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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge
Civil Action No. 20-CP-46-01803
Appellate Case No. 2025-000032

Bobby Blakney ……..…….., Respondent,

v.

City of Rock Hill …….…..., Petitioner.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Brian M. Gibbons, Circuit Court Judge

Case No. 20-CP-46-01803

Bobby Blakney . . . . . .
Respondent,

v.

City of Rock Hill . . . . . Appellant.

NOTICE OF APPEAL

The City of Rock Hill appeals the Orders and Judgment of the Honorable Brian M. Gibbons dated March 21, 2024, received March 21, 2024, and December 4, 2024, received December 4, 2024.

Appellant received written notice of entry of these Orders and Judgment on March 21, 2024, and December 4, 2024 respectively.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2025-000032

Bobby Blakney ..... Respondent,

v.

City of Rock Hill ..... Appellant,

MOTION TO DISMISS

Respondent Bobby Blakney ("Blakney") moves the Court for an Order dismissing City of Rock Hill's ("Rock Hill") appeal. A proper and timely filed Rule 59(e) motion stays the time for appeal.[1] However, because Appellant Rock Hill's Rule 59(e) motion only recapitulates arguments from Rock Hill's written post-trial motion with a request for reasoning or legal analysis, the Rule 59(e) motion does not stay Rock Hill's time to appeal. Therefore, Rock Hill's time to appeal was not stayed and this appeal must be dismissed as untimely.

Respondent reserves all other arguments in opposition to this appeal.

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[1] A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment. Rule 203(b)(1), SCAR.

Background Facts

On February 29, 2024, a jury returned a verdict for Plaintiff. Exhibit pp. 1–5. On March 11, 2024, Rock Hill filed a written post-trial motion for a JNOV, new trial absolute, new trial, and nisi remittitur. Ex. pp. 6–31. The motion also specifically asked for the verdict to be reduced in a manner contrary to law and precedent. Ex. pp. 24–30. Mr. Blakney opposed Rock Hill's motion. Ex. pp. 32–48.

On March 21, 2024, after "review[ing], deliberat[ing], and careful[ly] consider[ing] the points raised in defendant's post trial motions and subsequent response from the plaintiff," Judge Gibbons issued a written Order denying "Defendant's motions in their entirety." Ex. pp. 49–50. As required by law and precedent, Judge Gibbons subtracted any set-offs and comparative fault, and then reduced the verdict to the Tort Claims Act cap of $300,000.00.[2] Id. Considering April 20, 2024, was a Saturday, the deadline to perfect the appeal thus became April 22, 2024. Rules 203(b)(1) & 263(a), SCACR.

Instead of filing a notice of appeal, on April 1, 2024 Rock Hill filed a Rule 59(e) motion, rehashing its earlier arguments and asking the court to provide "reasoning or legal analysis for the denial of each of the grounds for relief as set forth in the Defendant's Post-Trial Motions." Ex. pp. 51–55. Mr. Blakney opposed Rock Hill's motion. Ex. pp. 56–60. On December 4, 2024, Judge Gibbons denied Rock Hill's motion. Ex. pp. 61–63. Rock Hill then filed this appeal.

There is no dispute that Rock Hill served its notice of appeal within thirty days after receiving the December 4, 2024 Order and more than thirty days after receiving the March 21, 2024 Order. The question then is whether Rock Hill's April 1, 2024 Rule 59(e) motion stayed the time for perfecting this appeal.

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[2] Smalls v. South Carolina Dept. of Educ., 339 S.C. 208, 219–223, 528 S.E.2d 682, ___ (Ct. App. 2000).

Discussion

A Rule 59(e) motion that is virtually identical to the post-trial motion and only raises the same issues already raised to and ruled upon by the trial judge will not stay the time to perfect an appeal.

In Coward Hund, the Court of Appeals held a second motion for reconsideration does not stay the time for filing a notice of appeal unless the second motion for reconsideration challenges something that was altered from the original judgement (due to the initial motion for reconsideration). Coward Hund Const. Co. v. Ball Corp., 336 S.C. 1 at 3, 518 S.E.2d 56 (Ct. App. 1999). In Coward Hund the trial judge granted Defendant's motion for summary judgement. Plaintiff filed a written motion to reconsider which was denied by the trial judge. Plaintiff then filed a second motion for reconsideration seeking clarification of an indemnity claim made against the Defendants. The trial judge granted the summary judgement ruling without referencing any prejudice to Plaintiff's indemnity claim. Id at 2. Plaintiff filed a notice of appeal which was ultimately dismissed by the Court of Appeals because Plaintiff did not file their notice of appeal within thirty days of receipt of the order denying the first motion to reconsider. Id. at 6. The Court of Appeals held Plaintiff's second motion to reconsider did not stay the time for appeal because it did not challenge a new ruling and was more appropriately classified as a Rule 60 motion (because it asked for clarification). Id. at 4 & 5.

In Quality Trailer, the Supreme Court held a Rule 59(e) motion does not stay an appeal when it is successive of the written post-trial motion. Quality Trailer Products, Inc. v. CSL Equipment Company, Inc., 349 S.C. 216, 562 S.E.2d 615 (2002). In that case, following a jury verdict, the defendant made a timely written post-trial motion for JNOV and a new trial. By written order, the trial court denied that motion. The defendant filed a Rule 59(e) motion. The trial court found the Rule 59(e) motion was in substance identical to the first post-trial motion and denied the motion. Id. at 218. On appeal, the Supreme Court agreed with the trial court that the Rule 59(e) motion was in substance identical to the post-trial motion. Id. at 220 & 218. It then held the Rule 59(e) motion was

successive because it raised the same issues already raised to and ruled upon by the trial judge. Id. at 219–20 ("It was simply a successive motion for JNOV and new trial, and thus did not toll the time for serving the notice of appeal.").

In Collins Music, the Court of Appeals held a Rule 59(e) motion does not stay an appeal when it is successive of the written post-trial motion and requests specific findings and conclusions of law when none are required. Collins Music Co., Inc. v. IGT, 579 S.E.2d 524, 353 S.C. 559 (Ct. App. 2002). In Collins Music, after a jury verdict, the defendant filed written post-trial motions for JNOV, new trial, and nisi remittitur. Id. at 560. The trial judge "carefully review[ed] the matter" and issued a written order denying defendant's motion in its entirety. Id. Instead of appealing the order, defendant filed a Rule 59(e) motion asking the judge to make specific rulings on the grounds raised in the post-trial motions. Id. at 561. The court denied the Rule 59(e) motion. Id. Defendant then appealed. Id. On appeal, this Court found the Rule 59(e) motion did not toll the time for serving an appeal. Extending the reasoning of Coward Hund Const. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) and Quality Trailer v. CSL Equip., 349 S.C. 216, 562 S.E.2d 615 (2002), this Court found the Rule 59(e) motion was nothing more than a second post-trial motion because it "failed to identify . . . any issue raised but not ruled upon." Collins Music, 353 S.C. at 566. And because the judge was not required to provide a detailed analysis, such a request did not support a finding that the Rule 59(e) motion tolled the time to appeal. Id. at 565.[3] The Court of Appeals dismissed the appeal as untimely. Id. at 566.

The Supreme Court has affirmed Quality Trailer and Collins Music. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 774 (2004). In Elam the jury returned a verdict in favor of Plaintiff. Immediately thereafter Defendant made oral post trial motions which were denied by the trial judge

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[3] Stating a trial judge is not required to provide a detailed analysis of all grounds raised and it is sufficient if it was clear from the order that all issues raised were considered.

in an oral ruling from the bench. Defendant timely filed a Rule 59(e) motion which was also denied by the trial court. Defendants filed their notice of appeal within thirty days of the denial of their written motion but after thirty days from their oral motion. The Supreme Court found Defendants appeal timely. In doing so it noted the importance that a party have an opportunity to preserve issues for appeal in the form of a written motion. Setting up a somewhat general rule that everyone has this opportunity (which Elam was not afforded but Rock Hill was). The Court cautioned parties who file post trial motions of the exceptions to this general rule as expressed by Coward Hund, Quality Trailer, and Collins Music. Id at 21. The Court stated, "We further conclude Quality Trailer and Collins Music – which involved written JNOV/new trial motions, a written ruling by the trial court, followed by a first, written, virtually identical Rule 59(e) motion – were correctly decided." Id at 19. The Court went on to state, "...we reaffirm the rationale and principles expressed in Coward Hund, Quality Trailer, and Collins Music. Id at 20.

The present case is the Quality Trailer exception. Rock Hill's Rule 59(e) motion is simply a successive written post-trial motion.. To be sure, it is in substance identical to its post-trial motion: in its Rule 59(e) motion, Rock Hill raises the same issues already raised to and ruled upon by the trial judge.[4] And it rehashes all or most of its previously made arguments. Cf. Ex. pp. 6–31 & 54–55. Rock Hill's motion cannot toll the time for serving the notice of appeal.

This case is also the Coward Hund exception as Rock Hill's Rule 59(e) motion does not challenge something that was altered from the original judgement (due to the initial motion for reconsideration). Additionally, it seeks clarification of the judges ruling. As a result, per Coward Hund, Defendants Rule 59(e) motion is more appropriately treated as a motion under Rule 60, SRCP. Rule

[4] The 59(e) motion alleges that all or almost every issue raised in the post-trial motion was not ruled on, but Judge Gibbons's Order denied every issue Rock Hill raised in its post-trial motion. Ex. p. 49.

60 motions do not stay the time for appeal. Otten v. Otten, 287 S.C. 166, 167, 337 S.E.2d 207 (1985). As a result, Rock Hill's motion cannot toll the time for serving the notice of appeal.

Finally, A Rule 59(e) motion is not timely and will not stay the time to perfect an appeal if it asks the court to provide clarification or a detailed analysis of all issues raised when it is clear from the order that all issues raised were considered and ruled on. Collins Music Co., Inc. v. IGT, 353 S.C. 559, 565, 579 S.E.2d 524, 527 (Ct. App. 2002). The present case is identical to the Collins Music exception. To be sure, following our jury verdict, Judge Gibbons "review[ed], deliberat[ed], and careful[ly] consider[ed] the points raised in defendant's post trial motions," and denied the post-trial motion in its "entirety." Ex. pp. 49–50. The Order could not be any clearer: all issues raised were carefully considered and ruled on. A detailed analysis of all issues raised is therefore not required.

Instead of appealing the Order, Rock Hill filed the same motion under another heading (Rule 59(e)) asking the judge to make specific rulings on the grounds raised in the post-trial motions.[5] However, Rock Hill did not identify any issues raised but not ruled on. Nor was the trial court required to provide an analysis of the issues raised. Just as in Quality Trailer and Collins Music, the Rule 59(e) motion did not toll the time to perfect the appeal—it was just another post-trial motion. Because Rock Hill did not perfect its appeal by April 22, 2024, the instant appeal is untimely, and a dismissal is mandated. See, e.g., Wells Fargo Bank, N.A. v. Fallon Props. S.C., 422 S.C. 211, 810 S.E.2d 856 (2018).

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[5] This is exactly what the party in Collins Music did. In any event, Rock Hill fails to point out any principle of law requiring the trial court to make the specific findings Rock Hill asks for in its Rule 59(e) motion. See e.g. Armstrong v. Union Carbide, 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992) (holding an order of the circuit court did not have to specifically address the issues raised when it is clear that the court considered all of the grounds raised). In the Order, Judge Gibbons clearly considered every ground raised when he reviewed, deliberated, and carefully considered the issues before denying Defendant's motion in its entirety. See also Ex. pp. 56–57 (refuting Rock Hill's claim that Lolis v. Dutton, 421 S.C. 467, 807 S.E.2d 723 (Ct. App. 2017) required the trial court to provide specific findings and its legal reasoning).

Conclusion

Based upon the foregoing, Respondent respectfully requests that the Court of Appeals dismiss Appellant's appeal.

Respectfully submitted,

/s/ Tyler Bathrick
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Attorney for Respondent

January 17, 2025

STATE OF SOUTH CAROLINA	IN THE COURT OF GENERAL SESSIONS
COUNTY OF YORK	SIXTEENTH JUDICIAL CIRCUIT
Bobby Blakney, Plaintiff, vs. City of Rock Hill, Defendant.	**VERDICT FORM** CASE NO: 2020-CP-46-01803

We, the jury, unanimously find as follows:

1. Was the Defendant negligent?

   ✓ YES – Go to Question 2.

   _____ NO – Stop Deliberations.

2. Was Defendant's negligence a proximate cause of Plaintiff's injuries?

   ✓ YES – Go to Question 3.

   _____ NO – Stop deliberations.

3. Did the Plaintiff contribute to his injuries by his own negligence?

   ✓ YES – Go to Question 4.

   _____ NO – Go to Question 7.

4. Was the Plaintiff's own negligence a proximate cause of his injuries?

   ✓ YES – Go to Question 5.

   _____ NO – Go to Question 7.

5. What percentage of the injuries did the Plaintiff and the Defendant cause? (These percentages must add up to 100 %, and each party should have a percentage amount greater than zero.)

Plaintiff	38 %
Defendant	62 %
TOTAL	100%

6. Was the Plaintiff's own negligence greater than 50%?

_____ YES – Stop Deliberations.

✓ NO – Go to Question 7.

7. Please state the amount of actual damages that the jury is awarding to the Plaintiff:

$ 500,000

February 29, 2024
York, SC

Foreperson's Signature

NOTIFY THE BAILIFF WHEN COMPLETED

Verdict = $310,000

2/29/24

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4601803

Bobby Blakney
PLAINTIFF(S)

Rock Hill City Of
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☑ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Jury Verdict For Plaintiff in the amount of $500,000.00, calculated to $310,000.00 for 68% comparative negligence. it is so ordered.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/06/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

York Common Pleas

Case Caption: Bobby Blakney VS Rock Hill City Of , defendant, et al

Case Number: 2020CP4601803

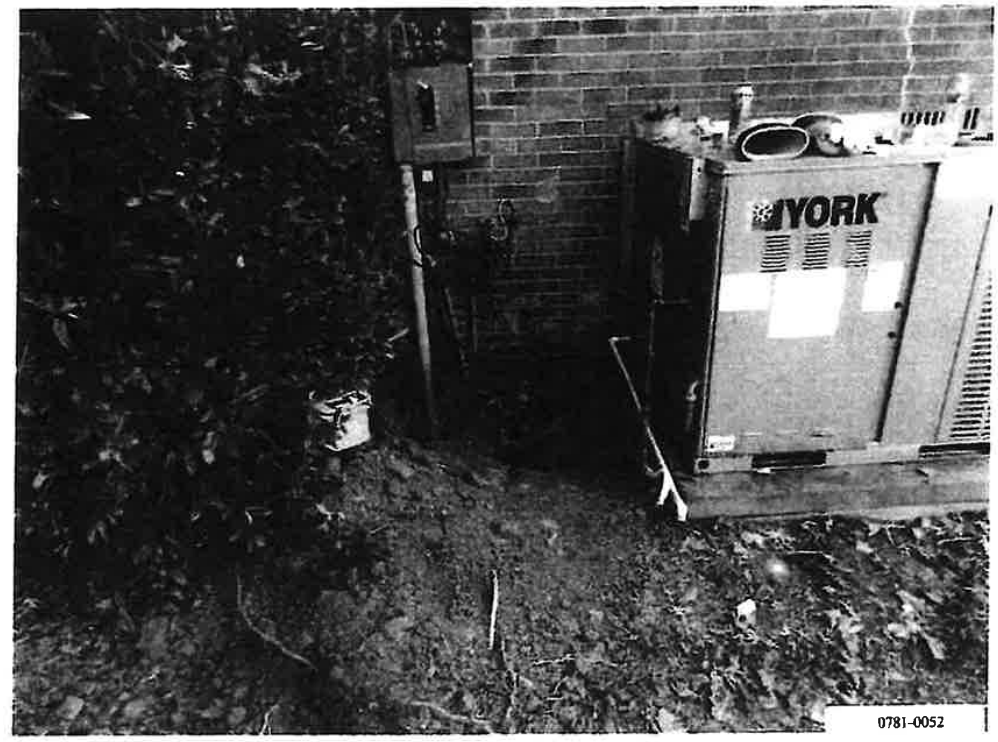
Type: Order/Electronic Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK	)	
Bobby Blakney,	)	C/A #: 20-CP-46-01803
Plaintiff,	)	
v.	)	**POST-TRIAL MOTIONS BY CITY OF ROCK HILL (JNOV, NEW TRIAL ABSOLUTE, NEW TRIAL NISI, NEW TRIAL REMITTITUR)**
City of Rock Hill and Palmetto Utility Protection, d/b/a South Carolina 811,	)	
Defendants.	)	

The City of Rock Hill files this motion seeking relief from the jury's verdict. On February 29, 2024, a York County jury returned a verdict in favor of the Plaintiff, Bobby Blakney, for $500,000 after a four-day trial. The Plaintiff contended Rock Hill did not properly mark an electrical line. He was shocked while digging beside the electric meter box conduit running into the ground. He was working on a home foundation repair. He was digging with a jackhammer. He did not request a re-mark when the markings were not apparent on the ground but utilities (electric meter and communications conduits also running to the ground) were apparent on the house wall right beside where he was digging. The law requires the excavator to call for a re-mark in that exact situation. Rock Hill believes the verdict is not supported by the evidence and is contrary to the fair preponderance of the evidence. Therefore, the City seeks relief in the form of a Judgment Notwithstanding the Verdict or a New Trial on several grounds as more fully set forth below. This is where he was digging and is in evidence as Defendant's Exhibit 52.



NEW TRIAL

The City of Rock Hill requests, and believes it is entitled to, a New Trial Absolute or New Trial Nisi.

> "Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.' " *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 479, 567 S.E.2d 851, 854 (2002); *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990); *S.C. State Hwy. Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976); *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct.App.1996); *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 364, 474 S.E.2d 819, 822 (Ct.App.1996). [The Appellate] Court's "review is limited to consideration of whether evidence exists to support the trial court's

> order." *Folkens*, 300 S.C. at 255, 387 S.E.2d at 267; *Vinson*, 324 S.C. at 403, 477 S.E.2d at 722. "As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed." *Norton*, 350 S.C. at 479, 567 S.E.2d at 854. Further, in an appeal of an order granting a new trial pursuant to the thirteenth juror doctrine, the appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993) (citing *Gray v. Davis*, 247 S.C. 536, 148 S.E.2d 682 (1966)).
>
> *Youmans ex rel. Elmore v. South Carolina Department of Transportation*, 380 S.C. 263, 670 S.E.2d 1 (2008).

In this case, the evidence does not support the verdict. Plaintiff alleged the City of Rock Hill was negligent in failing to properly mark a utility line. He alleges that the City was negligent for failing to locate the line properly and failing to use flags in addition to paint to mark the line, which is not required by the South Carolina statute.

A. PLAINTIFF'S EXPERT TESTIMONY OFFERING REGARDING FAILING TO MARK THE LINE

The City of Rock Hill asserted a motion to exclude as to the Plaintiff's expert witness after the jury had been selected and empaneled. The testimony had been taken before trial for the purpose or presenting it by video during trial. The expert was from out of state and halfway across the country. (Missouri) The motion was denied in its entirety. The City asserts that the trial court erred in denying that motion for the following reasons.

Ron Peterson was the Plaintiff's liability expert. His testimony was known prior to the trial as he was presented by video deposition. Based on that proposed trial testimony, the City moved to exclude certain testimony to prevent his opinions and other testimony.

In the video deposition, Mr. Peterson testified at p. 30-31 to a hypothetical not based on facts in evidence. That was objected to after the jury was empaneled and before the video was played. The purpose of raising that before the video was played was to prevent repeated interruption of the video presentation. The testimony was already in hand and was argued outside the presence of the jury. The matters were ruled upon, and the jury was informed of that ruling.

The testimony was a "what if" things were done perfectly, would the same thing still have happened. Peterson was relying on facts not in the record to create a scenario for the jury to base a decision. This testimony was regarding the failure to utilize the correct method/equipment to mark the line. Specifically, the question and objection were:

> Q: Let's say that Dry Pro trained Mr. Blakney perfectly. As a result Mr. Blakney shows up at 768 Summerwood. He sees faded lines or nonexistent lines near the location where he is going to be digging. He sees the electric meter near the spot he's going to be digging. As a result he calls for a re-mark. Mr. Boatright and the City of Rock Hill come back out. Mr. Boatright re-marks the line the same way he did, with that coupling method. Mr. Blakney gets back to work. He's perfect. He hand-digs with a shovel around the lines that have been newly marked by the City. He exposed those line without hitting them. Then he goes back to the exact location where our electrocution occurred and starts digging. If Mr. Blakney did all of that do you have an opinion as to whether or not this electrocution would have occurred?
>
> Mr. Morrison: Object to the form of the question. Assuming facts not in evidence. Assuming things happened that didn't happen. And calling for speculation.

Again at p. 32-33 he continued on that line of testimony.

> Q: All right.
>
> A: Give me just a second. The first picture is 0781-118 which is a closeup of the second picture which I had referred to which was 0781-0021. Those two pictures show the re-creation of marks based on the clamp and then directly hooking up. There are two more pictures or one more picture I should say. 0781-0010. And the clamp - - and this is a real closeup with a measuring device and a circle that was placed to show I believe the point of contact. What is also shows though on the - - are three conductors, three utility lines, which would have pretty well lined up with the clamp locates. So my reasoning behind all of this is that had they re-marked and had the City came out and marked the exact same methodology that they used to clamp, and had Mr. Blakney or his company hand-exposed that they would have dug down, found the three conductors, if you will. That would have in their mind fulfilled their obligation to expose the lines. And then they would have moved over and dug in the same spot, which would have caused the same incident?
>
> Mr. Morrison: Move to strike. Purely speculation.

Once more, at pg. 34-35, he further testified that:

Q: So even if the City re-marked with a coupling method the line Mr. Blakney struck would not have been located by the re-mark?

A: That's correct. At that point, at the point of damage, you are correct.

Mr. Morrison: Same objection.

Q: So he would have dug there anyway thinking he was good?

Mr. Morrison: Same objection.

Continuing on pgs 35-37:

PAGE 35; LINE 20-25

Q: So the line that Mr. Blakney struck was never located by Mr. Boatright or the City of Rock Hill?

Mr. Morrison: Object to the form.

A: No, not at the point of damage it wasn't.

PAGE 36-37; LINE 22-25 & LINE 1-4

Q: So if I'm hearing you right, even if Mr. Blakney did everything perfect he still would have hit the line or the area of the line he hit because the City used the wrong method to mark their lines?

Mr. Morrison: Same objection. Based on speculation.

A: Yes, I believe so.

On re-direct, Mr. Peterson further expounded on illusory facts:

Q: I'm having technology problems. Bear with me. And it says, an excavator may not perform an excavation or demolition within the tolerance zone unless the following conditions are met. No use of mechanized equipment except non-invasive equipment specifically designed or intended to protect the integrity of the facility within the marked tolerance zone of an existing facility until the excavator has visually identified the precise location of the facility or has visually confirmed that no facility is present up to the depth of the excavation. Now, if the City had come out and re-marked with the coupling method what would have happened?

Mr. Morrison: Object to the form. Calling for speculation.

A: From my perspective they would exposed - - if they knew, if they had the training to do so, they would have exposed lines under the marks which we know based on the pictures we talked about earlier, there are several. And them would have moved over, used their mechanized equipment and struck the line anyway.

The City contends the court erred in allowing this testimony. The facts were made up. They were speculative. They had no basis in real fact as presented in that deposition. They hypothetical is not based on facts in the record. They were illusory and harmful to the City. They were illusory and speculative as to what the City would have done under those imaginary facts and illusory and speculative as to what Plaintiff would have done under those imaginary facts. There are additional examples of this line of questioning throughout the deposition. The line of testimony was objected to prior to trial by way of motion to exclude that testimony. The testimony had been taken and was in hand. The objection to this line of testimony was overruled. During the playing of the testimony, when the first objection came up, the judge instructed the jury that these matters had already been taken up and that all of the objections were overruled. That matter had been taken up after the jury was empaneled based upon the testimony previously taken and preserved for presentation at trial by playing the video of the recorded testimony.

Finally, Mr. Peterson admitted that regardless of which method was utilized to mark the line, all of the excavation took place withing the tolerance zone for the results of either location method. Digging with mechanized equipment is not allowed in the tolerance zone until all utility lines have been unearthed. Again, the verdict is not supported by the evidence.

Furthermore, in the motion to exclude his testimony, the City objected to his testimony generally as an expert on the grounds that he could not testify as to any standard in the industry. No industry standard exists. Mr. Peterson admitted that. Each state drafts and passes their own individual versions of "one call" or "call before you dig" laws.

Mr. Peterson testified as to the standard of care in the industry. However, on cross he admitted that each of the fifty states has a different "Call before you dig" statutory fiefdom. He admitted that there are no two alike. He testified that there is no national standard of care!

Pg. 65:

Q. I believe you told me that under these one call laws each state is kind of their own little chiefdom (sic, fiefdom) with regard to what the one call law entitles and entails and how they run it?

A. Yes. Absolutely is.

Q. So there really is no national standard on the one call laws because every state is different:

A. Correct.

But he testified to it anyway! He also testified that the City of Rock Hill employees could not have found the standard he recited anywhere in the United States in writing. Certainly, nowhere that applied to South Carolina.

Pg. 67.

Q. Okay, All right. Let me change paths now. You've mentioned that you believe that they should have used flags and paint rather than just paint?

A. Yes.

Q. And since you've looked at South Carolina law, because that is the standard we are looking at, you are aware that South Carolina law requires that they use paint, flags, stakes, or any combination there of?

A. Yes.

Q. And they used paint?

A. Yes.

Q. Which is one of those things South Carolina requires that they use?

A. Yes.

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Q. And there is no written standard anywhere in the country that would say you have to use flags for this particular location.

A. As it applies to South Carolina , no.

.....

Q. There is nothing in writing anywhere that Mr. Boatwright (the Rock Hill employee who marked the lines) could have read before this that would have told him that in this particular type of application you have to use flags in addition to paint?

A. Correct.

Despite that, he was allowed to testify as to the "standard in the industry" that does not exist and is not written down anywhere. He testified that the standard in the industry would be to use flags ***and paint*** in this situation. The City asserts that allowing his testimony was error.

Mr. Peterson was also allowed to testify over objection the objection to exclude that the standard in the industry that he was applying to this case was Plaintiff's employer, not Plaintiff, was the "excavator." This is critically important because the "excavator" had the legal duty to call for a re-mark if the lines were not apparent and there were utilities on the wall. He said this numerous times throughout his testimony. When challenged by requiring him to read the South Carolina statute, including definitions, Peterson claimed the South Carolina law did not mean what it said. The law was simple. Excavator means any person engaged in excavation. S.C. Code Ann. Section 58-36-20 (10).

After reading the definition, Mr. Peterson attempted to avoid the plain language of the law and refused to apply South Carolina law to a South Carolina incident. Instead, he attempted to apply the "standard in the industry" by claiming that Mr. Blakney's employer was the "excavator," not Plaintiff Blakney!

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Q. All right. And then South Carolina law says the excavator means any person engaged in excavation. Mr. Blakney –

A. Yeah, I see that.

Q. Mr. Blakney is a person, isn't he?

A. Mr. Blakney is a person.

Q. He is the person that was doing the excavation, correct:

A. Yes, he was excavating.

Q. He is an excavator under South Carolina law?

A. I disagree.

....

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Q. Your testimony is the standard in the industry is that Dry Pro is the excavator, not Mr. Blakney:

A. Correct.

So, Mr. Peterson testified there is no national standard. He testified that each state's one call laws are unique to that particular state. But he maintained under his preferred non-existent standard in the industry, Mr. Blakney is not the excavator, his employer is the excavator. He attempted to apply non-existent national standard in the face of South Carolina law to claim the South Carolina law did not mean what it said! Allowing Ron Peterson to testify as an expert witness when his opinions were not related to any substantive topic which could be relied upon to any degree of professional certainty was error. The standards applicable to locators and excavators is a matter of state law.

Mr. Peterson also testified the one call system requires the excavator to call for a marking before they dig. The one call system then has to obligation to notify the facility operators. The facility, in this case Rock Hill, is then required to mark the lines. Mr. Peterson testified all of those steps were completed. The excavator is then required to call for a re-mark in ***this specific*** situation. He did not. Peterson testified that up until that point everybody had complied with the statutory obligation and done what the statute required! He then said that the excavator had the last chance to do something that was required by law to prevent this situation. He admitted that the excavator neglected his statutory duties.

This specific testimony was not objected to in the motion to exclude other than through objecting to his ability to give any opinions at all. Instead, it is offered here to demonstrate how completely the jury's verdict is out of touch with the evidence and admissions offered by the Plaintiff's own expert witness, and therefore, how the verdict is not supported by the evidence.

Mr. Peterson should not have been allowed to testify. That was addressed by the motion to exclude when his testimony was already taken. He admitted there is no national standard of care. He testified that Rock Hill breached the standard in the industry anyway. He admitted that everyone complied with the South Carolina statute until the excavator had the duty to call for a re-mark and failed to do so. He ignored South Carolina law and testified that under the standard in the industry, Plaintiff Blakney is not an "excavator." He said that after reading the definition of "excavator" under South Carolina law. Again, the jury's verdict is not supported by the evidence and the expert's testimony is not supported by his own admissions of the non-existence of a standard in the industry. For all those reasons, the City of Rock Hill is entitled to a New Trial Absolute or New Trial Nisi.

Lastly, Mr. Peterson responded to a question regarding whether Rock Hill properly trained its employees. His response was to the effect of not based on anything I have seen. Earlier in the video deposition, he admitted that what he had seen was the depositions of the Plaintiff, the discovery deposition of the defense expert and the deposition of City employee Graham Boatwright. He had not seen what the court and jury had seen regarding training from all of the other Rock Hill employees who testified in the trial before Mr. Peterson's video was presented. The Plaintiff offered no other affirmative evidence of negligent training. Mr. Peterson's testimony is wholly insufficient to get that issue to the jury.

B. PLAINTIFF'S CLOSING ARGUMENTS CHALLENGING THE LAW AS INAPPLICABLE.

At the Plaintiff's request, and over objection, the court charged the jury the last section of the act. That section reads:

> "This chapter does not affect any civil remedies for personal injury or property damage except as otherwise specifically provided for in this chapter. The penalty provisions of this chapter are cumulative to, and not in conflict with, provisions of the law with respect to civil remedies for personal injury or property damage."
>
> S.C. Code Ann. Section 58-36-120.

The City contends that means only that even though the Act itself does not provide for any civil remedy, it cannot be read to abrogate any civil remedies under common law. This section does no more than that. In that common law civil remedy, a negligence action, the first element is the duty owed. The cause of action is preserved, and the duties of the parties are spelled out by this Act.

This charge allowed the Plaintiff to create confusion as to the law. In closing, no less than three or four times, Plaintiff's counsel plastered that specific statute on video before the jury with language indicating this means the entire Act and these statutes that we have been talking about all week do not apply to this case! He called it a pop quiz and wanted to make sure they remembered the answer to the pop quiz when they went into the jury room.

Counsel had been informed of the court's charge before closing. Knowing what the charge was made the charge appropriate to discuss with the jury. That was the point of objection to this charge in the charge conference. While we disputed counsel's conclusion, the

interpretation of that preservation of civil remedies charge was squarely placed before the jury for them to figure out the law. That is not the jury's province. For that reason, the City of Rock Hill asserts that it was error to charge that specific statute. The error was prejudicial because the jury received no clarification from the court as to whether the duties owed by the parties applied to this case. They were left to determine what the law was with no instruction that these duties are binding on the parties. They are. The City is entitled to a New Trial Absolute or a New Trial Nisi.

During the trial, the jury had indicated some confusion on various points. First, they asked a question regarding statutory law and standards in the industry. They sent a question regarding whether the zone of tolerance was a statutory mandate or a standard in the industry. The plaintiff's expert's improper testimony regarding standards in the industry, which he admitted do not exist, and the court's confusing improper instruction to the jury that the Act does not affect common law remedies, gave rise to the closing argument that the duties imposed by the statute do not apply. These errors coupled together were inevitably confusing as to the proper standards to apply. The jury also sent a question during deliberations. They asked the court to define proximate cause again. Here too, the confusion created by the erroneous jury charge affected the outcome of this case because the closing argument that the statutory law did not apply improperly obfuscated the jury's proximate cause analysis. By arguing the statutory law did not apply, the jury was precluded from finding the Plaintiff was negligent per se, which goes directly to proximate cause. A jury cannot determine that the violation of a statute was the proximate cause of the Plaintiff's injury if they are left in doubt as to whether the statute even applies.

The law is the province of the court. The court failed to properly instruct the jury on the law. In this case, the jury was allowed to figure out what the law was based on the charge and the closing arguments. The question submitted clearly showed confusion regarding the law versus standards in the industry. This charge was clearly prejudicial.

The applicability of the statutory duty mandates was crucial to the trial. Plaintiff's counsel argued that the duties that had been discussed throughout the weeklong trial, no longer applied to this case. That argument was based upon the court's improper charge of S.C. Code Section 58-36-120. The court's improper charge of that inapplicable statute confused the jury on the key points of analysis, the duty of care, breach and causation. That section is inapplicable

because its only function is to preserve the common law remedy – a negligence action, which was never an issue in this case. It does not abrogate the duties imposed on the parties under the Act as a whole. Accordingly, the City of Rock Hill is entitled to a new trial.

C. THE COURT'S FAILURE TO CHARGE THAT IGNORANCE OF THE LAW IS NO EXCUSE.

Plaintiff Blakney contended that he did not know that he had to call for a re-mark. He testified that he did not know what the red paint lines meant anyway. He claimed that he did not know there were utilities present. He assumed it was safe to dig there despite the utilities on the wall and the three separate conduits travelling down the wall to the ground within inches of where he was digging. He was an excavator. He is required to know the law. He cannot claim ignorance. He also claimed that it was not his job to call for a re-mark. Regardless of his job description, under the law, it most certainly was his responsibility to call for a re-mark.

We recognize that Plaintiff Blakney was impeached on the lack of knowledge issue with his deposition testimony. In deposition, he testified that he could have shut the job down and requested a re-mark if he did not feel safe with the utilities on the wall. Despite that, the jury still heard his testimony regarding a lack of knowledge. The City was entitled to have the jury charged that ignorance of the law is not an excuse. Everyone is charged with knowledge of the law. An excavator is not a professional nor are they held to a professional standard. Instead, every homeowner who decides to dig in their own yard is an excavator, the person digging, under the law and is required to follow the statutory scheme and the duties imposed on the excavator therein.

The City requested a charge on that issue. The court declined. The City contends that it was entitled to that charge given the facts of the case. Failure to charge that was prejudicial error and the City is entitled to a New Trial Absolute or a New Trial Nisi.

D. THE PLAINTIFF'S NEGLIGENCE WAS GREATER THAN FIFTY PERCENT AS A MATTER OF LAW.

The cumulative effect of the evidence presented at trial coupled with the statutory scheme of South Carolina Code Ann. Section 58-36-10 et. seq. reveals that negligence was greater than fifty percent as a matter of law. The statutory scheme requires the excavator call to have lines

marked when they intend to dig. They did. SC 811 is then required to notify the facilities that a mark has been requested. They did. A request was submitted to the City of Rock Hill on July 2 and the marks were completed on July 3. The City of Rock Hill responded timely and marked the lines. The City performed its duty.

The excavator is then required to request a re-mark under these circumstances. Plaintiff claims the marks were not present when he went to excavate on July 18. The photos clearly show utilities apparent on the wall. Conduit flows to the ground from those utilities. A rem-mark is required under these circumstances. S.C. Code Section 58-36-60 (6) and (7). Blakney did not. Even Plaintiff's own expert admitted in cross examination that this is where the system broke down. During cross examination he was forced to admit, because it was unavoidable, the first required step here was for the excavator to request a re-mark of the area because Plaintiff claimed the marks were not visible. The request for a re-mark is foundational to this process. He admitted that the excavator did not comply with its statutory duty. He admitted the excavator breached his statutory duty. He admitted that the excavator had the last clear chance to prevent this accident from happening. He further explained that regardless of the method used by Rock Hill to locate and/or mark the lines, the excavator had a duty to call before digging in this case!

The law recognizes that the marks are not permanent. The markings were never intended to be permanent. They were created to be utilized in commercial and residential settings for temporary purposes. They are designed to fade over time. Paint will wash away over time. It is designed to wash away over time. It can be disturbed and lost. Flags can be removed instantly. Flags can be moved to a wrong location without notice to anyone. Because of that, the law imposes a duty on the excavator to observe the situation before digging. If marks are not apparent but utilities are, the excavator MUST call for a re-mark. He did not.

Mr. Blakney clearly avoided his known responsibility in this situation and tried to pass off his personal duty by portraying himself as the duty-bound employee following orders of his supervisor. He claimed he did not know better. Unfortunately for Plaintiff, his ruse falls short when he is confronted during cross examination with his previous sworn deposition testimony regarding his knowledge of "call before you dig" laws. In his sworn deposition testimony, he acknowledged that he was aware that if he was unsure of where to dig of felt it was unsafe, he had the authority to call for a re-mark. He also acknowledged based upon his experience with Dry-Pro, they would call for a re-mark if he requested it or felt unsafe.

Further, Plaintiff is not allowed to dig in the zone of tolerance with mechanized equipment until he has unearthed all lines in the ground. He did dig in the zone of tolerance. He did not unearth any lines and he did dig with mechanized equipment, namely a jackhammer with a shovel attachment. He also dug despite the fact that there were Comporium communication lines present with no markings for them either. Again, the law requires that he call for a re-mark for the Comporium lines before digging also.

As to comparing the City's alleged negligence, the Plaintiff alleges that the lines were not present when he began to excavate on July 18, fifteen days after the marks were placed. The law requires that the excavator maintain the marks after the date they indicated work would begin on the initial request for a locate. That date as reflected on the ticket in evidence is July 6, three days after Rock Hill marked the lines. There is no evidence or even any allegation that the marks were not present on July 6. The excavator had the duty to maintain those marks from that point forward and to call for a re-mark if the marks were not present at any time during excavation. Plaintiff did neither. He did not maintain the integrity of the marks. He did not call for a re-mark after he alleges the marks were not present. He dug in an area where that was not allowed without unearthing the lines before digging. He dug with a jackhammer in the tolerance zone where digging with mechanical equipment is not allowed until all utilities have been unearthed by the excavator first. Each of those violations of statutory law by Plaintiff are admitted and not disputed. They constitute several instances of negligence per se and evidence of gross negligence and recklessness. Blakney even incredibly claimed under oath that it was not his job to call for a re-mark. That constitutes more evidence of his recklessness that was the direct and proximate cause of this accident. There is no comparable degree of evidence of gross negligence and recklessness against the City. Certainly, there is no evidence of the violation of a statutory duty.

In *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000), the Supreme Court explained that a circuit court may find a plaintiff's claim is barred as a matter of law "if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." 529 S.E.2d at 713. The *Bloom* Court ruled that the evidence in that case, even when viewed in a light favorable to the plaintiff, demonstrated that the plaintiff was more than fifty percent negligent.

The *Bloom* Court also reaffirmed the decision of the Court of Appeals in *Hopson v.*

Clary, 321 S.C. 312, 468 S.E.2d 305 (Ct. App. 1996). In *Hopson*, the Court affirmed the trial court's grant of a directed verdict where the evidence demonstrated that the plaintiff's negligence was greater than any potential negligence of the defendant. Similarly, the Court of Appeals in *Bass v. Gopal, Inc.*, 384 S.C. 38, 680 S.E.2d 917 (Ct. App. 2009), concluded as a matter of law that the plaintiff's negligence claim was barred because the only reasonable inference to be drawn from the evidence was that the plaintiff's actions in leaving his hotel room and confronting his assailant exceeded the defendant innkeeper's possible negligence.[1]

Like the *Bloom*, *Hopson* and *Bass* cases, the present case is also most appropriate for a judicial determination as a matter of law that the plaintiff's degree of fault exceeds fifty percent.

E. *THE CITY IS ENTITLED TO A NEW TRIAL ABSOLUTE OR NEW TRIAL NISI UNDER THE THIRTEENTH JUROR DOCTRINE.*

This court should order a new trial under the Thirteenth Juror Doctrine. Under that doctrine, a trial judge is allowed to grant a new trial, based solely on the facts, if he finds that the evidence does not justify the jury's verdict . *See, Youmans ex rel. Elmore v. South Carolina Department of Transportation,* 670 S.E. 2d 1 (SC. App. 2008); *Folkens v. Hunt,* 300 S.C. 251, 387 S.E.2d 265 (1990). The Judge sits as the thirteenth juror and is allowed to take his own view of the evidence and set aside the verdict without making any factual findings to justify his decision. This doctrine may be applied if the trial judge finds that the jury's verdict is "contrary to the fair preponderance of the evidence." *Burke v. AnMed Health*, 393 S.C. 48, 710 S.E.2d 84 (Ct. App. 2011)

The trial judge's vote effectively hangs the jury. Because of that, the trial judge is not required to make factual findings. The doctrine assumes that the trial judge, acting as the thirteenth juror, acknowledges their responsibility and exercises the authority given to them with fairness and impartiality. If challenged on appeal, the trial judge's decision will not be overturned unless it is wholly unsupported by the evidence or if the conclusion was influenced by a legal error. *Williams v. Johnson*, S.C. App. 2020 WL 241583.

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[1] In *Bass v. Gopal, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011), the Supreme Court affirmed the Court of Appeals on different grounds. The Supreme Court did not reach or comment on the comparative negligence defense. Justice Pleicones, however, concurred by concluding "that the Court of Appeals correctly affirmed the grant of summary judgment on the comparative negligence ground." 716 S.E.2d at 917.

Here, the court should grant a new trial based on the factual evidence presented at trial. The verdict is contrary to the fair preponderance of the evidence.

"The question of whether the evidence is legally sufficient to support a verdict – a question of law – is totally different from the question of whether the fair preponderance of the evidence supports a verdict – a question involving the exercise of discretion." "Stated differently, 'it may well be that a party's evidence makes a case for the jury while it is so outweighed by the countervailing evidence that, in the exercise of discretion, the trial court should not hesitate to set aside the verdict in his favor." *McEntire v. Mooregard Exterminating Services, Inc.*, 353 S.C. 629, 578 S.E.2d 746 (2003).

Although previous arguments have been made thoroughly in this motion, here we are asking the court to evaluate the evidence presented in the record in a logical manner and assess the evidence in its entirety. When applying the fair preponderance of the evidence standard, "...the trial judge weighs the evidence under the thirteenth juror doctrine and need not view it in the light most favorable to the opposing party." *McEntire v. Mooregard Exterminating Services, Inc.*, 353 S.C. 629, 578 S.E.2d 746 (2003). Under this standard, when the court evaluates the evidence, it will see it is appropriate to grant a new trial.

Plaintiff is clearly in violation of the statutory scheme set out in South Carolina Code Ann. § 58-36-10, *et seq*. During the trial, the City of Rock Hill pointed out to the court and jury the sections of the statute where Plaintiff violated his duties. Specifically, the Defendant identified how the Plaintiff was not allowed to use any mechanized equipment within the tolerance zone which provides for a 2-foot buffer area on each side of the utility line location for a total of four feet in which the Plaintiff was prohibited from using mechanized equipment. Despite the fact Plaintiff clearly violated the statute, and Plaintiff's expert witness, Ron Peterson, also acknowledged the fact Plaintiff was violating his duty under the law when he said Mr. Blakney was using a "mechanized deal" in his trial deposition testimony. Mr. Peterson tried to gloss over this requirement under the law by not drawing attention to the fact Mr. Blakney was using prohibited equipment when he purposely chose to avoid drawing attention to the fact Mr. Blakney as using an electric jackhammer to dig next to an electrical meter box. Even though Ron Peterson attempted to avoid liability for Plaintiff under the statute he is still unable to avoid South Carolina Code Ann. § 58-36-20 (14), which defines "Mechanized Equipment" means equipment operated by means of mechanical power, including, but not limited to, trenchers,

bulldozers, power shovels, augers, backhoes, scrapers, drills, cable and pipe plows, and other equipment used for plowing-in or pulling-in cable or pipe." As statute makes clear, it is clearly a violation for Plaintiff to have used a power shovel in the tolerance zone and he openly admitted to using an electric jackhammer without any regard for himself or for anyone else on the job site.

Furthermore, Plaintiff's expert witness also testified the City of Rock Hill complied with the statute when it chose to use paint to mark the area because Defendant adhered to South Carolina Code Ann. § 58-36-70 (A)(1) which states, "The location shall be marked by stakes, paint, flags, or any combination thereof as appropriate depending on the site conditions of the proposed excavation or demolition using the APWA Uniform Color Code." Here, Defendant followed its duty by using red paint to mark the area for the excavator. The City of Rock Hill was not required to use a specific combination of paints and flags, or even an industry standard as suggested by Ron Peterson. We are aware of this component based on South Carolina Code Ann. § 58-36-30(A)(3) which states, "The provisions in this chapter supersede and preempt any ordinance enacted by a local political subdivision that purports to specify the types of paint or other marking devices that are used to identify facilities." It is clear the South Carolina legislature made it clear they were going to grant to the locators to ability to use what they determined was best in each specific scenario and they were not going to leave it up to the citizens of South Carolina to be required to adhere to a national industry standard. The legislature provided an umbrella for the people of South Carolina to solve their problems as they deem necessary. If the legislature did not want to leave it up to local political subdivisions to determine the standards, they certainly did not intend to leave it up to a national component who is not familiar with the climate and landscape of South Carolina.

As the court evaluates these examples from the record in conjunction with the entire record, we believe the court will utilize its discretion and perform its duty by setting aside the verdict based on the totality of the evidence and not the misconstrued interpretation of the jury. The result is clearly contrary to the fair preponderance of the evidence.

F. *THE CITY'S OBLIGATION WAS COMPLETE WHEN THE MARKS WERE MADE AND THE BURDEN SHIFTS TO THE EXCAVATOR TO CALL FOR RE-MARKS UNDER THESE CIRCUMSTANCES AS A MATTER OF LAW.*

The City is entitled to a New Trial Absolute or New Trial Nisi on the ground that the Act's burden shifting scheme completely shifted the burden to the excavator once the City's marks were made. The Act requires the excavator to maintain the marks, not the City. S.C. Code Section 58-36-60(E)(7) states:

An excavator must comply with the following:

> (7) Beginning on the date provided in the excavator's notice to the notification center, the excavator shall preserve the staking, marking, or other designation until no longer required. When a mark is no longer visible, but the work continues in the vicinity of the facility, the excavator must request a re-mark from the notification center to ensure the protection of the facility.
>
> +

Here, the date provided by the excavator's notice to the notification center was July 6. The mark was made by Rock Hill on July 3. After July 6, Rock Hill was under no obligation to maintain the mark. The excavator was. The City did not return to the site after marking the lines July 3. It is not the city's obligation to return to the site before or when excavation begins to ensure the lines are still present. The City does not know when the contractor or excavator will begin work. The duty to maintain the marks and make sure it is safe to dig is upon the excavator. The fact that the mark may not have been apparent near the house on July 18, is known only to the excavator. It is their burden to maintain that mark on the ground and their duty to call for a re-mark under these circumstances. That duty was upon the excavator from July 6 until July 18 when Blakney arrived on the scene and began to dig with a jackhammer.

When Rock Hill received the ticket, they promptly responded within about twenty-four hours. The excavator abandoned his responsibility to maintain the marks for approximately two weeks. Then Plaintiff excavator again abandoned his responsibility and began to excavate with utilities on the wall, conduits running into the ground and no marks apparent on the ground. Rather than calling for a re-mark, as required, he began to dig with his head within twelve inches of the electric meter on the wall. He dug with a jackhammer without concern and without complying with the law in any fashion. He did not call for a re-mark. And, despite claimed lack of knowledge, he was impeached with his prior testimony where he admitted that he knew he could call for a re-mark. He simply said it was not his job.

There is no evidence that the mark was not visible on July 6. The excavator assumed responsibility for maintaining the marks on July 6. *See*, utility locate report in evidence. There only evidence is that the City marked the line with paint. The City cannot be negligent for the mark no longer being apparent on July 18, twelve days after the excavator assumed legal responsibility for maintaining the mark. The excavator also had the duty to call for a re-mark if the marks were no longer apparent and the excavator had digging to do. Plaintiff Blakney was the excavator. He was the person who was digging. Consequently, the City of Rock Hill is entitled to a Judgment Notwithstanding the Verdict on the grounds that the Plaintiff's negligence was greater than fifty percent and on the grounds that the City's legal obligation was performed and complete. The City is also entitled to a Judgment Notwithstanding the Verdict.

Additionally, the City based on the uncontroverted evidence, the City was entitled to the entry of a directed verdict as to the Plaintiff's negligence in the violation of his statutory duties, or negligence per se. The court denied that motion at the directed verdict stage.

The Plaintiff's own expert did not attempt to claim otherwise. He admitted that the excavator violated his duties under the law. The entry of a verdict of negligence per se also gives rise to an inference of gross negligence. That is important for apportionment of liability purposes. The failure to give that direction of verdict was prejudicial to the City.

G. STRIKING OF CITY'S DEFENSE OF LIABILITY OF DRY-PRO, PLAINTIFF'S EMPLOYER.

Prior to the start of the trial, the Court struck the City's 16th affirmative defense from the answer, related to the liability of Dry-Pro, Plaintiff's employer. Under the law, if the employer was 100% at fault, Rock Hill would have no liability. Dry-Pro was an unnamed third party with substantial if not all fault for this incident. An empty chair is always fair game during a trial. During closing argument, defense counsel was not allowed to address that in any detail because the defense had been stricken.

The court and parties engaged in a discussion as to how that defense would be presented during trial because Dry-Pro was not a party. It was during that discussion that the defense was stricken. Without that defense, the City was hamstrung as to what they could present as to Dry-Pro's fault. Without a doubt, Dry-Pro had substantial responsibility and perhaps all responsibility. They were an empty chair at trial. Certainly, the City could refer to Dry Pro's

liability as an unnamed, even immune, third party. Even the Plaintiff attempted to cast blame on his employer by claiming he had not been properly trained and did not know about the duty to request a re-mark. He just did as he was told. However, the City was without recourse as to the fault of a third party. The City claims that was error entitling it to a new trial.

H. THE CITY OF ROCK HILL IS ENTITLED TO A NEW TRIAL ABSOLUTE AND A NEW TRIAL REMITTITUR OF THE VERDICT IN THAT IT IS EXCESSIVE AND NOT WARRANTED BY THE EVIDENCE.

The City of Rock Hill requests a New Trial Absolute and a New Trial Nisi Remittitur on two grounds: First, the damages amount awarded and the verdict amount is excessive and not warranted by the evidence and second, the verdict amount, after reduction for comparative negligence, still exceeds the South Carolina Tort Claims Act cap of $300,000. The first ground is considered immediately below in this section. The second ground is considered in another section below.

The jury returned a damages amount of $500,000. That damages amount is excessive and unwarranted by the evidence. After reduction for comparative negligence found by the jury, the verdict amount is $310,000. That amount is likewise excessive and unwarranted by the evidence.

The Plaintiff offered evidence of medical expenses of approximately $50,000. He claimed injuries and damages from which he has fully recovered. He offered lost wages of $31,920. While he claimed pain, suffering and other physical damages, he admitted a full recovery from those. Given the jury's apportionment of liability, the applicable total recoverable specials are less than $50,000.

Under South Carolina law, a circuit court may a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802, 805 (1993). However, new trial absolute on damages should be granted only if the amount is so excessive as to shock the conscience of the court and clearly indicate that the figure reached was the result of passion, caprice, prejudice, corruption or some other improper motive. *Id.* @ 805. An inclination to punish in this case would also be an improper motive.

The grant of a new trial motion rests with the discretion of the trial court. The trial court's decision will not be disturbed on appeal unless its findings are wholly unsupported by the

evidence or the conclusions reached are controlled by error of law. *Brinkley v. South Carolina Department of Corrections,* 386 S.C. 182, 687 S.E.2d 54, 57.

Here, the damages testimony for personal injuries included an alleged brain injury. However, that was not diagnosed by any physician, medical personnel or medical test. Instead, a hired gun psychologist only diagnosed it. He gave written tests to determine his level of functioning while Plaintiff was engaged in a claims process. He discounted his own test examiner's opinions that Plaintiff was not giving good effort. At one point in his testimony, he excused his own attendance at the test taking by testifying that he had assistants who were well trained to observe the test taking and observe for signs of effort. When confronted with the fact that he disregarded his examiners' report of poor effort, he claimed they were not trained to do that anyway.

Then he compared his findings of current level of functioning with his prediction of pre-accident level of function or IQ. He did that primarily by looking at demographics along with post-accident testing results. He claims that based on demographics, including race, age, level of education, level of income in the home based upon levels in the surrounding community and other purely demographic predictors, he can predict a person's pre-injury IQ. Of course, with that as his predictive base, every child raised in the same family would have the same demographics if they had the same educational level. Thus, all such siblings would have the same IQ. His testimony was rubbish and unbelievable. During a lengthy cross examination, some jurors had difficulty staying awake to hear that testimony. At one point, the judge kicked his bench, then minutes later recessed early in the day because of the juror's inability to continue listening to several back-to-back lengthy depositions.

In closing arguments, Plaintiff insinuated that the jury should punish Rock Hill. While claiming that he was aware that he could not get punitive damages against a governmental entity, he still argued to the jury that they should be worried about what Rock Hill does tomorrow and next week. That was clearly a punitive argument. It was intended to send a message to deter, which is solely one of the two purposes for punitive damages. The appellate issue on a new trial is whether there is any evidence to support the necessary elements for the granting of a new trial. Clearly, here there are. There is evidence that the verdict is excessive and evidence to support the conclusion that the verdict was based on improper motive as argued by Plaintiff's attorney in

closing argument. Plaintiff's attorney had to be admonished not once but twice during his closing argument for those improper remarks and insinuations.

This argument supports a New Trial Absolute, especially when coupled with all the arguments for a New Trial Absolute stated above, which are incorporated herein by reference. This argument also supports a New Trial Remittitur for the reasons stated above.

CONCLUSION AS TO NEW TRIAL ABSOLUTE AND NISI.

The City of Rock is entitled to a New Trial Absolute. Various matters supporting that have been outlined above. When considered together, the overwhelming evidence supports only one conclusion – that the verdict is contrary to the fair preponderance of the evidence.

First, the Plaintiff's expert was allowed to testify as to a national standard when he admitted there is none. He admitted that South Carolina law defined the standard. He attempted to ignore South Carolina law by applying a national standard to say that Plaintiff was not an excavator. He did so despite the fact that South Carolina defines an excavator as a person who is digging.

He also testified that the standard in the industry would require that Rock Hill use paint and flags in this situation. However, he admitted that Rock Hill complied with South Carolina law by using paint. He testified that the standard in the industry he relied upon is not specifically applicable to South Carolina. He admitted that it is not written down anywhere. He admitted that there is nowhere that Rock Hill employees could go to see it in writing and learn it for themselves. That is not an appropriate standard for this expert to testify to.

He also admitted that Rock Hill complied with its obligation under the act by marking its line. In fact, everyone complied with their obligation under the act until the excavator. He admitted the excavator did not preserve the marks. The excavator did not observe the situation and call for a re-mark when it was clearly required. He admitted that the excavator had the last clear chance to stop this from happening.

He was allowed to testify to hypotheticals not based on facts in the record but based on speculative ideas of what Plaintiff would have done in a different circumstance. That was inappropriate and prejudicial.

His testimony on the standards applicable to Rock Hill was inappropriate and prejudicial.

Plaintiff's request for the court to charge the civil remedy preservation section of the Act was also prejudicial. In the charge conference, a discussion was had as to the reason for that

request. We argued that charging that statute would give the Plaintiff the opportunity to argue that the other statutes in the act imposing duties upon the parties did not apply. Plaintiff jumped on that opportunity in his closing argument with his pop quiz game. He came back to that point several times in closing to argue to the jury that the answer to the pop quiz is that those duties imposed under the act do not apply to this case. The jury was left to figure out for themselves whether the duties did apply. That is not the province of the jury but the province of the court. That was highly prejudicial because the excavator's duties were no longer applicable based upon that argument. The law was never delivered to the jury as a result.

Following that, the court declined to charge that ignorance of the law is not an excuse. Plaintiff testified that he did not know he had to call for a re-mark. He was not trained. He assumed the area was safe to dig. The court sustained an objection to whether that was a bad assumption. We were not allowed to cross-examine that assumption. Plus, the Plaintiff was allowed to offer an excuse for not following the law. The excuse was ignorance. He played the role of a good but untrained employee who simply did what he was told to do. The City was entitled to a charge that everyone is charged with knowledge of the law and ignorance is not an excuse. That charge was requested, and the court declined. Again, that was prejudicial.

The City amended its answer during the course of the proceedings. One additional affirmative defense was added – whether Dry-Pro, Plaintiff's employer was negligent and responsible. When discussing the presentation of that defense after the jury was empaneled, the court struck the defense. The City was not allowed to offer evidence of Dry-Pro being the sole responsible party. Again, that was prejudicial.

The City moved for a directed verdict as to the Plaintiff's being negligent per se for violating the duties owed by the excavator as a matter of law. The Plaintiff admitted that he did not call for a re-mark. His expert admitted that he should have. Plaintiff violated a statutory duty. That was undisputed – until the closing argument when the Plaintiff argued that the statutory duty did not apply to this case. The City was entitled to that determination by the court with the jury being instructed that the Plaintiff was guilty of negligence per se. The court declined to do so. Again, that was prejudicial to the City. Especially so, after the court charged 58-36-120 that gave rise to the question of whether the statutory duties even apply to this case. The court should have directed a verdict on negligence per se.

The City was obligated to mark the line. The statute allows the mark to be made with paint. Plaintiff's expert admitted that the city complied with its duty to mark the line. The City's obligation ended there. After that, the duty is on the excavator to maintain the line. That is based in common sense. The City does not return to the site. The excavator is in control of their site after that. The excavator is the only party that has the opportunity to view the site before excavation. The excavator did not maintain the marks as required by statutory law.

The excavator Blakney then claims that the marks were not apparent when he was ready to dig on July 18. The duty is on the excavator to call for a re-mark if the line is not apparent and utilities are in the area. The Plaintiff claimed the line was not apparent. He admitted that the utilities were on the wall with conduit running into the ground. He did not call for a re-mark. Again, Plaintiff's expert admitted all that. Based on those facts and others that were before the court, the Plaintiff's negligence exceeded fifty percent as a matter of law. The City was entitled to a directed verdict on that ground. That motion was denied. The court now has the opportunity, as the thirteenth juror, to correct that because the verdict is contrary to the ***fair preponderance of the evidence.***

The thirteenth juror doctrine gives the court the opportunity to view this matter with hindsight as a whole. The court can exercise its discretion as the thirteenth juror to correct this manifest injustice. The issue is whether the verdict is contrary to the fair preponderance of the evidence. The City contends that it is. The City has demonstrated that the verdict was likely influenced by other motivations. And the City has demonstrated that it did not get a fair trial and that led to this result that is contrary to the fair preponderance of the evidence. For those reasons, the City of Rock Hill is entitled to a New Trial Absolute.

NEW TRIAL ABSOLUTE AND NISI REMITTITUR

The City of Rock Hill requests a New Trial Absolute and a New Trial Nisi Remittitur on three grounds: First, the damages amount awarded and the verdict amount is excessive and not warranted by the evidence; second, the verdict amount, after reduction for comparative negligence, still exceeds the South Carolina Tort Claims Act cap of $300,000, and third, the verdict should be reduced to the statutory cap first and then have the comparative negligence apportioned and remitted from that cap so that the total remitted verdict is $300,000 reduced

thirty-eight percent for a total of $186,000. Arguments regarding the excessiveness of the damage were made above and incorporated here by reference for the sake of brevity.

The statutory caps under the South Carolina Tort Claims Act are contained at S.C. Code Section 15-78-120. This recovery is capped at $300,000. If all other arguments are denied, the verdict must be remitted to $300,000 in compliance with the statutory law regarding governmental liability in South Carolina.

Alternatively, the City recognizes that it is arguing against precedent but believes that this argument should be decided by the Supreme Court where the only precedent is from the Court of Appeals. *See, Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000). The City contends that the calculation of the remittitur from the statutory cap and the comparative negligence should be managed in this fashion. First the damages award should be limited to the cap that reflects the most any plaintiff can ever recover against a governmental entity. After that reduction, comparative negligence should be applied so that the ultimate award in this case is remitted by the Plaintiff's negligence found to be thirty-eight percent. The ultimate award is then thirty-eight percent of $300,000 or $186,000. That preserves the integrity of the Tort Claims Act and the specific stated intent of the act to interpret the act in favor of limiting the liability of the state and its political subdivisions.

JUDGMENT NOTWITHSTANDING THE VERDICT

The City of Rock Hill is entitled to a Judgment Notwithstanding the Verdict. The court is required to review the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Under that standard, the City of Rock is entitled to a JNOV.

For brevity, the City will not repeat arguments stated above but will incorporate them by reference. The City incorporates each of the arguments set forth above and asserts that the totality of the evidence in combination reveals that the City the Plaintiff's negligence was far greater than fifty percent. The only reasonable inference that can be drawn from the evidence is that Plaintiff was solely or mostly at fault. He was guilty of negligence per se in several instances. He had the last clear chance to avoid this situation. The evidence of any negligence by the City is suspect based upon the errors in allowing the Plaintiff's liability expert to testify as to a standard of care in the industry that is not specifically applicable to South Carolina, as he

admitted. Without specifically repeating each of the arguments set forth above, the City incorporates each of them here by reference. The City contends that when they are considered, the City is entitled to a Judgment Notwithstanding the Verdict and that the verdict must be set aside with a verdict entered in favor of the City.

For all the reasons stated above, the City of Rock Hill requests that the court grant a Judgment Notwithstanding the Verdict in favor of the City. Alternatively, the City requests that the court grant a New Trial Absolute on the grounds stated above, including that the verdict is clearly contrary to the *fair preponderance of the evidence.* Further, the City requests that the court grant a new trial for the myriad of other reasons set forth above. The City also requests in the alternative that the court grant a new trial on the grounds that the Plaintiff's negligence was greater than fifty percent as outlined above. The City requests that the court grant a New Trial Remittitur on the grounds set forth above and lastly that the verdict be remitted to the Tort Claims cap as required by law.

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March 11, 2024

STATE OF SOUTH CAROLINA COUNTY OF YORK Bobby Blakney, Plaintiff, v. City of Rock Hill, Defendant.	IN THE CIRCUIT COURT Civil Action No.: 2020-CP-46-01803 PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS POST TRIAL MOTIONS (JNOV, NEW TRIAL ABSOLUTE, NEW TRIAL NISI, NEW TRIAL REMITTITUR)

City of Rock Hill ("Defendant") moves this Court for (1) a judgment notwithstanding the verdict ("JNOV"), (2) a new trial absolute, (3) a new trial under the thirteenth juror doctrine, and (4) a remittitur. Because there is evidence supporting the jury's verdict and the verdict is not excessive, justice was done. Defendant's Motion should therefore be DENIED.

BRIEF PROCEDURAL HISTORY

On July 18, 2018, Bobby Blakeny ("Plaintiff") was injured when he hit an unmarked underground power line while digging at a customer's house. He suffered severe injuries and filed suit against Defendant, alleging its failure to properly locate and mark the underground power lines caused his damages.

A four-day trial was held in York County, and the jury returned a verdict of $500,000.00 against Defendant. The jury further found Plaintiff was 38% comparatively at fault, so the verdict was reduced to $310,000.00 in favor of Plaintiff. Defendant then filed its post-trial motions.

STANDARDS

Defendant's post-trial motions essentially ask two questions: (1) is the jury's determination on liability and damages supported by the evidence? And (2) is the verdict adequate?[1] The answer to both is yes.

Judgment Notwithstanding the Verdict

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed . . . when there is no evidence to support the ruling below." Bass v. S.C. Dep't of Soc. Servs., 403 S.C. 184, 190, 742 S.E.2d 667, 670 (Ct. App. 2013) (internal citations omitted).

New Trial Absolute

"A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. The jury's determination of damages, however, is entitled to substantial deference. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." Vinson v. Hartley, 324 S.C. 389, ___, 477 S.E.2d 715, 723 (Ct. App. 1996) (internal citations omitted).

The Thirteenth Juror Doctrine

"The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case." Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). "Traditionally, in South Carolina,

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[1] The framing of the issue on damages is for the sake of clarity and in no way suggests that the verdict represents Plaintiff's total cognizable damages, which Plaintiff believes is greater than the verdict.

circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993); See also Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App.1995) (under "thirteenth juror doctrine," the trial court may grant a new trial if she believes the verdict is unsupported by evidence or if the verdict is inconsistent and reflects jury's confusion).

New Trial Nisi Remittitur

"The trial court may grant a new trial nisi additur or remittitur when it finds the verdict is merely inadequate or excessive." Howard v. Roberson, 376 S.C. 143, ___, 654 S.E.2d 877, 883 (Ct. App. 2007). "The granting of a motion for new trial nisi additur or remittitur rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages." Hassell v. City of Columbia, 430 S.C. 620, 635, 846 S.E.2d 373, 381 (Ct. App. 2020). In that vein, compelling reasons must be given to justify invading the jury's province in this manner. Howard v. Roberson, 654 S.E.2d at 883.

ANALYSIS

Defendant argues it is entitled to a JNOV, new trial, or remittitur. Defendant's arguments are taken below in the order they appear in Defendant's Motion.

A

Defendant first complains that Plaintiff's liability expert, Ron Peterson, should not have been permitted to (1) answer hypothetical questions, (2) testify to an industry standard, or (3) testify to whether Defendant properly trained its employees. Why Defendant spends any time making this argument is uncertain. Defendant undoubtedly would like to have this testimony stricken, but the issue here is whether the jury's verdict is supported by the evidence. Mr. Peterson was permitted to testify, so his testimony is evidence. And his testimony supports the jury's verdict.

Mr. Peterson was admitted as an expert in the field of marking underground electrical lines. And he is qualified as an expert. He has been a utility locator for over thirty years. Over that time he has worked as a locating technician, a trainer, a supervisor, a manager, and about every other position he could hold within a contract locate company. (Transcript p. 5, lines 17-21.) He estimates that he has performed 125,000 locates over the course of his career. (Transcript p. 6, lines 23-25; p. 7, lines 1-2.) He has been training locators since 1996. Over the course of his career, he estimates that he has trained four- to five-thousand locators. (Transcript p. 7, lines 3-25.) He has testified as an expert witness in locating and excavating between one hundred and two hundred times. (Transcript p. 8, lines 1-8.) He is a member of the National Utility Locating Contractors Association ("NULCA") and The Common Ground Alliance, an association of sixteen stakeholder groups brought together to disseminate best practices in locating. (Transcript p. 8, lines 1-25; p. 9, lines 1-24.) Mr. Peterson is familiar with best practices in the locating industry as he is on the Common Ground Alliance best practice committee. (Transcript p. 9, line 1; p. 10, lines 1-9.) Ron Peterson judges locating competitions. (Transcript p. 10, lines 10-25; p. 11, lines 1-19.) He was the 2007 Common Ground Alliance member of the year and the 2008 NUCA member of the year. (Transcript p. 11, lines 20-24; and p. 12, lines 1-4.) Ron Peterson is as qualified as an expert witness in the field of locating underground power lines.

At trial, Mr. Peterson testified that there are two ways to locate underground power lines: the direct connect and the coupling method. And the industry or gold standard for locating underground power lines is the direct connection method. If this method had been used by Defendant, the line Plaintiff hit would have been marked. And it follows that the incident would not have occurred and Plaintiff would not have been injured. But Defendant used the coupling method and did not find the line that Plaintiff hit. Mr. Peterson therefore testified that Defendant failed to follow the industry standard.

Not only did Defendant fail to use the proper method for locating underground power lines, it failed to properly mark the underground power line it found. After Defendant identified an underground

line, it marked the line by painting the ground above the lines. But when Plaintiff showed up to dig, the paint had been washed or blown away. It is true, Mr. Peterson did testify that there is no national one-call law or standard for marking lines. But the Underground Facility Damage Prevention Act (which Defendant relies so heavily on) requires a combination of stakes, flags, paint, or any combination as appropriate depending on site conditions. Based on his experience, Mr. Peterson testified that Defendant failed to properly mark the lines because considering the site conditions, it was appropriate to use flags.

And his testimony is consistent with the textbook Defendant's expert coauthored. The textbook—Locating Buried Utilities: A Professional Approach—states, "The intent of this textbook is to provide a comprehensive analysis and general instruction of key topics and issues within the field of underground utility locating." The textbook indicates that underground lines should be marked in a way that provides maximum visibility and longevity for the marks according to site conditions and that flags are absolutely essential in snow, sand, or other conditions where paint marks are ineffective. The textbook also provides that the direct connect method is the gold standard for locating underground power lines. Defendant's expert was inclined on cross-examination to agree.

One of Defendant's positions during trial was that if Plaintiff's employer properly trained Plaintiff, the incident would not have occurred. To test that theory, Mr. Peterson was asked a hypothetical question. See Brown v. La France Industries, 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985) (opinion testimony of an expert may be based upon a hypothetical question and counsel posing the hypothetical "may frame his question on any theory which can reasonably be deduced from the evidence and select as a predicate therefor such facts as the evidence proves or reasonably tends to establish or justify."). Defendant lays out in its Motion the hypothetical it thinks was improper. But the hypothetical clearly challenged Defendant's theory. And this is permissible. Moreover, it was based on testimony from Graham Boatright, the remark/investigation performed by Ken Cushman, testimony of Plaintiff, and

photographs taken after the investigation. The hypothetical is based on facts and supported by evidence. As a result, the hypothetical was proper.

Defendant also argues Mr. Peterson should not have been allowed to testify to whether Defendant properly trained its employees. Graham Boatright testified that he had not been trained to use direct connect method or flags. Ron Peterson indicated that direct connect and flags are the industry standard and how he trains. (Transcript p. 78, lines 10-24.) His testimony was proper.

Bottom line: if Defendant used the direct connection method, there is no injury to Plaintiff. And both Defendant and Plaintiff's expert tend to agree with that. Defendant did not use the direct connection method. And it didn't properly mark the lines it identified. Based on this evidence, the jury found Defendant breached the duty it owed Plaintiff.

B

Defendant next argues the Court should have held the Underground Facility Damage Prevention Act ("Act") creates a duty of care that applies to Plaintiff. Throughout the trial, Defendant argued to the jury that the Act imposed a duty on Plaintiff. And Defendant had every right to do that; this is a comparative negligence case. But Defendant was not entitled to a negligence per se charge and the Court was correct in finding the Act does not create a duty of care applicable to Plaintiff. To be clear, the Court did not instruct the jury that Plaintiff had no duty of care—it simply allowed Defendant to make its argument while refusing to instruct the jury that the Act creates a duty of care that applies to Plaintiff. This was appropriate.

Defendant's argument turns on the meaning of negligence per se, and it confirms at page 11 in its Motion that it wanted the jury to find Plaintiff's acts were negligence per se. But Defendant's argument not only fundamentally misrepresents negligence per se law, it also conflates negligence per se with comparative negligence. In the end, the Court rightly concluded the Act imposed no duty on Plaintiff or Defendant, framed the issue as comparative fault, and, in the interest of fairness and completeness, read

to the jury relevant portions of the Act (specifically the last portion of S.C. Code Ann. § 58-36-120), See **Dixon v. Ford**, 362 S.C. 614, 619, 608 S.E.2d 879, ___ (S.C. App. 2005) ("When instructing the jury, the trial judge is required to charge only the current and correct law of South Carolina.").

Defendant fundamentally misrepresents the law of negligence per se. Negligence per se is a tool used in tort actions to show a violation of a statute without an excuse is automatically considered as a breach of the duty the statute imposes. But the mere fact that a statute was violated "in and of itself [does not] create a duty enforceable by tort law." **Denson v. Nat'l Cas. Co.**, 439 S.C. 142, 148, 866 S.E.2d 228, 231 (2023) (citing **Cuyler v. United States**, 362 F.3d 949, 952 (7th Cir. 2004). "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 doing something." Id. 439 S.C. at 147.

To show that a violation of a statute should be considered a breach, two things must be true: (1) the essential purpose of the statute is to protect from the kind of harm suffered and (2) the one suffering the harm is a member of the class of persons the statute is intended to protect. **Whitlaw v. Kroger Co.**, 306 S.C. 51, 410 S.E.2d 251 (1991).

The essential purpose of the Act is to protect from property damage, not personal injury. The Act was enacted "to prevent damage to underground facilities, including electrical lines [and] creates a procedure to mark underground lines prior to digging to avoid such damage." Defendant's Memorandum in Support of the Motion for Summary Judgment p. 7, Filed December 15, 2022[2]; see also S.C. Code Ann. § 58-36-10 et. seq.

Toward that end, the Act, among other things, provides duties on Operators (in this case, Defendant) and Excavators (in this case, Plaintiff). For example, an Operator must mark the location of the underground lines, by stakes, paint, flags, or any combination thereof as appropriate depending on

[2] Defendant's prior Motion for Summary Judgment filed on December 14, 2021, also makes clear its position that "the Act['s] purpose is to prevent damage to underground facilities."

the site conditions of the proposed excavation or demolition using the APWA Uniform Color Code. S.C. Code Ann. § 58-36-70(A)(1). Likewise, an Excavator, for example, before digging must allow the Operator to mark the underground lines and if the area of excavation is unmarked, must notify the Operator. S.C. Code Ann. § 50-36-60. And important to the Defendant, the Excavator must not use mechanized equipment to dig until the underground lines have been identified. Id. In other words, after the Operator marks the line, the Excavator must, under the Act, hand dig within the tolerance zone to find the lines. The thought is that when an underground line is properly located and marked and the excavation properly performed, the underground line will not be damaged.

If the underground line is damaged, the Act imposes a penalty on the one responsible, but only after the Attorney General proves the penalty must be paid. S.C. Code Ann. § 58-36-120. And we know the act only applies to the situation of imposing a penalty because the Act tells us—Chapter 36 "does not affect any civil remedies for personal injury or property damage except as otherwise specifically provided for in this chapter." Id.

Plaintiff filed a claim against Defendant seeking damages for personal injury. The Act does not apply to impose negligence per se on Defendant because (1) the harm Plaintiff suffered (personal injury) is not the harm for which the Act is intended to protect (property damage) and (2) Plaintiff is not a member of the class of persons the Act is intended to protect because he is not property.

Defendant did not suffer any harm. And if it did, it has not alleged it. Defendant did not file a counterclaim against Plaintiff and as a result waived that cause of action. See Rule 13(a), SCRCP). But it is still entitled to argue, as it did at trial, that Plaintiff was comparatively negligent and caused his own damage. It does not, however get the benefit of negligence per se.

Defendant cannot show that the essential purpose of the Act is to protect it from the kind of harm it has suffered because it hasn't alleged it suffered any harm. Nor can Defendant show that it is a member of the class of persons the Act is intended to protect because the Act intends to protect damage

to underground facilities. Infra n. 2. The negligence per se analysis doesn't support the conclusion Defendant asks for. But for the sake of argument, we will run with Defendant's argument.

First, let's assume Defendant filed a counterclaim against Plaintiff alleging some harm. Could Defendant in that situation establish negligence per se? In a nutshell, no. Defendant's had a claim for property damage. Admittedly, the first prong of the negligence per se analysis would be met because the essential purpose of the Act is to protect from property damage. But Defendant could not show the Act is intended to protect it—the Act doesn't protect persons or entities at all, it was enacted to protect property from being damaged. Infra n. 2.

Next, let's assume further that Defendant could establish negligence per se against Plaintiff. That doesn't end Defendant's burden of proof. See **Dropkin v. Beachwalk Villas**, 373 S.C. 360, ___, 644 S.E.2d 808, 810 (Ct. App. 2007) ("The finding of a statutory violation in an action alleging negligence per se does not end the inquiry. The causation of the injury must also be evaluated."). All the evidence presented at trial on causation showed it was Defendant's breach that caused Plaintiff's damages. And the fact that the jury found Plaintiff contributed to causing his own damages doesn't relieve Defendant of its burden of proof.

Defendant simply conflates negligence per se with its defense of comparative negligence. But even if Defendant can use negligence per se as it would like in this case, it does not follow that Plaintiff's breach would necessarily constitute more than 50% fault. Just to be clear: nothing in the Court's decision precluded Defendant from arguing that Plaintiff had to follow the duties the Act set forth or to argue Plaintiff is responsible for causing his own injury by not following the Act. And Defendant did just that. Considering the jury's allocation of fault, it appears Defendant's argument resonated. And Plaintiff presented evidence that Defendant's breach was the proximate cause of Plaintiff's injuries. The jury weighed the evidence. And the jury assigned 38% fault to Plaintiff. The Act does not apply here. The

Court's decision not to instruct the jury that the Act imposed mandatory duties was not an abuse of discretion.

But more to the point, Defendant's argument here does not show in any way the jury's verdict is not supported by the evidence. Nor does Defendant offer any analysis how this shows the verdict was excessive.

C

Defendant next argues the Court erred in failing to charge the jury that ignorance of the law is no excuse. How this works to show the jury's verdict is not supported by the evidence or how the verdict was excessive is unknown. In any event, as already discussed, the Act does not apply to impose a duty as Defendant alleges. And considering the jury's comparative allocation, the refusal to charge was not prejudicial. See **Cohens v. Atkins**, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct. App. 1999) ("To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well."). Moreover, the refusal was not erroneous. The charge was not at all relevant or applicable.

D

Defendant next argues the Court should direct a verdict for Defendant because Plaintiff's negligence is, as a matter of law, greater than fifty percent. As already discussed in section B, the Act does not impose an applicable duty on Plaintiff that he breached. This is simply not the case and Defendant has conceded this point in its 2021 Motion for Summary Judgment.

The cases Defendant cites to support its position here do not apply. Two of those cases (Bloom and Hopson) involve motor vehicle collisions with undisputed facts and statutes that applied to both parties. The other case (Bass) is a negligent security case with undisputed facts where the court found no duty. Here we have disputed facts and an Act that does not apply. Nor do the facts itself clearly show only one outcome was possible. Moreover, the jury assigned Plaintiff with 38% comparative fault. And

Defendant has not suggested at all that this finding or the jury was unreasonable. See Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) (noting all evidence and reasonable inferences must be viewed and a verdict directed only if it is not reasonably possible for plaintiff to obtain a verdict.); Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, ___ (2000) ("In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference which may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent.").

E.

Defendant is not entitled to a new trial absolute or new trial nisi under the thirteenth juror doctrine.

> A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. The jury's determination of damages, however, is entitled to substantial deference. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.

Vinson v. Hartley, 324 S.C. 389, ___, 477 S.E.2d 715, 723 (Ct. App. 1996) (internal citations omitted).

The jury's verdict is supported by the evidence. As a result of the electrocution, Plaintiff was rendered unconscious. He suffered a head/brain injury, post traumatic stress disorder, anxiety, and an aggravation of a pre-existing compression fracture in his back.

Concerning the head/brain injury, Plaintiff suffered slurred speech and memory deficits. He participated in cognitive therapy with Dr. Ewert. And he made a full recovery.

Concerning the post traumatic stress disorder and anxiety, Plaintiff underwent counseling and group counseling with the Rehab Center and Dr. Ewert. Like the head/brain injury, Plaintiff eventually made a full recovery.

Concerning the back injury, Plaintiff underwent physical therapy as prescribed by Dr. Darden. Dr. Darden provided a 7.5% permanent disability rating to his back and was provided with permanent

work restrictions. He continues to experience intermittent pain with activity and wears a back brace from time to time. Given the impairment rating, work restrictions, and testimony, this injury is permanent.

Plaintiff was out of work for approximately two years and incurred $63,840.00 in lost wages. He incurred approximately $50,000.00 in medical expenses. This totals $113,840.00. This means the jury verdict of $500,000.00 valued Plaintff's noneconomic damages at $386,160.00.

Noneconomic damages include, but are not limited to, (1) pain and suffering endured, (2) pain and suffering endured in the future, (3) loss of enjoyment of life now and (4) in the future, (5) future medical expenses, (6) physical impairment, (7) emotional distress, and (8) mental anguish, among other things. See **Harper v. Bolton**, 239 S.C. 541, 124 S.E.2d 54 (1962) (recognizing pain and suffering have long been recognized by South Carolina courts to be a compensable element of damages); see Campbell v. Hall, 210 S.C. 423, 430-31, 43 S.E.2d 129, 132 (1947) (recognizing plaintiff is entitled to future pain and suffering as it is reasonably certain will result in the future from the injury); see **Boan v. Blackwell**, 343 S.C. 498, 501, 541 S.E.2d 242, 244 (2001) (noting loss of enjoyment of life is a separate and distinct element of damages); see **Pearson v. Bridges**, 344 S.C. 366, 544 S.E.2d 617 (2001) (providing a plaintiff is entitled to future medical expenses reasonably certain to occur).

Dividing $386,160.00 by the 8 noneconomic damages to which Plaintiff is entitled equals less than $50,000.00 per noneconomic damage.

The jury found Plaintiff 38% at fault, reducing the verdict in his favor to $310,000.00. If we take out medical expenses and lost wages, we have $196,160.00 representing the nonexomomic damages award. Dividing $196,160.00 by the 8 noneconomic damages to which Plaintiff is entitled equals $24,520.00 per noneconomic damage. And this was within the range Plaintiff suggested to the jury. See Hassell, 430 S.C. at 636. The verdict is not excessive.

"The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done." **Graham v. Whitaker**, 282 S.C. 393, 321 S.E.2d 40 (1984). Under "thirteenth juror doctrine," the trial

court may grant a new trial if she believes the verdict is unsupported by evidence or if the verdict is inconsistent and reflects jury's confusion. Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App.1995).

The jury did justice with its verdict. Without rehashing the evidence already presented, the verdict was supported by the evidence, and the verdict is consistent because the jury considered Plaintiff's fault, finding him 38% comparative.

F

Defendant's next argument, like the majority of the others, rests on the assumption that the Act imposes an applicable duty on Plaintiff that he breached. As explained and conceded to by Defendant, it imposes no such duty. But assuming the Act does, Defendant's "obligation was [not] complete when the marks were made." As Mr. Peterson testified and the jury believed, Defendant did not use the right method to find underground lines, did not find the underground line that injured Plaintiff, and failed to properly mark the lines it did find. In other words, Defendant breached the duty it owed Plaintiff.

G

Defendant next claims the Court struck its empty-chair defense[3] that Dry-Pro, Plaintiff's employer, was responsible for the damages he sustained and alleged in his claim. But it isn't clear that the Court struck this defense. Indeed, on March 23, 2022, the Court allowed Defendant to amend its Answer to allege this defense. Admittedly, we do not have the trial transcript, so the Court may have struck this defense. But this doesn't stand out at all as having occurred.

Even if we assume that the Court did strike this defense, it is entirely not true that Defendant "was without recourse as to the fault of a third party." Defendant's Post-Trial Motions p. 20. To be sure,

[3] "Further answering, as to Plaintiff's claims for negligent [sic], grossly negligent [sic], careless, reckless, willful and wanton conduct, any injuries or damages to the Plaintiff were solely and proximately caused by the negligence, gross negligence, carelessness, recklessness, willfulness and/or wantonness of the Plaintiff's employer Dry Pro Basement Systems, Inc., a/k/a Dry Pro Foundation and Crawlspace Specialists." Amended Answer ¶ 38.

as Defendant readily admits, "[e]ven the Plaintiff attempted to cast blame on his employer by claiming he had not been properly trained and did not know about the duty to request a re-mark." Id. Taking Defendant at its word, Plaintiff clearly opened the door to Defendant arguing the empty-chair defense it claims the Court struck. But Defendant made no such objection—instead assuming it had no recourse.

It may be argued in the alternative that the Court limited Defendant's closing argument on the empty-chair defense. We did not understand that to be the Court's decision, but assuming it was, it was proper because Defendant failed to offer any evidence sufficient for the factfinder to determine whether the employer's actions were the cause of Plaintiff's injuries and damages.

The empty-chair defense is the defendant's "right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages." Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) (quoting S.C. Code Ann. § 15-38-15(D)). Importantly, the Defendant must establish its empty-chair defense by "assign[ing] fault for the plaintiff's injury to another party by providing evidence to the fact-finder that is sufficient for it to determine whether the party's 'actions were the cause of the plaintiff's injuries.' " Edwards v. Scapa Waycross, Inc., 437 S.C. 396, 878 S.E.2d 696 (S.C. App. 2022) (citing Machin v. Carus Corp., 419 S.C. 527, 542–43, 799 S.E.2d 468, 476 (2017)).

Providing evidence sufficient for the factfinder to determine whether the third-party's actions were the cause of Plaintiff's injuries necessarily required Defendant to prove Dry-Pro (1) owed Plaintiff a duty, (2) breach that duty, (3) which caused, (4) Plaintiff's damages. See Edwards at 437 S.C. 427–8 (noting defendant must provide a link between its claim that a third party is responsible and the damages it claims results). To be sure, in its Amended Answer, Defendant asserted that Dry-Pro's, Plaintiff's employer, negligence caused Plaintiff's damages sustained. Infra n. 3. And it is Defendant's burden to prove this assertion. But Defendant presented no evidence at all to establish or prove its empty-chair defense. Indeed, in its case, Defendant presented one expert witness who touched on none of the allegations Defendant made in its Amended Answer about Plaintiff's employer's liability.

Nor can Defendant complain now that the Court limited Defendant's closing argument on the empty-chair defense (assuming that was the Court's decision). Defendant alleged someone else was responsible for causing Plaintiff's damages and had every opportunity to call witnesses to establish Dry-Pro's breach caused Plaintiff's damages. Defendant decided to do none of that and to instead focus on its own liability and Plaintiff's contributory negligence.

H

Defendant next argues it is entitled to a new trial absolute and a new trial remittitur. We have already addressed the new-trial-absolute argument in section E.

> The trial court may grant a new trial nisi additur or remittitur when it finds the verdict is merely inadequate or excessive. The trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice. A motion for a new trial nisi because of excessiveness of the verdict contemplates not the striking down of the verdict in toto, but remission of part of it and the granting of a new trial in default thereof. The trial court essentially gives the party against whom damages are assessed the option, by way of additur or remittitur, of avoiding a new trial. The granting of a motion for new trial nisi additur or remittitur rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages. Compelling reasons must be given to justify invading the jury's province in this manner.

Howard v. Roberson, 376 S.C. 143, ___, 654 S.E.2d 877, 883 (Ct. App. 2007) (cleaned up).

For the same reasons as discussed in section E, a remittitur is not warranted. Moreover, the jury's award of $310,000.00 was within the range suggested to the jury. See Hassell, 430 S.C. at 636. And as discussed in section E, the noneconomic damages to which Plaintiff is entitled show the verdict is not grossly excessive or indicate it was reached as the result of passion, caprice, or prejudice.

Nor does the Tort Claim Act work to the advantage of a remittitur. To be entitled to a remittitur, compelling reasons must be given why the jury's verdict is excessive. The Tort Claim Act simply limits Plaintiff's recovery.

CONCLUSION

Defendant has presented nothing to show the evidence and the inferences that reasonably can be drawn therefrom yield only one conclusion or that the conclusion would be in its favor. Defendant has presented nothing to show the verdict is unsupported by evidence, is inconsistent, and reflects jury's confusion. Defendant has presented nothing to show the verdict is not just. Defendant regurgitates the arguments it made at trial—which, admittedly, resulted in the jury's 38% comparative fault decision. But pointing out what it believes the Court should have done differently does nothing to prove a JNOV, new trial, or remitter is warranted. The evidence presented at trial supports the verdict. The jury could have found for Defendant. There is evidence to support that verdict, too. But, comparing and considering the evidence, the jury found Defendant breached the duty it owed Plaintiff and that the breach proximately caused Plaintiff's damages. And—to the point—the jury placed 38% of the blame on Plaintiff. Defendant's Motions should be DENIED.

Respectfully submitted,

s/Tyler Bathrick
Tyler Bathrick (SC Bar #74944)
Attorney for Plaintiff
Stewart Law Offices, L.L.C.
Post Office Box 670
Rock Hill, SC 29731
Telephone: 8033285600
tyler@stewartlawoffices.net

March 18, 2024

STATE OF SOUTH CAROLINA COUNTY OF YORK Bobby Blakney, Plaintiff, v. City of Rock Hill, Defendant.	IN THE CIRCUIT COURT Civil Action No.: 2020-CP-46-01803 CERTIFICATE OF SERVICE

I, Fredericka A. Truesdale the undersigned employee of Stewart Law Offices, LLC do hereby certify that on March 18, 2024, served the foregoing ***PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS POST TRIAL MOTIONS (JNOV, NEW TRIAL ABSOLUTE, NEW TRIAL NISI, NEW TRIAL REMITTITUR)*** in connection with the above-referenced case by filing the same using the SC Judicial E-Filing System and the same being transmitted and by electronic mail and by mailing a copy properly addressed and with sufficient postage affixed thereto to the following addresses:

The Honorable Brian M. Gibbons
Post Office Drawer 580
Chester, South Carolina 29706

David L. Morrison, Esquire (SC Bar ID #4101)
MORRISON LAW FIRM, LLC
7453 Irmo Drive, Suite B
Columbia, South Carolina 29212
david@dmorrison-law.com
Attorneys for Defendant

FA Truesdale

Fredericka Truesdale
Paralegal

March 18, 2024

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Bobby Blakney, Plaintiff, v. City of Rock Hill, Defendant.	)	Civil Action No.:2020-CP-46-01803 **ORDER DENYING DEFENDANT'S POST TRIAL MOTIONS (JNOV, NEW TRIAL ABSOLUTE, NEW TRIAL NSI, NEW TRIAL REMITTITUR)**

This matter comes before the court on post-trial motions following a jury verdict of $500,000, reduced by the Court to $310,000 (by apportioning 62% of fault decided by the trial jury on the comparative negligence verdict form). After further review, deliberation, and careful consideration of the points raised in defendant's post trial motions and subsequent response from the plaintiff, the Court determines that there is no further need for oral argument, and the Court respectfully DENIES Defendant's motions in their entirety. However, the Court does hereby reform the jury verdict to $300,000 due to the statutory cap on damages pursuant to the South Carolina Tort Claims Act.

IT IS SO ORDERED.

March ___, 2024

Brian M. Gibbons
Circuit Judge

York Common Pleas

Case Caption: Bobby Blakney VS Rock Hill City Of , defendant, et al

Case Number: 2020CP4601803

Type: Order/Judgment and Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF YORK	)	
Bobby Blakney,	)	C/A #: 20-CP-46-01803
Plaintiff,	)	
v.	)	**NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER AND/OR MOTION TO RECONSIDER**
City of Rock Hill and Palmetto Utility Protection, d/b/a South Carolina 811,	)	
Defendants.	)	

TO: HONORABLE BRIAN M. GIBBONS

TYLER BATHRICK, ESQUIRE, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Defendant, City of Rock Hill, will move before the Honorable Brian M. Gibbons at such time and place as may be set by the Court, for an Order, pursuant to Rule 59(e), SCRCP, altering, amending and reconsidering the Order Relating to Post-Trial Motions filed on March 11, 2024. The Defendant's counsel received written notice of entry of the Order on March 21, 2024.

The Defendant's motion is based upon the following grounds:

The Order Relating to the Defendant's Post-Trial Motions filed on March 11, 2024, does not specifically address or provide the Court's reasoning or legal analysis for the denial of each of the grounds for relief as set forth in the Defendant's Post-Trial Motions. Specifically, the Order does not reference, let alone address, any of the grounds asserted by the Defendant for a JNOV, for a new trial absolute, for a New Trial Nisi, and for a New Trial Remittitur.

Accordingly, the Defendant has filed this motion to affirmatively and officially on the record request that the Court issue a ruling on each ground raised in its Post-Trial Motions. The

Defendant makes this request in order to ensure that all of the issues and arguments raised in its Post-Trial Motions are preserved for appellate review. The Defendant recognizes that in the case of *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014), the South Carolina Supreme Court addressed the necessity of a formal order in the context of a motion for summary judgment. The Supreme Court found that findings of fact and conclusions of law were not required and concluded *that the record* showed "the circuit court's reasoning is clear from the order, as it plainly referenced the evidence the circuit court considered in making its decision." *Woodson*, at 526 – 27, 753 S.E.2d at 433. The Supreme Court thus found *in that case* that the appellate court had "a sufficient record before it to permit meaningful appellate review and make a decision on the merits." *Id.* Nonetheless, the Supreme Court also "agree[d] it is better practice -- and in most cases common practice -- as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment." *Id.*

Woodson, of course, dealt with an order granting summary judgment, and based on that specific record, the Court found the record was sufficient to allow for meaningful appellate review. However, the Supreme Court's holding in *Woodson* did not adopt a blanket rule necessarily that all form or summary orders are sufficient under all circumstances.

Thereafter, in *Lollis v. Dutton*, 421 S.C. 467, 807 S.E.2d 723 (Ct. App. 2017), the Court of Appeals addressed whether a summary order was sufficient with respect to post-trial motions. The Court of Appeals noted that the "circuit court's summary order denying all post-trial motion did not specifically address" certain grounds raised in the motions. Despite citing to *Woodson*, the Court of Appeals in *Lollis* held that certain grounds required the circuit court to exercise discretion and "[n]othing in the order denying the post-trial motions indicates the circuit court order made such a determination." Lollis, at 488 – 89, 807 S.E.2d at 734.

In sum, the appellate case law still remains unclear when a summary order is sufficient to properly present and preserve issues for meaningful appellate review. Indeed, the Supreme Court has described a formal order as the "better practice" and "beneficial to the judicial process." *Woodson*, at 526 – 27, 753 S.E.2d at 433.

In this case, unlike most where the use of a summary order may suffice, the Court did not hold a hearing on Post-Trial Motions where both sides had the opportunity to orally argue the issues and the Court could have provided oral rulings from the bench as often occurs. In other words, typically where there is a hearing, it is more likely that an adequate record is made so that a summary order is sufficient to provide the appellate court with an understanding of the trial court's rulings and to ensure that all grounds raised in the Post-Trial Motions are properly preserved for appellate review. Additionally, the summary order in this case, unlike the one in *Woodson*, gives no indication of the Court's reasoning and legal analysis on any of the grounds raised for relief. Given the absence of the Court's own analysis and reasoning as well as even an acknowledgement as to what issues were raised, the Defendant is justifiably concerned that an appellate court will conclude that there is an insufficient basis for the court to review this Court's rulings. Often when the record is inadequate and the appealing party has not sought relief under Rule 59(e), the appellate court will summarily affirm or dismiss the appeal based on an inadequate record.

It is in recognition of such outcomes that the Defendant seeks to ensure, in a case of this importance, that an appeal will be decided on the merits and not on a preservation error. To that end, the Defendant with this motion is formally asking the Court to issue a formal order that provides its reasoning and legal analysis on the grounds raised. The Defendant seeks to meet its responsibilities to make certain the grounds for appeal are properly preserved and that the appellate courts can provide meaningful review for the benefit of all the parties.

The Defendant raised numerous meritorious issues in its post-trial motions. In the motion for a new trial the Defendant argued a new trial was necessary because: A) Plaintiff's expert testimony offering regarding failing to mark the line; B) The Plaintiff's closing arguments challenging the law as inapplicable; C) The Court's failure to charge that ignorance of the law is no excuse; D) The Plaintiff's negligence was greater than fifty percent as a matter of law; E) The City is entitled to a new trial absolute or a new trial nisi under the thirteenth juror doctrine; F) The City's obligation was complete when the marks were made and the burden shifts to the excavator to call for-remarks under these circumstances as a matter of law; G) Striking of City's defense of liability of Dry-Pro, Plaintiff's employer; H) The City of Rock Hill is entitled to a new trial absolute and a new trial remittitur of the verdict in that it is excessive and not warranted by the evidence. None of those arguments were addressed in the trial court's summary order denying the motion.

Furthermore, the Defendant also raised several arguments for a New Trial Absolutely and Nisi Remittitur. While the trial court granted the Defendant's motion to reduce the verdict amount to the statutory cap of $300,000, the Defendant raised additional arguments that went unaddressed. The Defendant argued that the damages award should first be reduced to the cap of $300,000 and then the comparative negligence percentages should be applied. In this case, the verdict amount would be sixty-two percent of $300,000 or $186,000. Awarding damages in that order of operations preserves the integrity of the Tort Claims Act and furthers the legislative intent of construing the Act liberally in favor of limiting liability. *See Gore v. Dorchester County Sheriff's Office*, 2024 WL 1293293, 2 – 3 (2024) (the South Carolina Supreme Court repeatedly emphasizes that the South Carolina Tort Claims Act "must be liberally construed in favor of limiting the liability of the governmental entity."). The order denying the Defendant's motion failed to address that argument as well.

Finally, the Defendant argued for a judgment notwithstanding verdict. The Defendant incorporated all of the above arguments and further explained the only reasonable inference that can be drawn from the evidence presented at trial was that the Plaintiff was solely at fault or if the Defendant was at fault, the Defendant's negligence was *dwarfed* by the Plaintiff's negligence. The Plaintiff was guilty of negligence *per se* for several violations of the statutory scheme regulating excavation in South Carolina and the Plaintiff had the last clear chance to avoid the situation. Contrarily, the "evidence" of the Defendant's alleged negligence is speculative as it is based upon the trial court's error in allowing the Plaintiff's expert to testify as to a standard of care in the industry that is not applicable to South Carolina, as the expert admitted in his deposition. This argument too went unaddressed in the trial court's summary order.

The Defendant's motion is based upon the pleadings filed in this case; Order Relating to Post-Trial Motions filed March 11, 2024; the Defendant's Post-Trial Motions previously filed; the rules of court; and such other matters as may be properly presented to the Court at the time of the hearing.

MORRISON LAW FIRM, LLC

By: *s/ David L. Morrison*
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Attorney for Defendant City of Rock Hill

Columbia, South Carolina

April 1, 2024

STATE OF SOUTH CAROLINA COUNTY OF YORK Bobby Blakney, Plaintiff, v. City of Rock Hill and Palmetto Utility Protection, d/b/a South Carolina 811, Defendants.	IN THE CIRCUIT COURT Civil Action No.: 2020-CP-46-01803 PLAINTIFF'S RETURN TO DEFENDANT'S MOTION TO ALTER OR AMEND ORDER AND/OR MOTION TO RECONSIDER

City of Rock Hill's ("Defendant") Motion should be DENIED. South Carolina law is crystal clear on what is required to preserve an issue for appellate review. To be sure, the issue must be raised to and ruled on by the trial court. See **Doe v. Doe**, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) ("To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court."). Nothing more and nothing less.

Defendant, however, suggests something more is needed in order to preserve an issue for appellate review: it believes the trial court's ruling must contain specific findings of fact and conclusions of law. And it cites **Lollis v. Dutton**, 421 S.C. 467, 807 S.E.2d 723 (Ct. App. 2017) to support this proposition. In Lollis, the court of appeals held the trial court was required to make specific findings in its order denying attorney fees and cost because a rule and statute required it. 421 S.C. at 487–9. There, a party filed post-trial motions asking for, among other things, attorney fees and cost under the Frivolous Civil Proceedings Sanctions Act, Rule 37(c), and the Uniform Declaratory Judgments Act. The trial court summarily denied the motions. The court of appeals remanded the denial of attorney fees and cost because the trial court did not make the specific findings required by the Frivolous Civil Proceedings Sanctions Act, Rule 37(c), and the Uniform Declaratory Judgments Act. Importantly, the trial court's

order did not fail to preserve an issue for appeal—the order simply failed to comply with the requirement laid out in a specific rule and statute.

Defendant points to no rule requiring the Court to make specific findings here. See e.g. Rule 52(a), SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."). And Defendant points to no statute or law requiring the Court to make specific findings. To be sure, the standard of review for JNOV and a new trial absolute requires the court to "consider the testimony and reasonable inferences to be drawn therefrom." Bass v. S.C. Dep't of Soc. Servs., 403 S.C. 184, 190, 742 S.E.2d 667, 670 (Ct. App. 2013); Vinson v. Hartley, 324 S.C. 389, ___, 477 S.E.2d 715, 722–4 (Ct. App. 1996). Likewise, the Thirteenth Jury Doctrine does not require any factual findings. Vinson, 477 S.E.2d at 722. And the judge's decision to deny a remitter is given great deference. Id. at 723.

And on the issue of reducing the verdict to the statutory cap and then reducing by comparative fault, the court of appeals has already affirmed the formula for this issue, and it was applied faithfully by the Court here. See Smalls v. South Carolina Dept. of Educ., 339 S.C. 208, 219–223, 528 S.E.2d 682, ___ (Ct. App. 2000).

Defendant's Motion should be DENIED.

Respectfully submitted,

s/Tyler Bathrick
Tyler Bathrick (Bar #74944)
STEWART LAW OFFICES, L.L.C.
Post Office Box 670
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tyler@stewartlawoffices.net
(803) 328-5600 - Telephone
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April 10, 2024
Rock Hill, SC

Stewart
LAW OFFICES

ROCK HILL I COLUMBIA I CHARLOTTE
SPARTANBURG I BEAUFORT

Reply To:

Tyler Bathrick
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Licensed in SC

April 29, 2024

VIA US MAIL & E-MAIL TO - david@dmorrison-law.com
Mr. David L. Morrison
Morrison Law Firm, LLC
7453 Irmo Drive, Suite B
Columbia, SC 29212

Dear Mr. Morrison:

I hope all is well. It appears the jurisdictional time for the City of Rock Hill ("City") to appeal has run. I am therefore writing to demand the City satisfy the $300,000.00 verdict rendered against it, with interest.

On March 21, 2024, Judge Gibbons denied the City's post-trial motions. An appeal was required to be perfected (if at all) by April 22, 2024. But no notice of appeal has been filed or served. The March 21, 2024 Order is therefore the law of the case.

Assuming the City believes the April 1, 2024 Rule 59 motion tolls the time to perfect an appeal, it doesn't.

It is true, our appeallate courts generally allow one final chance "to call the court's attention to a possible misapprehension of an earlier argument [and] to revisit a previously raised argument." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 21–2, 602 S.E.2d 772, ___ (2004) (cautioning the practitioner to "note carefully the exceptions to this general rule. . . ."). But the Rule 59(e) motion did not call the Court's attention to any misapprehension of an earlier argument or ask the Court to revisit a previously raised argument. Rather, the City's Rule 59(e) motion simply asked the Court to make specific rulings on each ground raised in the post-trial motions.[1]

[1] Interestingly, this is exactly what the petitioner in Collins Music Co., Inc. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) did. Of course, the court of appeals held the Rule 59(e) motion did not toll the time to appeal. And Elam cites this as an exception to the general rule it created. See also

Please make the check payable to Bobby Blakney and Stewart Law Offices, LLC and send to my office at the address listed in the letterhead.

I look forward to working with you again.

Sincerely,

/s/ Tyler Bathrick

Tyler Bathrick

TB/msm

Armstrong v. Union Carbide, 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992) (holding an order of the circuit court did not have to specifically address the issues raised when it is clear that the court considered all of the grounds raised).

Moreover, Judge Gibbons denied the City's post-trial motions in its entirety—every issue raised was therefore decided and preserved for appeal, and the Order did not alter anything. Judge Gibbons did reduce the verdict as a matter of law. See Smalls v. South Carolina Dept. of Educ., 339 S.C. 208, 219–223, 528 S.E.2d 682, ___ (Ct. App. 2000). But the City's post-trial motion made clear of its intention to argue against this precedent. The reduction was therefore not "as a result of [the City's post-trial motions.]" Coward Hund Const. Co. v. Ball Corp., 336 S.C 1, 4, 518 S.E.2d 56, ___ (Ct. App. 1999)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF York
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4601803

Bobby Blakney
PLAINTIFF(S)

Rock Hill City Of
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter came before the Court on a motion to alter, amend, or reconsider the Court's order of March 21, 2024 denying various post trial motions. The Defendant filed its motion to alter, amend or reconsider on April 1, 2024. Plaintiff timely responded on April 10, 2024. The parties were heard via WebEx on December 4, 2024. After further review and deliberation, the Court respectfully DENIES Defendant's motion to alter, amend, or reconsider, finding that the Court's legal reasoning for its various rulings set forth in the record during the trial of this case are sufficient for appellate review without the necessity of formal written order by the trial court detailing same.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/04/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

61

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

York Common Pleas

Case Caption: Bobby Blakney VS Rock Hill City Of , defendant, et al

Case Number: 2020CP4601803

Type: Order/Electronic Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

63

RECEIVED
Jan 17 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge
Civil Action No. 20-CP-46-01803
Appellate Case No. 2025-000032

Bobby Blakney……, Respondent,

v.

City of Rock Hill……., Appellant.

PROOF OF SERVICE

I certify that I have served the **Motion to Dismiss** on City of Rock Hill by depositing a copy of it in the United States Mail, postage prepaid, on January 17, 2025, addressed to their attorney of record, David L. Morrison, 7453 Irmo Drive, Suite B, Columbia, South Carolina 29212 and via e-mail on January 17, 2025, at david@dmorrison-law.com.

January 17, 2025

STEWART LAW OFFICES, LLC

By: *s/ Tyler Bathrick*
Tyler Bathrick (S.C. Bar No. 74944)
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Attorney for Respondent

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Licensed in SC

ROCK HILL | COLUMBIA | CHARLOTTE
SPARTANBURG | BEAUFORT

January 17, 2025

VIA EMAIL – ctappfilings@sccourts.org
Chief Deputy Clerk Catherine S. Harrison
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Bobby Blakney, Respondent v. City of Rock Hill, Appellant
Appellate Case No. 2025-000032

Dear Chief Deputy Harrison:

Enclosed please find Respondent's **Motion to Dismiss**, along with **Proof of Service**, in the above-referenced appeal.

Thank you for your attention to this matter. Please do not hesitate to contact me at (803) 328-5600 should there be any questions or concerns.

Sincerely,

s/ Tyler Bathrick

Tyler Bathrick
S.C. State Bar No. 74944

TB/msm

Enclosures
cc. David Morrison, Morrison Law Firm

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Civil Action No. 20-CP-46-01803

Appellate Case No. 2025-000032

Bobby Blakney ……..…….., Respondent,

v.

City of Rock Hill ……..…., Appellant.

RESPONSE TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellee moved to dismiss this appeal from the York County Court of Common Pleas upon the sole ground that the notice of appeal was not filed timely. Appellee misunderstands and misapplies both the Appellant's motion and law.

Relevant Factual background

Following a week-long trial, the jury returned a verdict on February 19, 2024. The verdict was tainted by several elementary and significant evidentiary errors by the trial judge. The gravamen of Appellee's claim was that the City was negligent in its actions to mark utility lines. However, it is not disputed that the City timely marked the utility lines using a method specifically

prescribed by state statute and that the Appellee failed to comply with state statute that required he request the City to mark the utilities again. South Carolina state statute requires an excavator to call for a re-mark if no marks are apparent and utilities are apparent at the site. In this instance, there were several different utilities in the exact area Appellee intended to excavate. Appellee dug with a mechanized jackhammer with a shovel attachment directly beside the visible electrical conduit connected to the visible electric the meter box that supplied electrical service to the home. (See photo on page 2 of the City of Rock Hill's original post-trial motions.) Predictably, he hit the electrical line and was shocked.

After the verdict, the court allowed the parties ten (10) days to file post-trial motions. The court entered judgment on March 6, 2024. The Appellant timely filed post-trial motions and set forth eight discrete issues in support thereof. These eight issues were not conclusory or boilerpate; rather, Appellant expounded on each in detail covering over 25 pages. Appellee does not contest timeliness of the post-trial motions. The Court entered its order denying post-trial motions on March 21, 2024. In this Order, the Court obliquely rejected Appellant's post-trial motions and provided no insight as to the Court's reasoning on any particular issue. The Court's order could be filed in any case at this same stage with little alteration.

Given the obvious evidentiary errors, the magnitude of the resulting verdict stemming from these errors and the trial court's seeming inattention, Appellant was concerned i) that these important issues be preserved for appeal and ii) that the trial judge, who is generally not prone to errors this rudimentary and material, had grossly misconstrued the issues and controlling law. Accordingly, on April 1, 2024, Appellant timely filed a Motion to Alter or Amend Order and/or Motion to Reconsider. Again, the timeliness is not contested. On December 4, 2024, the trial court issued an order denying the motion to reconsider. Appellant then timely filed this appeal.

The only issue before the Court on this motion to dismiss is whether the Motion to Alter or Amend Order and/or Motion to Reconsider stayed the time for the filing of the appeal.

Applicable Law

Rule 203(b)(1) of the South Carolina Appellate Court Rules provides that:

> **(b) Time for Service.**
>
> (1) *Appeals From the Court of Common Pleas.* A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.
>
> SCACR 203.

The Supreme Court's opinion in *Elam v. South Carolina Department of Transportation*, 602 S.E.2d 772 (Ct.App. 2004) controls the disposition of the motion to dismiss. The *Elam* Court altered the framework previously adopted by this Court. The Supreme Court (i) clarified and limited *Coward Hund*, 518 S.E.2d 56 (Ct.App. 1999), *Quality Trailer,* 349 S.E.2d 615 (Ct.App. 2002) and *Collins Music,* 579 S.E.2d 524 (2002); (ii) overruled *Matthews v. Richland County School Dist. One,* 594 S.E.2d 2004; (iii) reversed the court of appeals in Elam and (iv) provided the framework and reasoning for this Court to deny the motion to dismiss.

In the motion to dismiss, Appellant relies upon three Court of Appeals cases that preceded *Elam*. However, pursuant to the Supreme Court's holdings and reasoning in Elam, none apply to this situation. The Elam decision altered and clarified procedure in South Carolina. The Supreme Court specifically held:

> We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court. Again, we caution a party who files post-trial motions to note carefully the exceptions to this general rule as expressed in *Coward Hund , Quality Trailer* and *Collins Music*.
>
> *Elam 579 S.E.2d @* 778.

The Supreme Court further explained the holdings of *Coward Hund, Quality Trailer* and *Collins Music*:

> Accordingly, we reaffirm the rationale and principles expressed in *Coward Hund*, *Quality Trailer* and *Collins Music*. An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. *Coward Hund.* An appeal may also be barred due to untimely service of the notice of appeal when a party - instead of serving a notice of appeal – *recaptions a written NNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59 (e) motion. Quality Trailer, Collins Music.*

Id.

In this case, the City of Rock Hill did not file successive motions for reconsideration under Rule 59(e); therefore, *Coward Hund* is not applicable. Moreover, the City did not "recaption" a written JNOV/new trial motion…and resubmit[] it as a virtually identical, written Rule 59(e) motion" as expressly proscribed in *Elam* construing *Quality Trailer* and *Collins Music.* Rather,

Rock Hill filed the Motion to Alter or Amend the Order and/or Motion to Reconsider seeking to have the trial court consider and provide its legal reasoning for its ruling, for two reasons: to ensure the issues were preserved for appeal and to prod the trial court to examine the issues in greater detail so that the trial court could discern its manifest errors and correct them.

When a party believes that a court may have misapprehended the arguments or the law, they certainly have the opportunity in accordance with *Elam* to ask the court to reconsider – "even if it means re-hashing all or part of an argument previously presented." *Elam, 579 S.E.2d @* 779. That is the purpose of a motion to reconsider. The order is devoid of any reasoning supporting the ruling. The lack of any rationale does not negate the opportunity for a party to have the court reconsider the issue.

Here, the City contends that these issues have been misconstrued. For instance, allowing the plaintiff's expert witness to testify that the City deviated from the national standard of care, when he admitted on cross-examination that there is no national standard, is clear error. Contradicting this testimony, the witness admitted that each state's specific laws control and that South Carolina's statute requires the excavator to call for utilities to be re-marked if the prior markings are unclear. Yet, the trial court inexplicably allowed this "expert" provide his legal opinion as to this statute in contravention to the plain language of the statute. These evidentiary decisions manifest the normally able trial court either misunderstood or misconstrued basic evidentiary rules to the prejudice of Rock Hill. *Elam* plainly sets forth that a party has the right to file a motion to reconsider, even if that issue was previously presented to the court and ruled upon. Indeed, the overruling of *Matthews* squarely confirms that logic and procedure.

The only conclusion that could be drawn from the evidence was that the Appellee violated South Carolina statutory law because Appellee was the excavator, and the excavator was statutorily

required to call for a re-mark when there were utilities present and there were no visible marks remaining. By not doing so, he was guilty of negligence per se. However, the court inexplicably failed to recognize that the Underground Facility Damage Protection Act provided the appropriate statutory scheme defining the duties of the parties and therefore failed to charge the jury on the proper applicability of the Act. Consequently, the trial court failed to recognize that Appellee's failure to call for a re-mark of the line prior to excavation when utilities were obviously apparent, and no lines were marked violated his statutory duties under South Carolina law.

The court also allowed the jury to determine what the law was, which was clear error. He charged the statutes but also charged the jury that the act does not affect any civil remedies for personal injury. That led to confusion by allowing the parties to argue whether those statutes applied at all to this civil remedy. The parties were arguing what the law was with the court not providing any clear direction to the jury. The court's charge allowed argument as to whether those statutes even applied to this case and left that to the jury to determine. Again, that is a misunderstanding or misapprehension of the law that is appropriate for a motion to reconsider. That approach is sanctioned by the Court in *Elam*:

> There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity….
>
> [T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration.
>
> *Elam,* 602 S.E.2d @ 779 (2004).

Appellee's approach regarding any re-argument in a motion to reconsider would render motions to reconsider meaningless, useless and improper. A motion to reconsider presumes that

the court has considered the matter and is being asked one last time to try to correct the alleged error. That has long been the approach in South Carolina. *See*, *Arnold v. State*, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRCP to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits."). That approach is still appropriate today. The Elam court's conclusion applies equally to this case:

> While SCDOT in its written Rule 59(e) motion may have revisited some issues and arguments raised in its oral JNOV/new trial motions, we conclude the Rule 59(e) motion was proper for the reasons we explain today. This case is not factually similar to *Coward Hund* because it involves a first, written Rule 59(e) motion, not a second one. It is not factually similar to *Quality Trailer* or *Collins Music* because SCDOT did not simply resubmit a virtually identical, written Rule 59(e) motion raising the same issues on which it already had obtained a ruling by virtue of a previous, written JNOV/new trial motion.
>
> SCDOT timely served its notice of appeal within thirty days after receipt of written notice of entry of the order denying its Rule 59(e) motion. Consequently, we reverse the Court of Appeals' order dismissing SCDOT's appeal as untimely. We also overrule *Matthews,* 357 S.C. 594, 594 S.E.2d 177, because it is inconsistent with the view of post-trial motions we set forth today.
>
> *Elam,* 602 S.E.2d @ 781 (2004).

The City of Rock Hill asked the court to reconsider certain rulings. Certainly, it is understandable that while reading a twenty-six-page post-trial motion for JNOV, new trial and other relief, that a reader might get lost in the woods with all the factual testimony and evidence laid out. In the City's motion to reconsider, Rock Hill attempted to point out the legal issues that Rock Hill believed the court had mis-apprehended in succinct form along with requesting that the court provide its reasoning its ruling in a five-page motion. The goal was to prod the court into delving deeper into the legal issues which Rock Hill believed were erroneously applied. When there has been an apparent misapprehension, a request for the court's rationale in reconsideration is appropriate and sensible. The request for the court's rationale further illustrates that the City

believed the court has misconstrued the arguments as illustrated above. The City did not re-file the prior 26-page motion verbatim.

In *Elam*, the Supreme Court identified five important factors in considering this issue. First, the court determined that a Rule 59 (e) motion is properly considered a motion to reconsider, which includes the re-hashing of all or part of arguments previously considered. That applies here.

Second, the court emphasized the importance of issue preservation. The Appellant clearly demonstrated concern with issue preservation because it requested the trial judge to provide his rationale for his ruling. That would also provide an appropriate basis to determine whether the trial court had mis-apprehended the motion, the facts or the law. While there is no case law that would require a trial judge to provide a written explanation, there is case law set forth in the motion to reconsider that certainly encourages a trial judge to do so. Given that case law, the Appellant had a good faith belief that the judge should be asked to provide that given what we believed was the misapprehension of the motion, the facts or the law. Requesting the learned trial judge to do so would make it more likely that any mistake or misapprehension would be corrected at the trial court level, potentially without the necessity of an appeal.

Third, *Elam* outlined the two basic situations in which a party should consider filing a Rule 59(e) motion. As applicable here, the court said that party may wish to file such a motion when she believes the court has misunderstood and the party wishes for the court to reconsider. *Elam, 579 S.E.2d* @ 780. That is exactly what happened here.

Fourth, South Carolina appellate courts require issue preservation and do not recognize the "plain error rule" recognized in other courts. Those "mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e)

motion without concern a later appeal will be deemed untimely. *Elam, 579 S.E.2d* @ 781. Here, the Rule59(e) motion demonstrates the Appellants concern with issue preservation. The very nature of the issues presented led the Appellant to believe that the court had misapprehended the facts and/or the law. However, without any explanation, the City certainly could not demonstrate that. Requesting that the court provide its rationale served several purposes. First, any misapprehension could be readily identified in that rationale. Second, the issue of whether the Appellant should have given the court the opportunity to correct any error would properly preserved for appeal. Also, if the trial court would give its reasoning, it would be more likely that any error would be corrected prior to any appeal.

Fifth, Elam held that the civil procedure and appellate rules "should not be written or interpreted to create a trap for the unwary lawyer or party." *Elam* @ 781. When a party believes the court has misunderstood or misapprehended the issue, they may file a motion to reconsider. *Elam, 579 S.E.2d* @ 780.

But, in filing a Rule 59(e) motion, a party "may unwittingly forfeit the right to appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. Elam. *579 S.E.2d* @ 780. The court held: "We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." *Elam, 579 S.E.2d* @ 780-781. By footnote, the court noted that the SCDOT believed that a Rule 59(e) motion was necessary and appropriate. The City of Rock Hill likewise believed the motion was necessary and appropriate. Rock Hill certainly believed that the court had misapprehended the matter but had no way to demonstrate that without the court's reasoning. We requested that the court re-consider certain matters and provide its

reasoning. That was no attempt to delay the appeal. Under those circumstances, the rules should not be "interpreted to cause a trap for the unwary lawyer or party." Elam, *579 S.E.2d @* 780.

Elam is controlling. That analysis requires this court to find that the single Rule 59(e) motion, which did not consist of a verbatim repeat of the original post-trial motions with a new caption, to be appropriate and proper. Therefore, that motion stayed the time for the filing of the appeal.

Because the motion was proper, and the appeal was timely filed. Appellee's motion to dismiss should be denied.

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February 18, 2025

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Feb 21 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2025-000032

Bobby Blakney .....Respondent,

v.

City of Rock Hill .....Appellant.

REPLY TO APPELLANT'S RETURN OF RESPONDENT'S MOTION TO DISMISS

In South Carolina, a 59(e) motion will toll the time to appeal if it preserves an issue for appeal. An issue is preserved for appeal when it is raised and ruled on by the trial court. Appellant's first post-trial motion raised several issues to preserve for appeal and the trial court denied each. Appellant then filed a 59(e) motion, asking the trial court for clarity. The motion to dismiss presents this Court with one straightforward question: Does a 59(e) motion seeking clarity preserve an issue for appeal?

In South Carolina, to preserve an issue for appeal, the issue must be raised to and ruled on by the trial court. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) ("To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court."). Once the issue is raised and ruled on by the trial court, the time to appeal starts to run. Rule 203, SCARC. And Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 774 (2004) did nothing to change this rule of law—indeed, Elam simply pointed out a circumstance when an issue might not be preserved.

In Elam, the Supreme Court held the 59(e) motion tolled the time to perfect the appeal because it preserved an issue for appeal. Elam brought a claim against SCDOT for damages sustained in a car wreck. Elam, 361 S.C. at 13. "SCDOT asserted that notice of a hazard [was] 'interrupted' by responsive action to correct the defect," and the trial court adopted this standard of notice and instructed the jury to apply it. Id. at 25. After trial, SCDOT brought a motion for JNOV. Id. at 13. In a written order, the trial judge denied SCDOT's motion for JNOV. Id. But in the written order, the trial court applied a completely different notice standard from the one it instructed the jury to apply. Id. at 25–6. Believing the motion would have been granted if the proper standard was applied, SCDOT filed a 59(e) motion. Id.

The question of tolling turns on preserving issues for appeal—if the 59(e) motion preserves an issue for appeal, then the time to appeal is tolled. To be sure, Elam held the 59(e) motion tolled the time to perfect the appeal because the motion raised an issue that came to light because of the order denying the post-trial motion. Id. And the court pointed out why this is important: a party should have the opportunity or a "single bite at the apple" to preserve in writing issues for appeal. Id at 21. In that vein, it created a general rule: "a party usually is free to file an initial 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely." Id. at 21.

But that general rule is subject to three exceptions. And relevant here, Elam cautioned parties to "note carefully the exceptions to this general rule." Id. (citing Quality Trailer Products, Inc. v. CSL Equipment Company, Inc., 349 S.C. 216, 562 S.E.2d 615 (2002) and Collins Music Co., Inc. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) as two exceptions).

In Quality Trailer, the Supreme Court held a 59(e) motion did not preserve an issue for appeal when it is successive of the written post-trial motion. Quality Trailer, 349 S.C. at 562 . In that case,

following a jury verdict, the defendant filed a post-trial motion for JNOV and a new trial, which the trial court denied. The defendant filed a 59(e) motion, and the trial court denied the motion. Id. at 218.

On appeal, the Supreme Court found that the 59(e) motion was successive (and thus did not toll the time to appeal) because it raised the same issues already raised to and ruled upon by the trial judge. Id. at 219–20. The time to appeal was therefore not tolled, and the appeal was dismissed.

In Collins Music, after a jury verdict, the defendant filed post-trial motions for JNOV, new trial, and nisi remittitur. Collins Music, 353 S.C. at 560. The trial judge "carefully review[ed] the matter" and denied defendant's motion in its entirety. Id. Instead of appealing the order, defendant filed a 59(e) motion asking the judge to make specific rulings on the grounds raised in the post-trial motions. Id. at 561. The court denied the 59(e) motion, and Defendant then appealed. Id.

On appeal, this Court found the 59(e) motion did not preserve an issue for appeal because (1) it "failed to identify . . . any issue raised but not ruled upon" and (2) the judge was not required to provide a detailed analysis, such a request did not support a finding that the 59(e) motion preserved an issue for appeal. Id. at 565–6.[1] The 59(e) motion therefore did not toll the time to appeal, so the Court of Appeals dismissed the appeal as untimely. Id. at 566.

Here, after a jury trial, Appellant filed a 25-page post-trial motion (which aptly argued its points), laying out every issue it wished to preserve for appeal. This is not in dispute. Nor is there a dispute that the trial court reviewed, deliberated, and carefully considered the points raised in Appellant's post-trial motions before denying the motions in their entirety. March 21, 2024 Order at Exhibit. pp. 49–50. The issues Appellant raised in its post-trial motions are necessarily preserved for appeal.

[1] Stating a trial judge is not required to provide a detailed analysis of all grounds raised and it is sufficient if it was clear from the order that all issues raised were considered.

But the 59(e) motion does not work to preserve an issue for appeal. To be sure, in its 59(e) motion, Appellant points to no issue that was raised to but not ruled on by the trial court. And Appellant points out no new issue that came to light as a result of the trial court's treatment of the post-trial motion. See Elam at 25–6. Not satisfied with the trial court's conclusion, Appellant submitted a 59(e) motion with virtually the same arguments as it submitted in its post-trial motions and asked the trial court to make detailed findings of fact and conclusions of law to support its denial of the post-trial motions.

Removing all doubt, in its Response to Respondent's Motion to Dismiss, on page 5, Appellant clarifies that the 59(e) motion was filed solely to ask the trial court to "consider and provide its legal reasoning for its" denial of Appellant's post-trial motion so Appellant could be sure that "the issues were preserved for appeal and to prod the trial court to examine the issues in greater detail so that the trial court could discern its manifest errors and correct them." But because the issues were already raised to and ruled on by the trial court, the issues were preserved for trial.

Appellant put itself squarely into the Quality Trailer Products, Inc. v. CSL Equipment Company, Inc., 349 S.C. 216, 562 S.E.2d 615 (2002) and Collins Music Co., Inc. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002) exceptions to the general rule Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 774 (2004) created. And Elam is clear in its specific warning parties to carefully consider these exceptions before filing a 59(e) motion following post-trial motions. Elam at 21.

The Quality Trailer and Collins Music Co. exceptions are on point here. Appellant had its "bite at the apple" when it filed its detailed 25-page post-trial motion. It argued every issue for appeal, including its desire to argue against precedent. The motion was denied. Its 59(e) motion makes the same arguments its post-trial motions made, asks the court to make specific rulings on the grounds raised in the post-trial motions, and points to nothing that came to light as a result of the trial court's treatment of the original post-trial motion.

Stated differently, the 59(e) motion does nothing to preserve anything for appeal. Because the time to perfect this appeal was not tolled, the appeal was not timely. This appeal should therefore be dismissed.

Respectfully submitted,

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February 21, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge
Civil Action No. 20-CP-46-01803
Appellate Case No. 2025-000032

Bobby Blakney……, Respondent,

v.

City of Rock Hill……., Appellant.

PROOF OF SERVICE

I certify that I have served the **Reply to Appellant's Return of Respondent's Motion to Dismiss** on City of Rock Hill by depositing a copy of it in the United States Mail, postage prepaid, on February 21, 2025, addressed to their attorney of record, David L. Morrison, 7453 Irmo Drive, Suite B, Columbia, South Carolina 29212 and via e-mail on February 21, 2025, at david@dmorrison-law.com.

February 21, 2025

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The South Carolina Court of Appeals

Bobby Blakney, Respondent,

v.

City of Rock Hill, Appellant.

Appellate Case No. 2025-000032

ORDER

On January 17, 2025, Respondent filed a motion to dismiss, arguing Appellant had filed a successive post-trial motion that did not stay the time to appeal and thus, the appeal must be dismissed as untimely. Appellant filed a return, asserting the motion was "appropriate and proper" and "stayed the time for the filing of the appeal." Respondent filed a reply.

Following the February 29, 2024 jury verdict, Appellant filed post-trial motions for judgment notwithstanding the verdict, new trial absolute, new trial nisi, and new trial remittitur on March 11, 2024. On March 21, 2024, the trial court denied the "motions in their entirety" but reduced the verdict to the Tort Claims Act cap of $300,000. On April 1, 2024, Appellant filed a "Motion to alter or amend order and/or motion to reconsider" requesting the trial court provide its reasoning and legal analysis for the denial of each of the grounds for relief as set forth in its post-trial motions and briefly summarizing the various post-trial motions. On December 4, 2024, the trial court denied Appellant's motion to alter or amend, and Appellant served and filed its notice of appeal on January 3, 2025.

After careful consideration, we grant Respondent's motion to dismiss because Appellant's motion to reconsider, which sought reasoning and legal analysis on each ground raised in its post-trial motion, was inappropriately successive and thus procedurally improper. *See* Rule 203(b)(1), SCACR(providing an appeal from a final order of the family court must be "served on all respondents within thirty . . . days after receipt of written notice of entry of the order"); *Swing v. Swing*, Op. No. 28266 (S.C. Ct. filed March 12, 2025) (Howard Adv. Sh. No. 11 at 16) (explaining

that not all timely Rule 59(e) motions will stay the Rule 203(b)(1) deadline for appeal as has been explained in cases such as *Coward Hund Construction Co. v. Ball Corp.*,[1] *Quality Trailer Products, Inc. v. CSL Equipment Co.*,[2] and *Collins Music Co. v. IGT*[3]); *id.* at 17-18 ("From the entirety of the discussion of this issue in *Coward Hund*, *Quality Trailer*, and *Collins Music*, all as summarized and explained in *Elam[v. South Carolina Department of Transportation*],[4] it becomes clear the central point on which the question of whether a Rule 59(e) motion stays the deadline for appeal under Rule 203(b)(1) is not whether the motion was served within ten days, but whether the motion was inappropriately successive and thus procedurally improper."); *Collins Music*, 353 S.C. at 566, 579 S.E.2d at 527 (finding the trial court "was not required to provide a detailed analysis respecting each of the twenty-eight grounds offered in support of JNOV, new trial, and new trial nisi remittitur" and holding the appellant's "second post-trial motion was not an appropriate Rule 59(e) motion; instead it was simply a successive motion for JNOV and new trial."); Rule 52(a), SCRCP ("In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law . . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."); *Folkens v. Hunt,* 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) ("We have . . . refused to require trial judges to explain reasons for ruling on [the request for a new trial as the thirteenth juror]."); *Bailey v. Segars,* 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) (stating a form order denying a motion for JNOV and new trial coupled with the transcript of the proceedings was sufficient to allow appellate review and a Rule 59(e) motion was not required to preserve issues for appeal), *cert. granted on other grounds* (Jan. 10, 2002). The remittitur will be sent as required by Rule 221(b), SCACR.

FOR THE COURT

Columbia, South Carolina

FILED
Apr 08 2025

[1] 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).
[2] 349 S.C. 216, 562 S.E.2d 615 (2002).
[3] 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002).
[4] 361 S.C. 9, 602 S.E.2d 772 (2004).

cc:
David Leon Morrison, Esquire
William Mark White, Esquire
Tyler A. Bathrick, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge
Civil Action No. 20-CP-46-01803
Appellate Case No. 2025-000032

Bobby Blakney ……..…….., Respondent,

v.

City of Rock Hill ……..…..., Appellant.

PETITION FOR REHEARING

The Appellant, City of Rock Hill, petitions the South Carolina Court of Appeals for a rehearing of the Court's April 8, 2025 Order dismissing this appeal on the ground that the notice of appeal was untimely because the Rule 59, SCRCP motion filed in the lower court was inappropriately successive and procedurally improper.

The grounds for Appellant's petition for rehearing are addressed in detail in the supporting memorandum being filed herewith and incorporated herein.

This petition for rehearing is based upon the Court's April 8, 2025 Order dismissing this appeal, the supporting memorandum filed herewith, the motion to dismiss appeal briefs and exhibits, including the Rule 59 SCRCP motion filed in the lower court and challenged by Appellant, Rule 221(a), and Rule 221(c) SCACR and other rules of court.

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April 23, 2025

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge
Civil Action No. 20-CP-46-01803
Appellate Case No. 2025-000032

Bobby Blakney ……..…….., Respondent,

v.

City of Rock Hill ……..…., Appellant.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant, City of Rock Hill petitions the South Carolina Court of Appeals for a rehearing of the Court's April 8, 2025, Order dismissing this appeal on grounds that the Rule 59(e) motion filed in the lower court was inappropriately successive and procedurally improper, thereby rendering the subsequent notice of appeal untimely. The Appellant respectfully submits that the following points were overlooked or misapprehended by this Court.

No issue exists regarding the timeliness of the Notice of Appeal following the denial of the Rule 59(e) motion.[1] Instead, the only issue before the court in this motion to dismiss is whether the Rule 59(e) motion was proper so that it tolled the time to appeal.

[1] The JNOV motion, the Rule 59(e) motion and the court's ruling on the JNOV motion are in the record pending before the court and are not separately attached here. Each of those documents is attached to the Respondent's Motion to Dismiss the Appeal. Likewise, the Response to the Motion to Dismiss the Appeal is in the record. Appellant craves reference and incorporates that document here. Many of the issues are explained in more detail in that Response.

This Court held that motion for reconsideration was inappropriately successive and therefore procedurally improper. The court misconstrued the state of the law, the motion itself and the applicability of the narrowly created judicial exceptions to the rule that a timely filed motion tolls the time for appeal.

The South Carolina Supreme Court has recently clarified the law applying to this area in *Elam v. S.C. Dept of Transportation* , 361 S.C. 9, 602 S.E.2d 772,777 (2004) and more recently in *Swing v. Swing*, Op. No. 28266 (S.C.Ct filed March 12, 2025).

The normal rule is that a timely filed Rule 59(e), SCRCP motion tolls the time for the filing of an appeal. The exceptions to this rule apply to successive Rule 59(e) motions (*Coward Hund Const. Co. v. Ball Corp.*, 518 S.E.2d 56 (Ct.App. 1999) or to 59(e) motions that are virtually identical to post-trial motions. (See, *Elam*, supra, affirming (*Quality Trailer Products v. CSL Equipment Co., 562 S.E.2d 615 (Ct.App. 2002)* and *Collins Music v. IGT, , 579 S.E.2d 524 (Ct.App. 2002).*

Here, there was no successive motion. Only one motion to reconsider was filed. The judicially created exception to the rule created by *Coward Hund* has no application.

Likewise, there was no virtually identical motion as in *Quality Trailer* so that the narrowly created judicial exception in *Quality Trailer* has no application either. In analyzing the Rule 59(e) motion to reconsider in *Quality Trailer*, the court said:

> I Corp then filed a written motion pursuant to Rules 52, 59 and 60 SCRCP which was virtually identical to its written JNOV/new trial motion. The only changes I Corp made were to caption the Rule 59(e) motion differently and to change the relief sought in the Rule 59(e) motion's final paragraph to coincide with the Rule 59(e) motion's caption.
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> *Elam*, 602 S.E.2d @ 776.

The post-trial motion filed by the Appellant was twenty-six pages and covered numerous grounds. The motion to reconsider at issue here was five pages. Three of the five pages had nothing to do with the original grounds asserted in the post-trial motions and instead were concerned with the apparent lack of understanding of the believed clarity of the issues presented and the preservation of those issues for appeal. However, trial counsel certainly has no room to argue to the trial judge that he did not understand the issues presented when the grounds for denial of the motion are not presented. Given the believed clarity of the issues presented, the Appellant sought better understanding of the reasons for the blanket denial so that the Appellant could properly ensure preservation. Further, Appellant could not contend why or how the court misconstrued the law when the reasons for the summary denial of the JNOV motion were unknown. For those reasons, the motion sought clarification.

In Elam, the Supreme Court said that a written JNOV motion followed by an initial Rule 59(e) motion is a part of a party's single bite at the apple in presenting his case to the trial court. Specifically, the court said:

> We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court. Again, we caution a party who files post-trial motions to note carefully the exceptions to this general rule as expressed in *Coward Hund , Quality Trailer* and *Collins Music*.
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> *Elam 579 S.E.2d @ 778.*

Here, the Appellant did not re-submit a virtually identical Rule 59 motion. Instead, it *appeared* that the court had misconstrued the law. For instance, allowing the plaintiff's expert witness to testify that the City deviated from the national standard of care, when he admitted on cross-examination that there is no national standard, is clear error. Contradicting this testimony,

the witness admitted that each state's specific laws control and that South Carolina's statute requires the excavator to call for utilities to be re-marked if the prior markings are unclear. Yet, the trial court inexplicably allowed this "expert" provide his legal opinion as to this statute in contravention to the plain language of the statute. He testified that the standard in the industry is different than what the South Carolina statutes said. These evidentiary decisions manifest the normally able trial court either misunderstood or misconstrued basic evidentiary rules to the prejudice of Appellant.

Further, this same expert was allowed to testify that the Appellant was not an "excavator who had specific duties under the law despite the South Carolina Statute defining an "excavator" as the person digging. The excavator has a specific duty to call for a re-mark if utilities are present and no marks on the ground are apparent. The expert witness explained to the jury that South Carolina law did not mean what it said and that the standard in the industry is that only the employer is an "excavator" so that the Respondent had no such duty. Despite objections, this testimony was allowed as expert opinion on the standard in the industry despite much of his testimony being in contravention of applicable South Carolina statutory law.

The court also refused to instruct the jury that the statutory law of South Carolina applied to the facts of this case. Instead, he allowed the parties to argue whether the law applied in closing. He did so by charging the jury that the statutory scheme did not affect any *civil* remedies. The parties were allowed to argue whether the law applied. The jury was left to speculate as to what law applied and to decide that for themselves without appropriate guidance from the court.

The Appellant believes that is a misapprehension of the law. That misapprehension is appropriate for a motion to reconsider. The motion to reconsider requested that the trial judge

provide his reasoning so whether a misapprehension existed could be determined and argued. The Appellant contends that such a misapprehension is appropriate for a motion to reconsider.

The *Elam* Court sanctioned that approach.

> There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity….
>
> [T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration.

Elam, 602 S.E.2d @ 779 (2004).

Additionally, prodding the court to examine the issues in greater detail so that it could discern the manifest errors and correct them is certainly appropriate for a motion to reconsider. Preserving the issues is also appropriate for a motion to reconsider.

By its very nature, a Rule 59(e) motion asks a court to reconsider certain rulings. Whether the judge is *required* to provide his thought process is not the issue. Whether a party is entitled to request that he do so under the circumstances presented here is the issue. The Appellant did not re-file its twenty-six-page motion. The majority of the motion to reconsider did not address the issues asserted in the JNOV.

The Court's order dismissing the appeal misunderstood the nature of the motion to reconsider and the issues presented. While a Rule 59(e) motion by its nature will always ask a court to re-hash some issues presented, such a motion has only been found to be improperly successive when it is virtually identical to the post-trial motion under the *Quality Towing* standard. Again, unlike the Appellant's motion, the motion in issue in Quality Towing was a cut and paste from the JNOV motion other than the caption and the relief requested. An attempt to ask the court

to prod deeper into the legal issues which the Appellant believes were erroneously applied is a part and parcel of a party's single bite at the apple.

The Order dismissing the appeal misconstrued nature of the Rule 59(e) motion. It is not virtually identical to the JNOV motion. A misunderstanding or misapprehension of the law is appropriate for a motion to reconsider. The *Elam* court sanctioned the type of motion filed here:

> There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity….
>
> [T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration.
>
> *Elam,* 602 S.E.2d @ 779 (2004).

Elam recognizes that a Rule 59(e) motion may revisit issues and arguments previously made. The Court's order of dismissal does not recognize that. While issues are re-visited, it is not a virtually identical motion as the one in *Quality Trailer*. The motion itself reflects that as the majority of the motion is devoted to issues not raised in the JNOV motion that relate to the trial court's order and apparent errors. A goal of prodding the court into a deeper dive into the legal issues present is laudable and worthwhile. That should be encouraged, not discouraged.

After the motion to dismiss and the response were filed, the Supreme Court again addressed this issue. The Court's order dismissing this appeal failed to appropriately apply the ruling in that most recent case. In *Swing v. Swing, supra*, the Supreme Court noted that our courts have struggled with the issue of preventing litigants from improperly filing successive and procedurally improper motions to delay the deadline for appeal, but also with the issue of protecting lawyers who "conscientiously attempt to comply with the preservation requirement that certain issues must be brought to the trial court's attention before an appeal." Swinton Op. No. 28266 (S.C.Sup.Ct filed

March 12, 2025) @ p. 14. The court noted that the issue in these cases is not whether a Rule 59(e) motion somehow runs afoul of a rule of procedure. The court flatly stated that it is not the correct view. Instead, the correct view is under Rule 203(b)(1). That Rule provides in plain language that a "timely" motion stays the time for appeal for all parties. There is no dispute that the Rule 59(e) motion here was timely filed. The court noted that there are two judicially created limited exceptions to this rule. One of those – successive Rule 59(e) motions does not apply here because there were no successive Rule 59(e) motions filed by Appellant. The Court's order of dismissal inappropriately relied upon the remaining narrow judicially created exception – that the Rule 59(e) motion was virtually identical to the JNOV motion. In *Coward Hund*, the Rule 59(e) motion found to be virtually identical was a paste and cut motion. The only changes were to the caption and the relief requested. That is not the case here.

The Court's order dismissing the appeal misconstrued the motion at issue here. There was no cut and paste. However, in a motion to *reconsider,* some repetition is appropriate and expected. The fact that the Appellant strongly believes in the validity of nearly all grounds set out in the JNOV motion and did not wish to waive any, does not render a motion to reconsider improper. Indeed, the majority of the motion was prodding the court to consider the issues deeper and provide the grounds for its reasoning so that any misunderstandings could be dealt with at the trial court level if those grounds were apparent.

The Court's order dismissing the appeal also failed to consider Elam's five factors to consider in addressing this issue. Those issues are developed and set out in the Appellant's Response to the Motion to Dismiss. The Appellant craves reference and incorporates those issues here along with the entirety of the ten-page Response to the Motion to Dismiss. However, Appellant briefly points out those five factors here.

First, the Supreme Court noted that a Rule 59(e) motion is properly considered a motion to reconsider, which includes the re-hashing of all or part of the arguments previously considered.

Second, the Court emphasized the issue preservation. Certainly, issue preservation was a concern expressed in the Rule 59(e) motion that was not addressed in the JNOV motion. While there is no law that would require the trial judge to provide a written explanation, there is law set forth in the motion Rule 59(e) motion that would encourage him to do so. It is certainly appropriate for a party to make that request.

Third, the *Elam* Court addressed two situations in which a party should consider filing a Rule 59(e) motion. One such situation was when a party believed the court had misunderstood and wished for the court to reconsider.

Fourth, the mandatory preservation requirements make it doubly important for litigants generally to be freely allowed to file a first, written Rule 59(e) motion without concern that a later appeal will be deemed untimely.

And fifth, the Elam Court held that the civil procedure rules "should not be written or interpreted to create a trap for the unwary lawyer or party." When a party believes the court has misunderstood, they may file a motion to reconsider.

Each of these five elements apply here. The Court's order of dismissal failed to consider these elements and failed to recognize that there was no virtually identical motion along with the other grounds stated here. For the reasons stated herein and in explained in more detail in the original Response to the Motion to Dismiss, this Court should grant this Petition for Rehearing, find the appeal timely and deny the Motion to Dismiss the Appeal.

(Signature to follow on page 9)

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Columbia, South Carolina

April 23, 2025

The South Carolina Court of Appeals

Bobby Blakney, Respondent,

v.

City of Rock Hill, Appellant.

Appellate Case No. 2025-000032

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

FILED
Jun 26 2025

cc:
David Leon Morrison, Esquire
William Mark White, Esquire
Tyler A. Bathrick, Esquire

The Supreme Court of South Carolina

Bobby Blakney, Respondent,

v.

City of Rock Hill, Petitioner.

Appellate Case No. 2025-001525

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file ten additional copies of the appendix and ten copies of their briefs in the manner provided by Rule 242(i), SCACR.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina
December 16, 2025

cc:
Tyler A. Bathrick
David Leon Morrison
William Mark White
The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge
Civil Action No. 20-CP-46-01803
Appellate Case No. 2025-000032

Bobby Blakney ……..…….., Respondent,

v.

City of Rock Hill …….…., Petitioner.

PROOF OF SERVICE

I certify that I have served Brief of Petitioner and Appendix on Bobby Blakney by depositing a copy of it in the United States Mail, postage prepaid, on February 17, 2026, addressed to his attorney of record, Tyler Bathrick, Post Office Box 670, Rock Hill, South Carolina 29731 and via e-mail on February 17, 2026, at tyler@stewartlawoffices.net.

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