issue at [defendant's] trial . . . testimony [as to prior bad acts] was not admissible to prove [intent].

Id. (citations omitted).

In addition, there must be a close degree of similarity or connection between the prior bad act and the crime for which a defendant is on trial to support admissibility under the common scheme or plan exception. *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). Moreover, remoteness in time between the acts is a significant factor to consider. *Id.* The common scheme or plan exception in sex crime prosecutions is usually limited to evidence of illicit activities or intercourse involving the same parties. *State v. Kirton,* 381 S.C. 76, 9, 671 S.E.2d 107, 117 (Ct. App. 2008).

Lastly, evidence of prior bad acts deemed relevant and proffered for a permissible purpose, may nevertheless be excluded upon a determination by the trial court that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision

on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998).

A. Evidence of Videos of People Other than Respondents Should Not Have Been Admitted

The trial court erred by admitting into evidence videos of people other than Respondents found on devices in Appellant Riviere's residence. Such evidence was admitted over Riviere counsel's repeated objections. **(R. pp. 341-351; R. p. 861, l. 23 – p. 862, l. 20; R. p. 894, l. 20 – p. 895, l. 17; R. p. 898, ll. 10-19; R. p. 903, ll. 17-21; R. p. 906, ll. 1-17; R. p. 906, l. 24 – p. 907, l. 7; R. p. 961, l. 25 – p. 962, l. 1; R. p. 968, ll. 14-22; R. p. 1090, ll. 22-24; R. p. 1117, l. 9 – p. 1118, l.24; R. p. 1126, ll. 4-7; R. p. 1136, ll. 21-25; R. p. 1293, ll. 2-8; R. p. 1561, ll. 14-20; R. p. 1746, ll. 2 – p. 1748, ll. 20).** First, the videos of others are not relevant because the existence of videos of others found on devices in Riviere's residence in 2019 does not make it more likely than not that Riviere invaded Respondents' privacy by secretly filming Respondents in the Grace Avenue Cottage in the summer of 2001. Even if this evidence could be deemed relevant, it is inadmissible under Rule 404(a) and (b) of the South Carolina Rules of Evidence as improper propensity evidence, as none of the exceptions under Rule 404(b) apply.

First, motive and intent were not at issue at the trial. Second, the videos lack sufficient similarity in time, place, and circumstances to qualify as part of a common scheme or plan. Third, they do not demonstrate identity, absence of mistake, or accident. Lastly, admitting these other videos resulted in unfair prejudice, confusion of the issues, and undue delay, and must be excluded under Rule 403.

Respondents argued that the introduction of videos of others was permissible to show an impact on public interest to support their Unfair Trade Practices claims. However, there was no

evidence that any of videos were of persons who rented property from Appellants,[3] or even that the individuals depicted in the recordings were unaware of being taped. Furthermore, except for one video, the other videos were taken at locations other than the Grace Avenue Cottage, and some were recorded on a boat, with no evidence establishing where the boat was located or whether individuals depicted were aware they were being filmed.

State v Simmons, 430 S.C. 1, 841 S.E.2d 845 (2020), involved very similar facts. Law enforcement seeking evidence of child pornography executed a search warrant and seized a desktop computer and an external hard drive from the defendant's bedroom. Investigators had traced an IP address where six child pornography videos had been downloaded to the defendant's residence. There was evidence from the desktop that the six videos had been downloaded and subsequently erased. The defendant was charged with downloading these six videos. There were eight other child pornographic videos on the external hard drive, but the defendant was not charged with possessing these. Nevertheless, the State sought to introduce evidence of these eight videos, and the trial court refused on the ground that the State was attempting to introduce improper character evidence. However, the trial court subsequently ruled that the defense opened the door to the introduction of the videos on the external hard drive through the cross-examination of the State's forensic expert. The Supreme Court reversed the case, concluding that the trial court erred in concluding that the defense opened the door, and in admitting evidence of the videos on the hard drive for which the defendant was not charged.

Simmons is instructive and on point. Respondents sued Appellants alleging that Riviere secretly videotaped them in violation of their privacy rights. Evidence of other videos found on

[3] Co-defendant Josee Riviere testified that Appellant Rhett Riviere frequently allowed others to stay at various properties without charging rent, and that did not know whether the individuals on the videotapes introduced into evidence were renters. **(R. p. 1671, ll. 20-25 – p. 1672, ll. 1-8).**

devices in Riviere's residence eighteen (18) years later served only to shift the jury's focus from charged conduct to other uncharged conduct, which is not relevant to motive, intent, identity, absence of mistake or accident, or common scheme or plan, resulting in unfair prejudice to the Defendant and causing undue delay of the trial.

B. The Videos and Evidence of the Existence of Thousands Other Videos and Images Should Have Been Excluded Under Rule 403, SCRE.

Furthermore, the other videos and evidence of the existence of thousands of other videos and images should have been excluded under Rule 403, SCRE. There was a total of ten (10) videos introduced into evidence. One video was a compilation of four (4) separate clips involving Respondents. **(R. p. 2493).** One video depicted Appellant Riviere adjusting a camera in a location different from the Grace Avenue Cottage. **(R. p. 2494).** The other eight (8) videos involve other individuals in various stages of dress, some nude and some engaging in sexual activities. (*Id.*).

Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions. *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010); *State v. Brazell,* 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Franklin,* 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995).

The trial judge described this video evidence as "some of the most horrendous things I have seen in my career." **(R. p. 1702, ll. 2-15).** The trial judge explained that she was "loathe to…put another [jury] panel through that," referring to watching the videos when considering Appellant Riviere's motion for mistrial. In addition, Appellant Josee Riviere testified she thought Riviere was kind and generous, saying "I thought I knew him," but that "the sicko who took these

[videos]—whoever took these is not that person." **(R. p. 1641, ll. 16-25).**

Clearly, the admission of these "horrendous" sexually explicit videos served to establish that Appellant Riviere was a "sicko" in the minds of the jury, and its marginal probative value was substantially outweighed by the danger of unfair prejudice. The jury's runaway and inconsistent verdicts are clear proof that this improperly admitted evidence caused the jury to render a decision on emotions.

II. THE TRIAL COURT ERRED BY RULING JOSEE RIVIERE'S QUESTIONING OF A WITNESS OPENED THE DOOR TO OTHERWISE INADMISSIBLE BAD ACT EVIDENCE PERTAINING TO APPELLANT RHETT RIVIERE

Respondents designated witness depositions and identified trial witnesses with the intention of eliciting testimony regarding prior instances of misconduct by Appellant Riviere. For example, Respondents sought to introduce evidence of a 1979 criminal charge for trespassing in Florida, and testimony from a witness who claimed that she arrived home one night to find Riviere under her house, dressed in a tuxedo. A third witness, Sue Hook, also claimed that when she moved to Aiken in 1989, her home was behind Riviere's mother's home. She testified that she arrived home and discovered Riviere climbing down from a tree outside her bedroom window. **(R. pp. 1169-1182; R. pp. 341-351).** He stated that he was attempting to retrieve his mother's peacocks from the tree. *Id.* The trial court correctly ruled that these incidents were inadmissible.

However, the trial judge permitted this testimony from Hook after she stated that she did not like Riviere, when questioned by counsel for Respondent Josee Riviere. The trial court ruled that this question and answer opened the door as to why Hook did not like Riviere. The trial court erred.

In *State v. Williams*, 430 S.C. 136, 148, 844 S.E.2d 57, 64 (2020), the Court ruled that the "accused must first offer evidence" of a character trait before rebuttal character evidence can be

admitted. The Court further explained that a witness other than the accused who gratuitously testifies about a character trait does not open the door to the admission of character evidence. *Williams* is instructive. Here, Hook, upon being questioned by Josee's counsel, testified that she did not like the Appellant Riviere. This in no way was evidence offered by Riviere, and Respondents should not have been permitted to introduce otherwise inadmissible Rule 404(b) evidence.

Furthermore, under the "door opening" doctrine, the evidence that is allowed must be proportional. In *Williams*, the Court stated:

> Whether the subject is contrary character trait evidence under Rule 404(a)(1) or impeachment of a witness under Rule 607, Rule 403 requires the evidence offered to be proportional to the evidence that gave rise to its admissibility. We have guarded against "thinly-veiled attempt[s] to show propensity" initiated under the guise of an attempt at impeachment. *See Young*, 378 S.C. at 106, 661 S.E.2d at 390; *State v. Heyward*, 426 S.C. 630, 637, 828 S.E.2d 592, 595 (2019). We have emphasized proportionality in "opening-the-door" settings as well. *See Bowman*, 422 S.C. at 40, 809 S.E.2d at 243-44 ("Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant." (quoting *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006))); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595 ("Testimony in response must be 'proportional and confined to the topics to which counsel had opened the door.' " (quoting *Bowman*, 422 S.C. at 42, 809 S.E.2d at 244)); *see also State v. Robertson*, 205 A.3d 995, 1004 (Md. 2019) ("The doctrine of opening the door has limitations. It allows for the introduction of otherwise inadmissible evidence, but only to the extent necessary to remove any unfair prejudice that might have ensued from the original evidence." (quoting *Little v. Schneider*, 73 A.3d 1074, 1082 (Md. 2013))); *Khan v. State*, 74 A.3d 844, 856 (Md. Ct. Spec. App. 2013) ("While the proverbial door was opened to the disputed testimony, it remained for the trial court to balance its probative value against its prejudicial nature ....").

430 S.C. 136, 151–52, 844 S.E.2d 57, 65 (2020)

At trial, Hook was permitted to testify that she did not like Appellant Riviere because he would come onto her property uninvited, to explain why she did not like him. However, this explanation was not satisfactory to Respondents, who then inquired about a specific instance of finding Riviere climbing down from a tree adjacent to her bedroom window. The Court, over

strenuous objection, concluded that Josee Riviere's questioning of Hook opened the door for testimony of this specific incident. Testimony about this incident was clearly disproportionate to the purported justification of explaining why the witness did not like Appellant Riviere. This evidence was introduced for the thinly veiled purpose of establishing that Riviere is a peeping Tom[4].

The trial court's ruling allowing the co-defendant's counsel to open the door was especially problematic here. It created a conflict of interest between Appellant Riviere and Respondent Josee and thus, created an attorney-client conflict given Mr. Harte's earlier representation of Appellant Riviere in the criminal matter and other civil matters and his representation of Josee Riviere at this trial. Respondent Josee Riviere pre-trial and during trial unsuccessfully moved for severance. After the trial court ruled the door had been opened by John Harte, Appellant Riviere raised the conflict of interest finding a potential issue had developed and at this point, renewed Appellants' motion for severance in addition to mistrial. **(R. p. 1757, l. 6 - p. 1761, l. 22; R. p. 1262, ll. 7-9).**

III. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF OTHER BAD ACTS THAT WERE NOT PROBATIVE OF THE CLAIMS AT ISSUE AND SERVED ONLY TO INFLAME THE JURY.

Riviere's counsel objected *ad nauseum* to the introduction of improper 404(b) evidence. **(R. pp. 341-351; R. p. 852, ll. 10-22; R. p. 853, l. 21 – p. 854, l. 25; R. p. 857; R. p. 880, l. 5 – p. 881, l. 2; R. p. 1260, l. 8 – p. 1261, l. 25; R. p. 1593, ll.5-13; R. p. 1607, ll. 3-21; R. p. 1746, l. 2 – p. 1749, l. 21).** As Riviere counsel argued, "We are shadowboxing. I mean, we literally have been placed in a position, as you have, where we're playing evidentiary whack a mole." **(R. p. 1866, ll. 5-7).** In addition to the Sue Hook tree episode described above, the lower court allowed

[4] Peeping Tom a nickname for a male voyeur, from the character Peeping Tom, who spied on Lady Godiva's naked ride. www.Wikipedia.org/wiki/PeepingTom

testimony from Christina Neuhaus, who testified that she, her husband, and stepdaughter rented a cottage from Riviere in 2017 while renovating their home. She noticed a modem in a bedroom corner that did not have a coaxial cable connection, and she unplugged it. A few days later, she observed that it was plugged back in. She testified that after she learned of the SD cards discovered by her friend Katherine Thomas, she became "extremely uncomfortable," knowing her 11-year-old stepdaughter stayed in the cottage for nearly three months. **(R. pp. 1443-1444; R. p. 1454, ll. 1-16; R. p. 1452, ll. 11-13).**

Another witness, who was an ex-girlfriend of Appellant Riviere, was permitted to testify that when she was cleaning out a garage, she came across some old video equipment, and Riviere stated that "the FBI didn't find that." **(R. p. 1419, ll. 13-20).** Emerson also testified that she found a number of thumb drives in a grocery bag which she believed belonged to Riviere. She had placed the bag in her car, but the thumb drives later disappeared. **(R. p. 1420, ll. 14-21; R. p. 1421, ll. 1-6).**

Respondent Gabriel Crespo's therapist, William Trezza, brought out other events of alleged misconduct involving Riviere in his testimony. Trezza testified that Gabriel learned of the video from an attorney in Columbia "*who was prosecuting related cases*." **(R. p. 1601, ll. 15-25).** Lastly, Respondent Gabriel took the stand and told the jury that Respondent Riviere "*needs to be stopped. He has been doing this for four decades*."

The trial court inexplicably permitted this testimony over objection. The fact that Neuhaus found a suspicious modem a cottage she rented from Rivier, and that she is now concerned about whether Riviere videotaped her, and her 11-year-old stepdaughter, is not relevant evidence whatsoever. The fact that Appellant Rhett Riviere's ex-girlfriend found a bag of thumb drives in a grocery bag is likewise not relevant to the issues before the jury, just as the fact that Respondents'

counsel is prosecuting related cases is not relevant. Respondent Gabriel's testimony that Riviere has been secretly videotaping individuals without their knowledge for four decades, and needs to be stopped, was totally improper and inadmissible under Rules 403 and 404.

Yet, the trial judge permitted this testimony. The cumulative effect of this improper testimony, combined with the other improperly admitted evidence addressed above, denied Appellants a fair trial. *See State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial).

IV. THE TRIAL COURT ERRED IN DENYING APPELLANTS MOTION FOR SEVERANCE AND MISTRIAL FOLLOWING THE CUMULATIVE ADMISSION OF PREJUDICIAL EVIDENCE, INCLUDING HEARSAY TESTIMONY, INFLAMMATORY EXHIBITS, AND SPECULATIVE REFERENCES TO OTHER ALLEGED RECORDINGS AND VICTIMS

After the Court ruled that Josee Riviere's questioning of Sue Hook opened the door to evidence of Riviere being seen climbing down a tree outside of Hook's bedroom in the 90s, Appellant Riviere moved for severance and mistrial. The Court denied this motion. Subsequently, Josee Riviere testified in the Respondents' case in chief, and on cross examination by her counsel was asked, "Did anyone ever tell you anything about Rhett Riviere having any sort of reputation that was not good?" **(R. pp. 1696, ll. 24-25).** Josee responded, "No, everybody liked him." **(R. p. 1697, l. 1).** Immediately following this exchange, counsel for Appellant Rhett Riviere requested a sidebar and objected to this testimony. After a lengthy exchange, the Court then instructed the jury "not to consider the last question and answer given by this witness to the question." **(R. p. 1697, ll. 9-16).**

Thereafter, the Court reprimanded counsel for Josee and *sua sponte* considered granting

a mistrial. **(R. p. 1701, ll. 19-25; R. p. 1702, ll. 1-24).** Appellant Riviere formally moved for a mistrial. After considering the motion overnight, and entertaining arguments the following morning, the trial court denied the motion for a mistrial. The Court erred.

At this point in the trial, the jury had been presented with the following testimony:

- Agent Dove testified about thousands of videotapes and images of evidentiary value
- Agent Busbee described specific videos of individuals in the nude, and engaging in sexual activities
- Sue Hook testified to finding Riviere in a tree outside her bedroom window
- Mr. Trezza testified that Respondents' counsel was prosecuting related cases
- Ms. Neuhaus testified regarding the modem and her concern as to whether her 11-year-old stepdaughter was videotaped
- Appellant Riviere's ex-girlfriend testified about a grocery bag of thumb drives, and a comment from Riviere that the FBI did not seize certain electronic devices
- Josee Riviere testified that a "sicko" must have made those videotapes introduced into evidence
- Appellant Rhett Riviere who invoked his 5th Amendment privilege when called to testify by Respondents, was asked if he videotaped young girls, and others without their consent for years

(R. p. 1746, ll. 21-25; R. pp. 1747-1748, ll. 1-20).

This character assault, combined with the Court having to strike evidence that Riviere had a good reputation and everyone liked him, almost certainly prevented Appellant Riviere from receiving a fair trial at that stage.

However, the character assassination crescendo most certainly occurred when Respondent Grabriel Crespo testified that Riviere "*needs to be stopped. He has been doing this for four decades*." He further emphasized that he wanted everyone to know what this guy did to us, and looking the jury square in the eyes, stated, "*it could be any of you*." **(R. p. 1819, ll. 11-15).** Respondent Riviere immediately renewed his prior motions for a mistrial following Respondent Gabriel Crespo's violation of the "golden rule." A golden rule argument is one that suggests to the jurors they put themselves in the shoes of one of the parties. Such an argument is improper because

it asks the jurors to place themselves in the victim's place and tends to destroy all sense of impartiality of the jurors. Its effect is to arouse passion and prejudice, thereby encouraging the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. *State v. Harris*, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009).

A mistrial must be granted when there is manifest necessity and to protect the public's interest in a fair trial. See, *State v. Prince,* 279 S.C. 30, 301 S.E.2d 471 (1983) (the less than lucid test is whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment). Here, the trial court erred by refusing to grant a mistrial. The cumulative effect of this improper character evidence, which served only to establish in the minds of the jury that Riviere is a "sicko," "who needs to be stopped," and that this could happen to "any of you," denied Appellant Riviere a fair trial, as is evident by the $36 million jury verdict.

V. THE TRIAL COURT SHOUND HAVE DIRECTED A VERDICT FOR APPELLANTS ON RESPONDENTS' CLAIMS FOR NEGLIGENCE AND NEGLIGENCE PER SE BECAUSE RESPONDENTS FAILED TO PRESENT ANY EVIDENCE OF PHYSICAL INJURY

To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages. *Sherrill v. S. Bell Tel. & Tel. Co.,* 260 S.C. 494, 499, 197 S.E.2d 283, 285 (1973). Under South Carolina law, the damages element requires a plaintiff to establish physical injury or property damage. *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013).

Recently, in *K.S. ex rel. Seeger v. Richland Sch. Dist. Two*, 445 S.C. 111, 120, 912 S.E.2d 240, 244–45 (2025), the Court reaffirmed this requirement:

> South Carolina law has long allowed a negligence plaintiff to recover for emotional harm in cases where the plaintiff has also suffered physical harm. *Cf. Norris v. S. Ry., Carolina Div.*, 84 S.C. 15, 21, 65 S.E. 956, 959 (1909) ("The law in this state does not allow recovery of damages for mental suffering in the absence of bodily injury ...."). The physical harm may take one of two forms: physical harm caused by physical impact from an external or outside force, or physical harm consisting of the physical manifestations caused by emotional distress.

Respondents presented no evidence of physical injury or property damage. Respondent Gabriel Crespo received virtual counseling on one occasion, and Respondent Heather Crespo attended several counseling sessions. Neither sustained any physical injury. Their claimed damages are limited to emotional distress, which is not compensable in a negligence action absent accompanying physical harm. *Id.* As such, the trial court erred in denying Appellants' motion for directed verdict, renewed motion for directed verdict, and JNOV.

a. RESPONDENTS FAILED TO ESTABLISH THAT APPELLANTS' ACTIONS RESULTED IN THE HARM THAT THE STATUTE WAS INTENDED TO PREVENT, AND THEREFORE THE COURT SHOULD HAVE GRANTED A DIRECTED VERDICT ON THE NEGLIGENCE PER SE CLAIM

Respondents also failed to show that Appellants' actions caused the type of harm the relevant statute was intended to be protected against, or that Appellants were subject to the statutory duty they invoke. To prevail on a negligence per se claim, the Respondents must show: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 134, 558 S.E.2d 271, 275 (Ct. App. 2001). If both elements are satisfied, then "he has proven the first element of a claim for negligence" and the jury "need not decide if the defendant acted as would a reasonable man in the circumstances." *Id.* If the Appellants' actions do not fall within the jurisdiction of the statute, then the Respondents cannot reasonably make a claim that he is a part of its protected class. *See Silva v. Wilcox*, 223 P.3d 127,

135 (Colo. App. 2009) ("If the statute applies to the defendant's actions, the statute conclusively establishes the defendant's standard of care, and violation of the statute is a breach of his duty").

Respondents failed to establish by a preponderance of the evidence that they fall within the class protected by S.C. Code Ann.§ 40-57-20, or that the statute applies to Appellants' conduct. Section 40-57-20 applies to licensed real estate brokers, salespersons, and property managers. S.C. Code Ann. § 40-57-5. Accordingly, Respondents failed to prove the corresponding statute applies to Defendant as a short-term, vacation rental property manager. Nowhere in Title 40 of South Carolina's Labor statutes is there an applicable licensing requirement that would mandate that Appellants' actions constituted unlicensed activities as a real estate agent, salesperson, or property manager. South Carolina courts have not extended § 40-57-20 to short-term rental property managers. In Pennsylvania, the issue was brought before their courts where they found that applying the state's Real Estate Licensing Act was unconstitutional when applied to "short-term vacation property management services." *Ladd v. Real Est. Comm'n*, No. 321 M.D. 2017, 2022 WL 19332047 (Pa. Commw. Ct. Oct. 31, 2022). Subsequently, the Respondents may not seek safe harbor as a member of this statute's protected class when it would be unconstitutional to expand the scope of this statute's duty requirement on the Appellants. Therefore, the Respondents' negligence per se claim must fail since the actions of the defendant were not subjected to the scope of this statute, and the Respondents are not a member of the statute's protected class.

Moreover, even if the statute applied, Respondents offered no evidence to support a finding that if Appellants had been licensed under the statute that the invasion of privacy would not have occurred. Respondents called two licensed real estate agents—Deidre Vaillancourt and Susan Haslup—but neither witness was qualified as an expert and thus could not testify to the duty of a

licensed real estate broker. However, Vaillancourt denied that she, as a licensed broker, is required to inspect properties before listing the properties.

VI. DIRECTED VERDICT OR JNOV SHOULD HAVE BEEN GRANTED ON RESPONDENTS' CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE RESPONDENTS HAVE FAILED TO PRESENT ANY EVIDENCE THAT EITHER SUFFERED EXTREME OR SEVERE EMOTIONAL DISTRESS

South Carolina recognizes a heightened standard for intentional infliction of emotional distress (IIED) claims. A plaintiff must show that "the conduct on the part of the defendant was 'extreme and outrageous,' and that the conduct caused distress of an 'extreme or severe nature.'" *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 71 (2007) (quoting *Hudson v. Zenith Engraving Co*, 273 S.C. 766, at 770, 259 S.E.2d at 814). Without legally sufficient evidence that the plaintiff suffered more than "fairly ordinary symptoms," the plaintiff fails to create a question for the jury on the damage's element of an IIED claim. *Hansson*, 374 S.C., at 360, 650 S.E.2d at 72 (2007).

Respondents failed to demonstrate that either suffered emotional distress of such severity that no reasonable person could be expected to endure it. Their injuries consist of ordinary symptoms and do not rise to the level of "extreme and severe" emotional distress required to submit the claim to a jury. Respondents' feelings of humiliation or anger are similar to the symptoms asserted by the plaintiff in *Hansson,* where the court found that testimony about losing sleep and being told by a dentist that he was grinding his teeth at night was not sufficient to establish the damages element of an IIED claim. Furthermore, the plaintiff's dental treatment for teeth grinding in *Hansson* was also deemed to be a fairly ordinary symptom that did not constitute a severe consequence.

Here, Respondents' evidence of emotional distress was limited to minimal medical bills and counseling records. These records do not establish distress of the "extreme or severe" nature under South Carolina law. Accordingly, the trial court should have directed a verdict or granted JNOV in favor of Appellants on the IIED claim.

VII. DIRECTED VERDICT OR JNOV SHOULD HAVE BEEN GRANTED ON RESPONDENTS' CLAIMS OF CONSTRUCTIVE FRAUD BECAUSE RESPONDENTS FAILED TO PROVE A NEGLIGENT MISREPRESENTATION

Respondents failed to present sufficient evidence to support a claim for constructive fraud, and the trial court should have granted a directed verdict or JNOV for Appellants. To establish fraud, a party must prove: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Sorin Equip. Co. v. The Firm, Inc.,* 323 S.C. 359, 365, 474 S.E.2d 819, 823 (Ct. App. 1996). For a claim of constructive fraud to succeed, "all elements of actual fraud except the element of intent must be established." *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 269 (Ct. App. 1993). The first element—"a representation"—has been described as "a statement or communicative act." *Woods v. State*, 313 S.C. 516, 431 S.E.2d 260 (1993). Respondents failed to introduce any evidence of such a representation at trial. Furthermore, "where there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely." *Poco-Grande Invs. v. C & S Family Credit, Inc*., 301 S.C. 323, 325, 391 S.E.2d 735, 735 (Ct. App. 1990). The previous statement is "especially true in situations where one should have utilized precaution and protection to safeguard his interests." *Id.*

To establish a fiduciary duty, the court has no strict definition of what constitutes a fiduciary duty, but the court states that "it appears when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed." *Chapman v. Citizens & S. Nat'l Bank*, 302 S.C. 469, 476, 395 S.E.2d 446, 451 (Ct. App. 1990).

Here, Respondents have failed to prove a statement was made, or that their arms-length transaction rose to the level of a fiduciary duty between the two parties. Accordingly, they cannot establish a right to rely on any representation, assuming one was made.

Respondents also failed to prove any financial loss as a result of the alleged fraud. Gabriel Crespo testified that he paid $2,400 to rent the cottage for three months but did not offer any testimony as to what the rental's value would have been had he known about the hidden cameras. *Sparrow v. Toyota of Florence, Inc.*, 302 S.C. 418, 422, 396 S.E.2d 645, 647 (Ct. App. 1990) (The measure of actual damages was the difference in fair market value). The only damages alleged to have resulted from the video recording are mental suffering, emotional shock, inconvenience, or embarrassment. These are not elements of damage in a fraud case. *Id.*

VIII. DIRECTED VERDICT OR JNOV SHOULD HAVE BEEN GRANTED ON RESPONDENTS' SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT CLAIM BECAUSE RESPONDENTS FAILED TO PRESENT EVIDENCE OF COGNIZABLE DAMAGES

Gabriel Crespo testified that he paid $2,400 to rent the cottage for three months, but did not testify to the property's fair market value if he had known of the hidden cameras. *Sparrow v. Toyota of Florence, Inc.*, 302 S.C. 418, 422, 396 S.E.2d 645, 647 (Ct. Aatat 1990) (The measure of actual damages was the difference in fair market value). Respondents claimed damages—mental suffering, emotional distress, inconvenience, or embarrassment—are not recoverable under the

South Carolina Unfair Trade Practices Act (SCUTPA). S.C. Code Ann. § 39-5-140 (Any person who suffers any "ascertainable loss of money or property, real or personal," as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action individually)

IX. RESPONDENTS FAILED TO PRESENT ANY EVIDENCE THAT APPELLANTS CHASE ENTERPRISES OR RC PROPERTIES OWNED, CONTROLLED OR RENTED THE COTTAGE TO RESPONDENTS

Respondents allege that they "stayed at one of Appellants' rental properties from April to June 2001." **(R. p. 98 ¶ 19; R. p. 113 ¶ 19).** Appellants Riviere, Chase Enterprises and RC Properties denied these allegations. **(R. p. 132 ¶ 19; R. p. 125 ¶ 19).** It was thus Respondents' burden to establish that the rental property was owned or controlled by Riviere, Chase Enterprises, or RC Properties. They failed to do so.

Gabriel Crespo testified that he wrote a rent check to a company but did not identify the company's name. **(R. p. 1837, ll. 8-12).** While Riviere invoked the Fifth Amendment in response to several questions, none of those questions addressed ownership of the cottage. His invocation cannot be used against the corporate Appellants, who do not enjoy Fifth Amendment protections.

In *Braswell v. United States*, 487 U.S. 99 (1988), the Supreme Court held that a corporate records custodian may not claim Fifth Amendment Privilege no matter how small the corporation is because it is well established that such artificial entities are not protected by the Fifth Amendment. Respondents offered no property records, deeds, or other corporate records showing any ownership or rental relationship between the subject property and Chase Enterprises or RC Properties in April through June 2001.

Without such evidence, the jury had no basis to conclude that either corporate entity owned or leased the cottage to Respondents. Therefore, the trial court erred in denying a directed verdict or JNOV for the corporate Appellants.

X. THE TRIAL COURT ERRED BY SUBMITTING A JURY VERDICT FORM THAT ALLOCATED DAMAGES BETWEEN SEPARATE CAUSES OF ACTIONS WHEN THE MEAUSURE OF DAMAGES WAS IDENTICAL

A special verdict form can be so defective that its submission results in a prejudicial effect which constitutes reversible error. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.,* 372 S.C. 295, 303, 641 S.E.2d 903, 907–08 (2007); see also 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2508, at 193 (2d ed.). In evaluating the prejudicial effect of a defective special verdict question or special interrogatory, the court must consider the form in conjunction with the jury instructions. *Id.; Fortune v. Gibson,* 304 S.C. 279, 282, 403 S.E.2d 674, 675 (Ct.App.1991) (finding that special interrogatories and instructions must be considered together).

Here, the verdict form required the jury to assign damages separately for each cause of action, even though the trial court instructed that the measure of damages was the same across claims (excluding fraudulent concealment). The Court correctly charged the jury on the measure of damages for these causes of action; however, the verdict form clearly confused the jury regarding the damages. Shortly after deliberations began, the jury asked for "a copy of the applicable laws pertaining to this case," a request the court denied. **(R. p. 2314, ll. 13-24).** The trial court refused to submit the written jury charges to the jury. *Id.*

The jury thereafter rendered a verdict by completing the verdict form, which resulted in inconsistent damages awards. The jury awarded $500,000 for each Respondent for a total of $1 million on the negligence cause of action but increased the award to $1 million for each

Respondent for a total of $2 million on the negligence per se cause of action. The jury obviously failed to follow the Court's instructions on damages, because the only difference between negligence and negligence per se is the standard of proof required to establish breach of duty.

Moreover, the jury awarded damages of $3 million dollars for intentional infliction of emotional distress to each Respondent (totaling $6 million), and $5 million for each Respondent for a total of $10 million for the invasion of privacy claim. The jury was instructed that the measure of damages for the tort claims, other than fraudulent concealment, was identical. Yet, the jury rendered varying damage amounts for these separate causes of action as a result of the confusing and improper verdict form.

XI. THE TRIAL COURT ERRED IN DENYING A NEW TRIAL ABSOLUTE BECAUSE THE JURY'S VERDICT WAS CLEARLY THE PRODUCT OF CONFUSION INVITED BY THE VERDICT FORM, AND WAS OBVIOUSLY THE RESULT OF PASSION AND PREJUDICE

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and those that are driven by passion, caprice, or prejudice. *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993)). The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive such that it shocks the conscience of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. Aatat 1996).

Here, the jury awarded $26 million in actual damages and $10 million in punitive damages. This $36 million award is grossly disproportionate to the evidence and indicates that the verdict was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives.

Plaintiffs incurred less than $5,000 in medical expenses, missed no work, and sustained no physical injuries. There was no evidence of permanent injury, future lost income, or future medical expenses. The jury appeared to have pulled the $26 million figure out of thin air.

This verdict was clearly the product of passion, caprice, and prejudice. This is especially evident where Plaintiffs' counsel sought to inflame the jury by referring to videos of "young girls," "couldn't have been older than 15," "thousands of videos," and other highly prejudicial character evidence during cross examination—despite repeated objections and motions by the defense to exclude such inflammatory and unfounded statements. These remarks were made over objection and led to at least three mistrial motions, all based on concerns that the jury would be confused and inflamed by improper arguments and inadmissible evidence.

The trial tactics of Respondents' counsel also resulted in inflaming the jury and prevented Appellants from receiving a fair trial. During trial, Riviere's counsel was forced to object repeatedly with no less than nineteen (19) sustained objections during trial. **(R. p. 1034, ll.16-21; R. p. 1035, ll. 12-16; R. p. 1103, l. 10 - p. 1104, l. 10; R. p. 1116, l. 13-24; R. p. 1117, l. 9 - p. 1118, l. 24; R. p. 1158, l. 15-21; R. p. 1159, ll. 1-7; R. p. 1290, ll. 5-9; R. p. 1290, ll. 11-22; R. p. 1347, ll. 15-17; R. p. 1372, ll. 1-8; R. p. 1374, ll. 2-6; R. p. 1589, l.14 – p. 1590, l. 2; R. p. 1593, ll. 5-13; R. p. 1615, ll. 8-11; R. p. 1843, ll. 2-4; ; R. p. 1864; R. p. 1994, ll. 6-10; R. p. 2074, l. 20 – p. 2075, 6; R. p. 2092, ll. 12-20; R. p. 2102, l. 24 – p. 2103, l. 15; R. p. 2103, l. 18 – p. 2104, l. 2).** Riviere's counsel pointed out to the court that having "to stand and object . . . disadvantages Mr. Riviere." **(R. 857, ll. 22-25).** This prejudiced is highlighted by comments of Respondent's counsel to the witness of "before we were interrupted." **(R. p. 1036, l. 1; R. p. 1053, l. 4).** As Appellants' counsel stated, "It puts us in a position that the plaintiffs know better than to put us in." **(R. p. 1264, ll. 10-12).** Even more egregious, Respondents' counsel made so many references

to "young girls," and questions about one girl not even being 15-years-old that the court felt it necessary to instruct the jury otherwise: "I do not think we can allow presentation of any insinuation that these subjects are younger than 18 years of age at this time, particularly given that the court specifically inquired as to the matter." **(R. p. 1787, l. 17 – p. 1788, l. 19).** Given the extreme prejudice to Appellant Riviere in such insinuations, that bell could not be unrung. These efforts by Respondents unduly inflamed the jury and prevented a fair trial for Appellants.

Respondents' counsel repeatedly crossed the line in attempting to introduce evidence of Appellant Riviere's wealth during the actual damages phase of trial. The jury's award of $26 million in actual damages—nearly triple the punitive award of $10 million—strongly suggests that the jury improperly included a punitive component in the actual damages award.

In addition, the jury verdicts were totally inconsistent, reflecting the juror caprice, prejudice or confusion. For instance, the jury awarded $500,000 in actual damages for constructive fraud, despite being instructed that the proper measure of damages was the difference in the value of the goods or property acquired and their actual value, plus any consequential damages. The only evidence on this issue was that Gabriel Crespo paid $2,400 for three months' rent of the cottage. The jury also awarded $500,000 per Respondent (totaling of $1 million) for negligence, but increased that amount to $1 million per Respondent (totaling $2 million) for negligence per se—even though the only difference between the two causes of action is the standard for establishing breach of duty, and the damages measure is identical. Furthermore, the jury awarded $3 million per Respondent (totaling $6 million) for intentional infliction of emotional distress and $5 million per Respondent (totaling $10 million) for invasion of privacy, despite the fact that both claims arose from the same conduct and were subject to the same damages standard.

In fact, the measure of damages was identical for all of the tort claims except fraudulent concealment. The jury's assignment of different and increasingly excessive amounts to each claim—based solely on the label of the cause of action—demonstrates that it failed to follow the court's legal instructions. No rational basis supports these calculations. The verdict was clearly the result of passion, prejudice, and confusion, and the trial court erred in refusing to grant a new trial absolute. *Vinson*, 324 S.C. at 404, 477 S.E.2d at 723.atat

XII. THE TRIAL COURT ERRED BY RULING THAT APPELLANT RIVIERE COULD NOT TESTIFY REGARDING HIS FINANCIAL CONDITION FOR PURPOSES OF CONTESTING PUNITIVE DAMAGES WITHOUT WAIVING HIS FIFTH AMENDMENT RIGHT TO ALL QUESTIONS PERTAINING TO HIS ALLEGED CRIMINAL CONDUCT

During the punitive damages phase of the bifurcated trial, Respondents once again called Appellant Riviere to testify on direct examination. **(R. p. 2412, l. 19 – p. 2413, l. 13).** Prior to being called to the stand, the trial court was notified that Riviere intended to answer questions pertaining to his net worth, but he sought clarification from the court that he retained the right to assert his Fifth Amendment privilege as to alleged criminal conduct. **(R. 2376, ll. 2-8).** The trial court, contrary to argument of Appellants' counsel, ruled that if Riviere answered any questions pertaining to his net worth, that he would thereby waive his Fifth Amendment privilege to questions relating to alleged conduct for which he has been criminally charged. **(R. p. 2385, l. 14 – p. 2386, l. 7; R. p. 2402, ll. 22-25; R. p. 2403, ll. 1-9).** As a result, Riviere asserted his Fifth Amendment privilege to all questions, including those relating to his net worth. **(R. p. 2411, ll. 11-25; R. pp. 2412-2422).**

The trial court erred by preventing Riviere from testifying about his net worth unless he waived his Fifth Amendment privilege as to unrelated matters. In the criminal context, a defendant has a right not to testify, but if he voluntarily chooses to testify in his defense, he waives his

privilege against self-incrimination to all proper questions. State v. Gilbert, 273 S.C. 690, 695–96, 258 S.E.2d 890, 893 (1979), overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); *Brown v. United States,* 356 U.S. 148 (1958); *Taylor v. State*, 258 S.C. 369, 188 S.E.2d 850 (1972); 8 *Wigmore, Evidence* § 2276.

However, that rule does not apply in civil cases, particularly where the person asserting the Fifth Amendment is not seeking affirmative relief, but merely defending against a claim. In *First Union Nat. Bank v. First Citizens Bank & Tr. Co. of S.C.*, 346 S.C. 462, 466–67, 551 S.E.2d 301, 303 (Ct. App. 2001), this Court vacated a contempt sanction against a witness who selectively invoked his Fifth Amendment privilege. The Court explained that in a civil proceeding, a witness cannot assert a blanket privilege, but may assert the Fifth only as to answers that would support a conviction or furnish a link in the chain of evidence needed to prosecute the witness. *Id.* The Court further emphasized that it must determine whether the privilege is properly invoked, giving deference to the witness. *Id. First Union Nat. Bank* clearly supports the principle that a witness may assert the privilege where appropriate and still answer other questions.

In *Griffith v. Griffith*, 332 S.C. 630, 637, 506 S.E.2d 526, 529–30 (Ct. App. 1998), the Court held that a wife could not pursue a claim for alimony while refusing to answer questions about adulterous conduct by asserting the Fifth Amendment. The Court explained:

> Our research indicates that those states confronted by this issue have almost uniformly concluded that one who seeks this affirmative relief in a civil case may not invoke the Fifth Amendment privilege against self-incrimination in response to proper questions relating to the subject matter in issue. In such instances, the trial court may properly require them to choose between the Fifth Amendment privilege and the continuation of their claim for affirmative relief.

The trial court's ruling misapplied the rule against selective invocation of the Fifth Amendment, which applies to criminal defendants who voluntarily testify in their defense. Appellant Riviere does not possess a right not to testify in a civil proceeding, and therefore, he did

not waive his Fifth Amendment privilege by answering questions about his net worth when compelled to testify by Respondents. Moreover, unlike the plaintiff in *Griffith*, Riviere was not seeking affirmative relief—he was a civil defendant.

As a result of the court's erroneous ruling, Riviere was forced to assert the Fifth Amendment to questions about his net worth—a topic that does not implicate self-incrimination—to avoid waiving his privilege as to questions concerning conduct for which he faces criminal charges.

The trial court's ruling constituted an egregious abuse of discretion and prevented Riviere from presenting evidence of his net worth during the punitive damages phase. Moreover, the court compelled him to assert the Fifth Amendment in front of the jury on financial questions, which was highly prejudicial.

XIII. THE TRIAL COURT ERRED BY AMENDING THE JUDGMENT AND AWARDING DAMAGES IN AN AMOUNT DETERMINED BY THE COURT RATHER THAN GRANTING APPELLANTS A NEW TRIAL OR NEW TRIAL NISI REMITTITUR ON THE UNFAIR TRADE PRACTICES AND FRAUDULENT CONCEALMENT CLAIMS

The jury returned a verdict against Appellant Rhett Riviere on each Respondent's claim for fraudulent concealment in the amount of $500,000 in actual and $500,000 in punitive damages, even though the Court had instructed the jury that the measure of damages for constructive fraud is the difference between the value of the goods or services as represented and the actual value. In addition, the jury returned a verdict against Appellant Riviere, the two corporate Appellants, and Appellant Josee Riviere in the amount of $500,000 each on Respondents' claims for violation of the South Carolina Unfair Trade Practices Act (SCUTPA), for a total of $2 million per Respondent.

Appellants argued to the trial court that damages recoverable under SCUTPA are limited to out-of-pocket economic loss and do not include recovery for emotional distress. The trial court

initially disagreed but later reversed that ruling in its post-trial order and correctly concluded that SCUPTA damages are limited to "ascertainable loss of money or property." The Court found that $2,400 in rent was paid jointly and therefore awarded each Respondent $2,400— double the actual rent paid. The Court also awarded Respondents their therapy fees and found that the SCUPTA violations were willful. It entered judgment for Heather Crespo in the amount of $12,960 and for Gabriel Crespo in the amount of $7,575, jointly and severally against all Appellants. **(R. pp. 55-56).**

The trial court also reduced the jury's fraudulent concealment award based on its own view of the evidence. After reiterating that the measure of damages is the difference in the value bargained for, the Court stated:

> This Court struggles with the measure of damages in this context…What is the value of a rental without videos that may have been released to the broader internet community (presumably $2,400) versus the value of rental that does not subject you to potential disclosure of sexual videos for the remainder of your life? The Court finds that it is reasonable for the jury to find that value is $0.00
>
> **(R. p. 56).**

Based on its own assessment of what a reasonable jury would find, the trial court reduced the judgment to $2,400.

The trial court erred by amending the judgment rather than granting Appellants' motion for a new trial or new trial nisi remittitur on the SCUPTA and fraudulent concealment claims. As the Court of Appeals explained in *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996):

> While the trial judge may not impose his will on a party by substituting his judgment for that of the jury, he may give the party an option in the way of *additur* or *remittitur,* or, in the alternative, a new trial.

It is axiomatic that "a judge cannot, under the guise of amending the verdict, invade the exclusive

province of the jury or substitute his verdict for theirs." *S.C. State Highway Dep't v. Miller*, 237 S.C. 386, 394–95, 117 S.E.2d 561, 565 (1960); *see also Vinson*, 324 S.C. at 406, 477 S.E.2d at 724 ("A trial court may amend a verdict in matters of form, but not of substance. A change of substance is a change affecting the jury's underlying decision, but a change in form is one which merely corrects a technical error made by the jury.").

Here, the trial judge invaded the province of the jury, substituted her judgment for theirs, and denied the parties their constitutional right to a jury trial. Accordingly, the judgment entered by the trial court on the SCUPTA and fraudulent concealment claims must be vacated, and the case remanded for a new trial.

XIV. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL FOLLOWING APPELLANT'S REQUEST THAT RESPONDENTS BE PROHIBITED IN CLOSING ARGUMENT FROM REFERENCING FACTS UNSUPPORTED BY ANY EVIDENCE?

The trial court erred again in failing to grant a mistrial during the closing argument phase of trial. Immediately prior to closing argument, the Court cautioned all counsel: "As to closing arguments, I find it necessary to take a moment to remind our esteemed counsel here, we need to be very careful on our closing arguments. No improper closing arguments, please. Those would be expressions of personal opinion. . . Do not try to . . .appeal to their personal biases or inflame their prejudices in any way." **(R. p. 2013, l. 18 – p. 2014, l. 14).** The Court then reminded counsel as to the Golden Rule applicability as to trial counsel. **(R. p. 2014, ll. 15-20).**

Thereafter, Appellant Riviere's moved in *limine* for Respondents counsel be prohibited from closing argument reference of unproven factual matters during trial and violation of the Golden Rule in reverse, among other requests. **(R. p. 2018, ll. 1 – 11; R. pp. 341-351).** Notwithstanding the Court's admonishment and the motion in *limine,* Riviere's counsel was forced to make four objections in front of the jury during Respondents' closing argument. **(R. p. 2074, l.**

20 – p. 2075, l. 7; R. p. 2092, ll. 13-20; R. p. 2102, l. 24 to 2103, l. 15; R. p. 2103, l. 18 – p. 2104, l. 2; R. p. 2106, l. 7 – p. 2108, l. 5; R. p. 2111, l. 6 - p. 2113, l. 2). Counsel thereafter moved for mistrial which was improperly denied as such efforts denied Appellants from having a fair trial. *Id.* See *State v. Prince,* 279 S.C. 30, 301 S.E.2d 471 (1983).

CONCLUSION

Erroneous legal and evidentiary rulings permeated the proceedings below and deprived Appellants a fair trial. From the beginning of the trial, Respondents launched a character assault against Appellant Riviere through the erroneous introduction into evidence of sexually explicit videotapes with the primary objective to show that Appellant Riviere was a "sicko," who had been secretly videotaping individuals for decades, and that he must be stopped because it could happen to you. For these reasons, the judgment below must be vacated, and the case should be remanded for a new trial on the invasion of privacy claim against Appellant Rivere only. The remaining claims should be dismissed based upon insufficient proof, as argued above.

[SIGNATURE PAGE ON FOLLOWING PAGE]

Respectfully submitted,

By: s/ James M. Griffin

James M. Griffin, SC Bar No.: 9995
Margaret N. Fox, SC Bar No.: 76228
8906 Two Notch Road, Suite 200
P.O. Box 999 (29202)
Columbia, South Carolina 29223
Telephone: 803-744-0800
jgriffin@griffinhumphries.com
mfox@griffinhumphries.com

Joseph M. McCulloch, SC Bar No.: 3760
Kathy R. Schillaci, SC Bar No.: 17248
1116 Blanding Street
P.O. Box 11623 (29211)
Columbia, South Carolina 29201
Telephone: 803-779-0005
joe@mccullochlaw.com
kathy@mccullochlaw.com

Attorneys for Appellant/Respondent Rhett Riviere, Chase Enterprises, LLC and R.C. Riviere Properties, LLC

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Columbia, South Carolina