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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No.: 2025-002523

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Charles Shabazz.....Appellant,

v.

Brian Cox..... Respondent.

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**INITIAL BRIEF**

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**BRINGARDNER INJURY LAW FIRM, LLC**

Mark J. Bringardner  
mark@bringardner.com  
Mary K. Linton  
mlinton@bringardner.com  
41 Broad Street  
P.O. Box 100 (29402)  
Charleston, SC 29401  
Office: 843-400-0550  
Facsimile: 843-350-8290

*Attorneys for Appellant Charles Shabazz*

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in denying Appellant's Direct Verdict and Judgment Notwithstanding the Verdict (JNOV) Motions?
- II. Did the Trial Court err in allowing Respondent to adopt a new position at trial that contradicted the judicial admissions contained in his Answer to the Complaint?
- III. Did the Trial Court err in allowing respondent to ambush Appellant at trial by taking a position wholly inconsistent with his responses to interrogatories?
- IV. Did the Trial Court err in allowing respondent to offer testimony and unsupported attorney argument that Appellant contributed to the collision?
- V. Did the Trial Court err in failing to charge the life expectancy table?
- VI. Did the Trial Court err in denying Appellant's Motion for New Trial Based on The Thirteenth Juror Doctrine?
- VII. Did the Trial Court err in denying Appellant's Motion for New Trial *Nisi Additur* or New Trial Absolute?

## STATEMENT OF THE CASE

On March 1, 2024, Appellant Charles Shabazz brought this action alleging negligence against Respondent Brian Cox in connection with a motor vehicle collision. Respondent's Answer conceded that Appellant maintained the absolute right of way. *See*, Complaint. (R. \_\_\_).

Respondent's Answers to Appellant's Interrogatories denied that Appellant caused or contributed to the collision. *See* Def.'s Supp. Ans. to Pl.'s Interrog. No. 30. (R. \_\_\_). Before trial, Respondent provided no evidence and made no contention that Plaintiff was comparatively negligent. Plaintiff conducted discovery and prepared for trial in reliance on Respondent's material representations in discovery. However, fifteen (15) minutes before jury selection began, Respondent's counsel advised – for the first time in over two years – that he would argue and attempt to prove that Appellant was comparatively negligent. Respondent never amended his Answer to Appellant's Complaint and never supplemented his interrogatory responses to give any form of notice of his contention. Respondent never produced any competent evidence to support his contention. Appellant was unfairly prejudiced and deprived of his right to a fair trial because Respondent's responses to discovery, under oath, were rendered meaningless right before trial and the trial court allowed Respondent to proceed with previously concealed allegations of comparative negligence – for which Respondent maintained the burden of proof. Had Respondent's contentions been properly disclosed in discovery, Appellant would have prepared the case much differently for trial. Appellant objected to Respondent's efforts to conduct trial by ambush and also moved for directed verdict at the close of Respondent's case in chief, which was denied. (Tr. 188:5 – 191:15).

On October 28, 2025, Respondent's strategy of trial by ambush proved successful. The jury returned a verdict finding Appellant 45% comparatively negligent and awarded damages in

the total amount of \$45,000. Verdict Form. (R. \_\_\_\_). No competent evidence was provided at trial to support an allocation of fault to Respondent. Appellant filed timely post-trial motions for JNOV, thirteenth juror, and *nisi additur* or new trial absolute, which were denied by Form 4 on November 20, 2025. Form 4. (R. \_\_\_\_).

The Appellant thereafter filed a timely appeal to this Court.

## STATEMENT OF THE FACTS

On March 22, 2023, Appellant was injured in a motor vehicle collision caused by Respondent. Plaintiff was driving south on Rochester Highway/Highway 130 near Seneca, South Carolina. *See* Complaint ¶ 4. (R. \_\_\_\_). At the same time, Respondent was driving east on Mill Road. *Id.* at ¶ 5. (R. \_\_\_\_). At the intersection of Rochester Highway/Highway 130 and Mill Road, Appellant did not have a stop sign. *Id.* at ¶¶ 6, 7. (R. \_\_\_\_). Appellant's Complaint alleged, and Respondent's Answer admitted, that Appellant had the absolute right of way to proceed through the intersection without obstruction. *See generally* Complaint (R. \_\_\_\_); *see also* Answer. (R. \_\_\_\_).

As Appellant approached the intersection of Rochester Highway/Highway 130 and Mill Road, Respondent suddenly pulled out from the stop sign in an attempt to make a left turn, drove into the intersection directly in the path of Appellant's vehicle, and caused the collision. *See* Complaint ¶ 8. (R. \_\_\_\_). More specifically, Appellant alleged that Respondent failed to yield the right of way, failed to keep a proper lookout, and failed to use due care. *Id.* at ¶ 9. (R. \_\_\_\_).

At trial, Respondent admitted Appellant had the right of way. (Tr. 103: 9-10). Respondent admitted that he was required to yield to Appellant. (Tr. 103: 11-13). Respondent admitted that Appellant was not required to stop or yield to Respondent as he maintained the right of way. (Tr. 103: 5-10). Respondent admitted he did not see Appellant. (Tr. 104: 5-8; 110:2; 114: 2-3). Respondent admitted that if he hadn't broken the rules of the road, the collision would not have occurred. (Tr. 110: 23-25). Yet, when asked who was at fault, Respondent's only contention was that it was an accident and both parties were at fault. (Tr. 105: 22-23). Despite this assertion, Respondent offered no evidence to support the conclusion.

## **STANDARD OF REVIEW**

The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id.*

"In an action at law, on appeal of a case tried by a jury, [appellate courts] may only correct errors of law. The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 142 (2010). "Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law." *Austin*, 691 S.E.2d at 149.

## ARGUMENTS

### **I. DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) MOTIONS**

A motion for JNOV is governed by Rule 50(b) of the South Carolina Rules of Civil Procedure. That rule states, in relevant part,

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict.

Rule 50, SCRPC. The same rule further specifies that, “[a] motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.” Rule 50, SCRPC. In ruling on a motion for judgment notwithstanding the verdict, such a motion may be granted “if no reasonable jury could have reached the challenged verdict.” *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). Further, in ruling on a motion for JNOV, a trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

The trial court committed several reversible errors in denying Appellant’s directed verdict and JNOV motions, with each issue addressed in turn:

#### **A. Trial Court Erred in allowing Respondent to Adopt a New Position at Trial that Contradicted the Judicial Admissions Contained in his Answer to the Complaint.**

On March 1, 2024, Appellant initiated the present action. *See* Complaint. (R. \_\_\_\_). On March 24, 2024, Respondent, by and through his counsel, filed an Answer to Appellant’s Summons and Complaint. *See* Answer. (R. \_\_\_\_). In his Answer, Respondent admitted that

Appellant maintained the absolute right of way while travelling southbound on Rochester Highway/Highway 130. *See* Answer, ¶ 2. (R. \_\_\_\_). Despite this, on the morning of trial, approximately fifteen (15) minutes before jury selection, Respondent – for the first time – took a new legal position contrary to his judicial admission. Respondent argued that liability was disputed and that the Appellant was comparatively negligent, without evidence. Respondent was barred from taking a position contrary to his judicial admissions and therefore a new trial is warranted.

Facts admitted in pleadings are conclusive against the pleader for purposes of the action. *Postal v. Mann*, 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992). **A party cannot take a position contradictory to his or her pleadings.** *Postal v. Mann*, 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992); *See also Skull Creek Club Ltd. Partnership v. Cook and Book, Inc.*, 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993) (parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise; the **allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings** and the facts which are taken as true against the pleader for the purpose of the action)(emphasis added).

A “judicial admission,” is a representation that is conclusive in the case such as formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. *Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733 (D.S.C. 2017); *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 347 (4th Cir. 2014). “Under the ‘rule of judicial admission’ a party is bound by the admissions of its pleadings.” *Id.* In *Lucas v. Burnley*, the Fourth Circuit Court of Appeals found that there was a binding judicial admission where the issue was raised in the complaint and admitted in the answer. 879 F.2d 1240,1242 (4th Cir. 1989); *see also Brown v. Sikora & Assocs., Inc.*, 311 Fed. Appx. 568 (4th Cir. 2008) (finding

that admission in amended answer and cross-claim was binding on the party).

In the longstanding case of *Postal v. Mann*, the Court of Appeals reversed a trial judge who allowed a defendant to take a position adverse to that of the admission made in his Answer:

In his complaint, Postal alleged in paragraph 19 that “As a part of the closing on the property, Mann tendered a note to Kinnie in the amount of Eight Thousand (\$8,000.00) Dollars ...” Paragraph 15 of Mann's answer states “Paragraph 19 of the Complaint is admitted.” Further, Mann asserted several defenses to the note in his answer, but never denied its existence. Having failed to amend his answer, Mann was bound by that admission. Accordingly, we hold the trial judge erred in finding the evidence insufficient as to the existence of the note and remand for consideration the terms of the note.

...

Mann's attorney responded he had always assumed the note would reappear, but now felt it did not exist. He added, “If it becomes an issue, I'll ask to amend my answer.” Postal continued to assert the existence of the note was admitted by Mann in the pleading and made a directed verdict motion on the \$8,000 note based on the admission in Mann's answer. There is no indication Mann asked to amend his answer.

308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). Because the defendant did not move to amend his Answer, it was reversible error to allow him to take a position adverse to that of the admissions set forth in his Answer.

Similarly, in *Elrod v. All*, the Supreme Court declared it was reversible error for the plaintiff to take a factual position opposite the one contained in the pleadings:

We consider the pleadings in this case in the light of the general rule, that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. **It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.** *Truesdale v. Jones*, 224 S.C. 237, 78 S.E.2d 274, 71 C.J.S. Pleading § 59a, page 147.

243 S.C. 425, 436-437, 134 S.E.2d 410, 416 (1964) (emphasis added). Testimony to the contrary

was found to have no force and effect as “[t]estimony of all the respondent's witnesses affirms the truth of this admitted allegation of the complaint. Any testimony of Mrs. Bankston contrary to the foregoing admission raises no issue as between appellant and respondent.” *Id.* at 437, 134 S.E.2d at 416–17.

The case of *Truesdale v. Jones*, also bound appellant to the judicial admissions set forth in his Complaint:

It was asserted in the complaint that ‘a petition was submitted to the Council by a majority of the freeholders of the territory it was proposed to annex.’ At the reference, counsel for respondents objected to all testimony tending to show that the petition did not contain the names of the requisite number of freeholders, upon the ground that the fact sought to be proved was not an issue and that appellant was bound by the admission made in his complaint. While agreeing with the position taken by respondents' counsel, the Referee felt that he was required to take the testimony, although he regarded it as inadmissible. In his report, the Referee concluded (1) that in view of the admission made in the complaint, appellant was precluded from raising the question that the petition was not signed by the requisite number of freeholders, and (2) that under the case of *Harrell v. City of Columbia*, 216 S.C. 346, 58 S.E.2d 91, since there were no charges or evidence of fraud, accident or mistake, the certificate of the Town Council was not open to question.

**We think the court below properly held that appellant was judicially bound by the admission made in his complaint, which he never made any effort to withdraw**, and that such admission was conclusive of the fact that a majority of the freeholders signed the petition.

224 S.C. 237, 241, 78 S.E.2d 274, 276 (1953)(emphasis added). In *Truesdale*, the Referee concluded that any evidence contrary to the position taken in appellant’s Complaint was inadmissible as the appellant was bound by the factual admissions contained in their filed pleading. *Id.* Such a situation is identical in the present case.

In the present case, Appellant’s Complaint asserted that, on March 22, 2023, Appellant was travelling southbound on Rochester Highway/Highway 130 and maintained the absolute right of way to proceed through the intersection of Mill Road without obstruction:

4. On or about March 22, 2023, Plaintiff was driving a vehicle traveling south bound on Rochester Highway/Highway 130 near Seneca, South Carolina.
5. At the same time, Defendant Brian Cox was driving a vehicle traveling east bound on Mill Road.
6. A stop sign governs traffic on Mill Road at the intersection with Rochester Highway/Highway 130.
7. South bound traffic on Rochester Highway/Highway 130 does not have a stop sign and has the absolute right of way to proceed through the intersection without obstruction.

See Complaint ¶ 7. (R. \_\_\_\_). In response, Respondent unequivocally **admitted**, in his filed Answer, that Appellant was travelling southbound on Rochester Highway/Highway 130 and maintained the absolute right of way to proceed through the intersection free of obstruction:

2. Defendant admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6 and 7.

See Answer ¶ 2. (R. \_\_\_\_).

During the two (2) years of litigation, Respondent made no effort to retract, amend, strike, or modify his Answer. Because Respondent made no effort to amend his Answer, he was barred from ambushing Appellant at trial by reversing admissions contained in his Answer and was therefore barred from asserting comparative negligence. To hold otherwise, unfairly prejudices the Appellant because Appellant's discovery and trial preparation were informed by Respondent's judicial admissions and the facts in evidence. Most notably, Appellant would have called additional fact witnesses such as the responding officer or Respondent's wife (who was a passenger in Respondent's vehicle but not disclosed as a witness in responses to interrogatories) to rebut such contentions.<sup>1</sup> See Def.'s Supp. Ans. to Pl.'s Interrog. No. 1. (R. \_\_\_\_). However,

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<sup>1</sup> Respondent's discovery responses omitted that Respondent's wife was a passenger. But for Respondent's deposition testimony, this key fact witness would not have been disclosed. Dep. of Brian Cox, p. 21:24 – 22:1. (R. \_\_\_\_). However, based on Respondent's abandonment of comparative negligence, Appellant did not call this witness at trial.

because Respondent's judicial admissions (and discovery responses, discussed *infra*) abandoned the affirmative defense of comparative negligence, which was not accompanied by any factual allegations as required, and Appellant proceeded to prepare for a trial concerning damages.

At trial, Respondent admitted Appellant had the right of way. (Tr. 103: 9-10). Respondent admitted that he was required to yield to Appellant. (Tr. 103: 11-13). Respondent admitted that Appellant was not required to stop or yield to Respondent as he maintained the right of way. (Tr. 103: 5-10). Respondent admitted he did not see Appellant. (Tr. 104: 5-8; 110:2; 114: 2-3). Respondent admitted that if he hadn't broken the rules of the road, the collision would not have occurred. (Tr. 110: 23-25). Yet, when asked who was at fault, Respondent's only contention was that it was an accident and both parties were at fault. (Tr. 105: 22-23). Despite this assertion, Respondent offered no evidence to support the conclusion, one in which he bears the burden of proof.

It is well established that the burden of proving an affirmative defense rests on the party asserting it. *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 223, 865 S.E.2d 910, 915 (Ct. App. 2021). The record is replete with admissions of fault by Respondent, yet it is devoid of evidence to support a finding of comparative fault, a finding which must be proved by Respondent. Rather, the stark change in Respondent's position was only meant to serve as a trial by ambush strategy and was not founded on any evidence whatsoever. As such, allowing the question of comparative negligence, over numerous objections of Appellant on directed verdict, with respect to the verdict form, and on JNOV, constitutes reversible error and warrants a new trial. (Tr. 190: 3-15; 203: 21 – 204: 1).

**B. The Trial Court Erred in Allowing Respondent to Ambush Appellant at Trial by Taking a Position Wholly Inconsistent with His Responses to Interrogatories.**

Respondent's interrogatory responses – answered under oath in accordance with Rule 33, SCRCP – expressly made no contention that Appellant caused or contributed to the subject collision. *See* Def.'s Supp. Ans. to Pl.'s Interrog. No. 30. (R. \_\_\_\_).

Despite numerous supplemental interrogatory responses, Respondent's contention never changed. Only until fifteen (15) minutes before jury selection did counsel for Respondent verbally advise Appellant and the Court of his new allegations, for which he bears the burden of proof. *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 223, 865 S.E.2d 910, 915 (Ct. App. 2021).

Rule 26(e), SCRCP places a duty on the parties to promptly supplement discovery:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except that requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party.

When a party fails to properly supplement their discovery, in accordance with the duties set forth in the South Carolina Rules of Civil Procedure, such evidence should be excluded from trial in accordance with Rule 37(b)(2). The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. *See State Hwy. Dep't v. Booker*, 260 S.C. 245, 195 S.E.2d 615 (1973); *Hodge v. Myers*, 255 S.C. 542, 180 S.E.2d 203 (1971). "The rights of discovery articulated by the rules give the attorney the means to prepare for trial. Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed." *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003); *see also, Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct.App.1987).

The entire thrust of the discovery rules involves full and fair disclosure to prevent a trial from becoming a guessing game or one of surprise for either party. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). Essentially, rights of discovery provided by rules give the trial lawyer the means to prepare for trial, and when those rights are not accorded, prejudice must be presumed. *Id.*

In *Samples v. Mitchell*, the Court of Appeals found the trial court's lenient sanction for a discovery violation by the defendant during trial was an abuse of discretion. 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). The defendant failed to disclose the existence of surveillance footage of the plaintiff and the trial court refused to exclude the surveillance from evidence. Instead, the trial court simply limited the testimony of the investigator. *Id.* In reversing the decision, the Court of Appeals found it was an abuse of discretion to afford such an inadequate remedy in the wake of flagrant discovery abuse:

Few litigants would reveal the existence of video surveillance evidence if the alternative were simply having the testimony of the investigator who filmed the video limited at trial.

In summary, in failing to exercise discretion, the trial judge abused that discretion. Furthermore, the sanction he imposed was not meaningful enough to protect the rights of discovery provided by the Rules.

*Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997).

In elaborating on discovery abuse in *Downey v. Dixon*, Chief Judge Sanders eloquently stated:

The rights of discovery provided by the Rules were not protected in any way. Neither was Ms. Downey accorded the rights of discovery provided by the Rules, nor was the sanction imposed against Mr. Dixon a meaningful deterrent to those who might fail to submit to discovery in the future. (It is perfectly obvious that few, if any, litigants would willingly submit to the discovery provided by the Rules if the alternative were simply paying \$50.). Indeed, it can be argued that the sanction imposed in the instant case tended to encourage, rather than discourage, noncompliance with the Rules.

294 S.C. 42, 45-46 n.2, 362 S.E.2d 317, 318 n. 2 (Ct. App. 1987).

The same is true in this case. Respondent's interrogatory responses expressly denied any contention that Appellant caused or contributed to the collision.

<p>30. If you contend that actions or non-actions of Plaintiff, another defendant, or some other person or legal entity other than you is, in whole or in part, liable to Plaintiff or responsible for causing or contributing to the incident and/or the injuries and damages being claimed by Plaintiff, please provide the following:</p> <ul style="list-style-type: none"><li>a. Identify the person or entity whom you claim is liable or responsible.</li><li>b. Identify the person or entity whom you claim is liable or responsible and state a summary of the facts and circumstances which support the contention, including, but not limited to, a description of each action or non-action on the part of the Plaintiff that caused or contributed to the incident and/or injuries and damages being claimed by Plaintiff;</li><li>c. The names, addresses, and telephone numbers of each person who supports, refutes, and/or has knowledge of that contention;</li><li>d. Identify each statute, regulation, ordinance, industry custom, practice or standard of care which you believe someone other than you violated and describe with specificity how the violation relates to that contention; and</li><li>e. A list of all documents which support, refute, and/or relate to that contention.</li></ul> <p><b><u>ANSWER:</u> Defendant does not make this contention.</b></p>
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See Def.'s Supp. Ans. to Pl.'s Interrog. No. 30. (R. \_\_\_\_).

During the two (2) years this of litigation, Respondent supplemented his initial interrogatory responses twice and never amended his responses relevant here. For example, Respondent amended his response to Interrogatory 31 below concerning his affirmative defenses:

31. Identify each denial of a material allegation and each special or affirmative defense in your pleadings and for each:
- a. state all facts upon which you base the denial or special or affirmative defenses;
  - b. state the names, addresses, and telephone numbers of all persons who have knowledge of those facts; and
  - c. identify all documents and other tangible things that support your denial or special or affirmative defense, and state the name, address and telephone number of the person who has each document.

**ANSWER: Objection. Defendant objects to this Interrogatory as it seeks an attorney's mental impressions and trial strategy. Subject to and without waiving these objections, discovery is ongoing and Defendant will supplement this response as additional information is obtained.**

**SUPPLEMENTAL ANSWER: Defendant states he relies upon the police report, Plaintiff's complaint, and privileged conversations with their counsel at Clarkson, Walsh, and Coulter.**

*See* Def.'s Second Supp. Ans. to Pl.'s Interrog. No. 31. (R. \_\_\_\_). Notably, both the police report and the Complaint showed Respondent to be the sole contributing party. *See* Complaint. (R. \_\_\_\_). *See also* Traffic Collision Report. (R. \_\_\_\_). Respondent cannot shield and conceal testimony or other evidence relative to an affirmative defense by invoking privilege, then turn around and use the same as a sword at trial against Appellant. *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 177, 829 S.E.2d 707, 717 (2019).

Respondent was clearly aware of his duty to supplement as evidenced by the numerous supplements. Respondent could have moved to withdraw, supplement or otherwise amend his discovery response to assert that the Appellant did not, in fact, maintain the absolute right of way or offer evidence as to why Appellant was allegedly comparatively negligent. But these contention interrogatory responses were never supplemented. With these responses, Respondent affirmatively abandoned his comparative negligence affirmative defense. Appellant was entitled to rely on that

abandonment. If not, interrogatory responses would have no value in civil litigation.

Worse, during closing argument, counsel for Respondent urged the jury to disregard the interrogatory responses. (Tr. 228: 11-16). Counsel claimed that he prepared the interrogatory responses so the jury should not hold them against the Respondent. (Tr. 228: 11-16). That was improper. Discovery responses and pleadings are binding upon the Respondent and were relied upon by Appellant. Moreover, this is not a minor clerical error – this is a material reversal of allegations and contentions that Respondent used to ambush Appellant at trial resulting in the jury finding 45% comparative fault on Appellant. If Respondent intended to rely on the affirmative defense of comparative negligence, he should have amended his interrogatory responses (and Answer) to conform to such. If the Rules of Civil Procedure had been followed by Respondent, Appellant would have prepared the necessary evidence and witnesses to rebut the affirmative defense of comparative negligence, such as deposing Respondent’s wife, the investigating police officer, any eyewitnesses, and potentially retaining an accident reconstruction expert witness, and calling all of those witnesses at trial. But there was no point in spending the time, money, and effort to do those things given that Respondent made no contention that Appellant contributed to the collision until trial. Respondents should not benefit from surprise and concealment. If responses to interrogatories are not binding, they have no utility. Appellant should not be punished for relying on Respondent’s material representations, subject to penalty of perjury, in preparing for and conducting trial.

Discovery responses are required to be prepared by the Respondent under oath. The party to whom they are meant for is entitled to rely on the positions set forth therein. The Court, over Appellant’s objection, discarded the importance of the discovery responses and admissions contained therein and, as a result, committed reversible error. (Tr. 191: 3-10). To hold otherwise

goes against the very principles of discovery and encourages trial by ambush. For this reason, a new trial must be granted.

**C. The Trial Court Erred in Allowing Respondent to Offer Testimony and Unsupported Attorney Argument That Appellant Contributed to the Collision.**

South Carolina courts have overwhelmingly held that, in collisions analogous to this, Respondent is barred as a matter of law from asserting comparative negligence.

A motorist approaching a stop sign must bring his vehicle to a stop and yield the right of way to vehicles on the intersecting roadway that constitute an immediate hazard. S.C. Code Ann. § 56–5–2330(b). The driver must not only stop but must look for traffic approaching on the through highway. *Blanding v. Hammell*, 267 S.C. 352, 228 S.E.2d 271 (1976); *Lawter v. War Emergency Coop. Ass'n*, 213 S.C. 286, 49 S.E.2d 227 (1948). His duty is not merely to look but to observe; he must look in such an intelligent and careful manner as to enable him to see what a person exercising ordinary care and caution could see under like circumstances. *Id.*

In *Odom v. Steigerwald*, the Supreme Court reversed the trial court's denial of a directed verdict motion when the plaintiff was t-boned by a driver who pulled out from a stop sign into her path of travel. 260 S.C. 422, 196 S.E.2d 635 (1973).

In the trial of this case, there were initially two issues to be determined: First, was young Steigerwald negligent? And, if so, secondly, was that negligence a proximate cause of injury to the plaintiff? These two questions should have been answered in the affirmative as a matter of law. It then became necessary to determine: Was the plaintiff negligent? If the plaintiff was not negligent, there could, of course, be no contributory negligence. Even if it was determined that the plaintiff was negligent, there was still one additional question to be answered before the plaintiff would be barred of recovery, and that question was: Did plaintiff's negligence contribute as a proximate cause?

As indicated hereinabove, as a matter of law, we think that young Steigerwald was at least negligent and that his improper driving conduct was a proximate cause of the collision.

Assuming, without so deciding, that the plaintiff was driving at an excessive rate of speed and was negligent, we think, as a matter of law, that such was not a

contributing proximate cause. The real cause, the more immediate and efficient cause, was the improper driving conduct of young Steigerwald. By driving his car directly into the path of plaintiff's vehicle when plaintiff was obviously so close to the intersection, young Steigerwald created a trap from which plaintiff could not escape.

The lower court should have granted the motion for a directed verdict on the issue of liability and submitted to the jury the question of damages. In failing to grant the motion for a directed verdict, and in failing to grant the motion for a new trial, we think he erred.

*Odom v. Steigerwald*, 260 S.C. 422, 427–28, 196 S.E.2d 635, 638 (1973).

In *Crosby v. Sawyer*, the Supreme Court again reversed the trial court's denial of his directed verdict motion as to liability in facts directly synonymous with the present case:

A stop sign is located on Glenn Street at its intersection with Middleton Street in Cayce, South Carolina. Sawyer's automobile pulled off of Glenn Street into Middleton Street and struck Crosby's truck broadside. Sawyer testified she stopped at the intersection and pulled out only after she looked both ways and saw no vehicles approaching on Middleton Street.

A motorist approaching a stop sign must bring his vehicle to a stop and yield the right of way to vehicles on the intersecting roadway that constitute an immediate hazard. S.C. Code Ann. § 56–5–2330(b) (Supp.1985). The driver must not only stop but must look for traffic approaching on the through highway. *Blanding v. Hammell*, 267 S.C. 352, 228 S.E.2d 271 (1976); *Lawter v. War Emergency Coop. Ass'n*, 213 S.C. 286, 49 S.E.2d 227 (1948). His duty is not merely to look but to observe; he must look in such an intelligent and careful manner as to enable him to see what a person exercising ordinary care and caution could see under like circumstances. *Lawter, supra*. Negligence is established as a matter of law if the only inference is that either the driver did not look or did so in such a careless fashion as not to see what was in plain view. *Williams v. Davis*, 243 S.C. 524, 134 S.E.2d 760 (1964).

291 S.C. 474,475–76, 354 S.E.2d 387, 387–388 (1987).

There is no evidence that Crosby was traveling at an excessive rate of speed as he approached the intersection. The fact that Sawyer struck Crosby broadside in the absence of any evidence that her view was obstructed leaves only the inference that if she did look it must have been in such a careless fashion as not to see what was in plain view. Crosby therefore established Sawyer's negligence as a matter of law and his motion for a directed verdict should have been granted.

291 S.C. 474,476, 354 S.E.2d 387, 388 (1987).

In the present case, it is undisputed that Respondent admitted Appellant maintained the right of way. (Tr. 103: 9-10). It is undisputed that Respondent was required to yield to Appellant. (Tr. 103: 11-13). It is undisputed that Respondent did not see the Appellant, despite pulling out into Appellant's lane of travel. (Tr. 104: 5-8; 110:2; 114: 2-3). Necessarily, Respondent cannot, and did not, opine as to the speed at which the Appellant was travelling prior to the collision because he admits he did not see him. *Id.* There is no evidence that Appellant was traveling at an excessive rate of speed as he approached the intersection. Because the Respondent offered no evidence of fault on the part of the Appellant, he was barred from asserting comparative negligence, an affirmative defense in which he bears the burden of proving. The record is devoid of any objective evidence to conclude otherwise. Respondent and his counsel cannot ask the jury to speculate and render a verdict without any competent evidence. As is consistent with South Carolina case law, because no reasonable jury could have reached this verdict, it must be set aside.

**D. The Trial Court Erred in Failing to Charge the Life Expectancy Table.**

The Court erred in failing to charge the life expectancy table as codified in S.C. Code Ann. § 19-1-150. Longstanding caselaw requires the trial judge to charge the life expectancy table if plaintiff sets forth “some evidence” of permanent injury. *Gethers v. Bailey*, 306 S.C. 179, 410 S.E.2d 586 (Ct. App. 1991).

A trial judge may properly charge the life expectancy tables to the jury in a personal injury action when there is evidence of “permanent injury.” *Gethers v. Bailey*, 306 S.C. 179, 410 S.E.2d 586 (Ct. App.1991); *cf. Hall v. Palmetto Enterprises II, Inc.*, 282 S.C. 87, 317 S.E.2d 140 (Ct. App.1984) (case wherein there was no expert medical testimony and the court held the jury could infer that the injury was permanent). *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 288, 428 S.E.2d 737, 739 (Ct. App. 1993).

In *Gethers v. Bailey*, the plaintiff injured her foot when Defendant ran a stop sign. 306 S.C.

179, 410 S.E.2d 586 (Ct. App.1991). During trial, the plaintiff testified about her injury and the treatment received. *Id.* She testified that she was still having pain two-and-a-half-years post collision. *Id.* Importantly, plaintiff’s physician indicated it was uncommon for individuals with the type of injury suffered by plaintiff to have complaints two years after the injury. *Id.* at 181, 410 S.E.2d at 587. However, the physician could not say with a reasonable degree of medical certainty that plaintiff either would or would not have a complete recovery with no more pain in her foot. *Id.* In reversing the trial court, the Court of Appeals found that “[s]ince there was some evidence of a permanent injury the trial court erred in failing to charge the life expectancy tables.” *Id.* at 182, 410 S.E.2d at 588.

In the present case, Appellant testified that his left wrist still suffered from a painful popping sensation in the two-and-half-years since the collision. Appellant’s friends, family, and employer confirmed the same. Appellant’s treatment provider, Dr. Tenley Murphy – a medical expert qualified in the area of orthopaedics – testified as follows:

**Q.** To a reasonable degree of medical certainty, was the edema caused by the crash?

**A.** Yes.

**Q.** And how do you know that?

**A.** The timing and the amount of edema are consistent with where he would be in the recovery of his injury.

**Q.** And was the edema consistent with the type of pain Charles was describing?

**A.** Yes.

...

**Q.** Dr. Murphy, can edema last long-term?

**A.** If there's continued irritation to the ligament, yes.

**Q.** And how can there be continued irritation? Could you give me an example?

**A.** Painful movements.

**Q.** Can edema cause long-term pain if it doesn't heal?

**A.** Yes.

**Q.** Can edema be permanent?

**A.** Yes.

**Q.** Why?

**A.** Your body's response to the injury at that location.

Dep. of Tenley Murphy, MD, p. 13: 14-23; 14: 10-23. (R. \_\_\_\_).

The charge of the life expectancy table does not require certainty that the injury is permanent. Rather, the inquiry is whether the Appellant has set forth “some” evidence from which a reasonable inference could be drawn that a person suffered a permanent injury. In the present case, Appellant testified about the continued pain. (Tr. 138: 18-20). Appellant’s treatment provider testified that such pain could be permanent. Dep. of Tenley Murphy, MD, p. 13: 14-23; 14: 10-23. (R. \_\_\_\_). The Court even charged future damages to the jury. (Tr. 260:21 – 262:15). It would necessarily follow that this combined testimony could lead a jury to reasonably infer the permanence of the injury thereby necessitating a charge as to the life expectancy table.

At trial and over Appellant’s objection, the Court denied charging the life expectancy table finding that the permanency must be found to a reasonable degree of medical certainty. (Tr. 199: 23 – 200: 20). Such a finding is inconsistent with South Carolina law. Appellant suffered prejudice in the Court’s failure to charge the life expectancy table given the longstanding history of pain caused by the collision and the substantial likelihood of its permanency. As such, the jury’s verdict must be set aside.

## **II. The Trial Court Erred in Denying Appellant’s Motion for New Trial Based on The Thirteenth Juror Doctrine.**

“Under the ‘thirteenth juror’ doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts.” *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996). It is well settled in this state that “the trial judge has the authority and responsibility to grant a new trial when, in his judgment, the verdict of the jury is contrary to the fair preponderance of the evidence.” *Adams v. Duffie*, 244 S.C. 365, 366, 137 S.E.2d 276, 276 (1964). A motion for new trial is properly granted where the trial judge is simply “not satisfied with the justice of the case

and feel[s] that it should be tried before another jury.” *Id.* Whether to grant the motion “rests within the discretion of the trial judge” and “will not be disturbed [on appeal] unless his finding is wholly unsupported by the evidence, or the conclusion reached has been controlled by error of law.” *S.C. Dep’t of Highways & Pub. Transp. v. Mooneyham*, 275 S.C. 205, 206, 269 S.E.2d 329, 330. For the trial judge’s finding to be supported by the evidence, it is only necessary that the moving party put forth evidence at trial that would support a verdict in the moving party’s favor, even if that evidence is in conflict with other evidence. *Id.* Such discretion is “founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge’s view of them.” *Vinson*, 324 S.C. at 404, 477 S.E.2d at 723 (quoting *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950)). “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.” *Vinson*, 324 S.C. at 403, 477 S.E.2d at 722.

“Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge’s finding that justice has not prevailed.” *Id.* (citing *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993)). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury’s confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983) (reversing the denial of a motion for new trial where “the record [was] replete with evidence the jury was confused”); *see also Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under “thirteenth juror doctrine,” trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).

“The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict.” *Vinson*, 324 S.C. at 403, 477 S.E.2d

at 722. “The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror ‘hangs’ the jury.” *Id.* For this reason, the trial judge is not required to give specific factual reasons for granting the motion for new trial. *Id.* (citing *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990)). Just as a juror would not be required to give justification for his or her findings, the trial court, sitting in its role as thirteenth juror, is required only to find that the evidence supported the side of the moving party to justify its grant of a new trial. *Id.*

In the current matter, Appellant presented significant evidence in support of liability and damages. Appellant presented evidence that Respondent admitted that Appellant maintained the absolute right of way to proceed in his lane of travel without obstruction (Tr. 103: 9-10); that Respondent made no legal contention that Appellant contributed in any manner to the subject collision (*See* Def.’s Supp. Ans. to Pl.’s Interrog. No. 30. (R. \_\_\_).); and that Respondent breached the standard of care by, among other things, failing to yield the right of way to Appellant in violation of S.C. Code Ann. § 56-5-2320. Other than his personal opinion, which directly contradicts the legal contentions set forth in Respondent’s Answer and discovery responses, Respondent offered no evidence to conclude Appellant was in any manner liable for the subject collision. Respondent did not even see the Appellant prior to the collision and therefore offered no evidence that Appellant violated any duties or acted negligent in any manner. (Tr. 104: 5-8; 110:2; 114: 2-3). The jury’s award of 45% comparative negligence on the part of the Appellant is contrary to the fair preponderance of the evidence and therefore a new trial must be granted. *See* Verdict Form. (R. \_\_\_).

With respect to damages, Appellant produced numerous witnesses to testify about the ongoing pain and struggles related to Appellant’s left wrist injury caused by the subject collision. Appellant’s treatment provider and orthopaedics expert testified that the injury was caused by the

collision and could be permanent. Dep. of Tenley Murphy, MD, p. 13: 14-23; 14: 10-23. (R. \_\_\_\_). Appellant's partner, mother, and grandfather testified about the struggles the subject collision has caused the Appellant (Tr. 98: 98-15; 184: 14-20; 121:21 – 122:19); the loss of his residence (Tr. 122: 9-17); the loss of his career (Tr. 128: 11-19); the loss of his ability to play basketball (Tr. 141: 15-24); and the loss of his ability to work pain free (Tr. 140:7 – 141: 12). Appellant's current employer testified about Appellant's struggles at work caused by the collision. (Tr. 174: 6 – 175: 12). Appellant even offered his friend to testify about how the collision has impeded his performance with basketball. (Tr. 170: 3-22). Such evidence presented throughout the course of the trial does not support the verdict. For this reason, the Court erred in its denial.

### **III. The Trial Court Erred in Denying Appellant's Motion for New Trial *Nisi Additur* or New Trial Absolute.**

“The practice of using *additur* is said to be in the interest of sound administration of justice, since it avoids the necessity of a new trial with its accompanying expense and delay.” *Waring v. Johnson*, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000). Absent an abuse of discretion, the trial court's grant of a motion for new trial *nisi additur* will not be reversed on appeal. *Id.*

A New Trial *Nisi Additur* may be ordered when the verdict is merely insufficient based on the evidence. *Id.* If the trial court, which had the opportunity to view the evidence as it was presented at trial, finds that the verdict did not adequately compensate Plaintiff for his injuries, the trial court may offer the Defendant a choice of either accepting an increased verdict amount or a new trial. The additur suggests an appropriate settlement amount. *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723 (Ct. App. 1996). This power was first approved in *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984) and has been repeatedly reaffirmed:

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

293 S.C. 490, 361 S.E.2d 775 (Ct.App.1987). The consideration of a motion for a new trial *nisi additur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct.App.1995). The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Accordingly, great deference is given to the trial judge. *Id.*

...

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). Therefore, on appeal of the denial of a motion for a new trial *nisi*, this Court will reverse when the verdict is grossly inadequate or excessive requiring the granting of a new trial absolute. *O'Neal*, *supra*.

*Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 724 (Ct. App. 1996).

The discretion of trial courts to grant *additur* under similar circumstances has been upheld. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). In *Graham*, the trial court ordered a new trial *nisi additur* of several times the jury verdict, increasing actual damages from \$10,000 to \$67,500. In finding no abuse of discretion in the trial judge's order, the Court noted "it cannot seriously be argued that plaintiff herein was adequately compensated or even nearly so, for the injuries she sustained." *Id.* at 405.

In *Waring v. Johnson*, the Court of Appeals affirmed the trial court's grant of a new trial *nisi additur*, noting "[t]he jury failed to consider Waring's pain and suffering in reaching its verdict." 341 S.C. 248, 260, 533 S.E.2d 906, 913 (Ct. App. 2000). The trial court granted Plaintiff's motion for new trial *nisi additur* and awarded nearly double what the jury awarded to adequately compensate Plaintiff for pain and suffering. The Court of Appeals noted that Waring "visited

numerous doctors for years after the accident," "underwent surgery for a condition... aggravated by the wreck," and "found herself unable to continue her previous active lifestyle." *Id.* The court ultimately concluded, "indubitably, Waring is entitled to an award for pain and suffering." *Id.*

In the instant case, Appellant introduced into evidence medical bills totaling \$19,851.31. (Tr. 139: 14-19). Appellant testified about visiting numerous doctors in the six (6) months that followed the subject collision, seeking relief from varying degrees of pain and discomfort. (Tr. 133:18 – 134: 14). He underwent painful physical therapy and complied with the treatment plan. *Id.* Appellant testified that the left wrist injury caused by the subject collision still causes him pain in his everyday life. (Tr. 138: 13-20). Appellant will most likely suffer pain for the remainder of his life as a result of the subject collision. In addition to the pain Appellant has and will continue to suffer from, Appellant and numerous witnesses presented evidence that this collision uprooted his independence, altered his previous active lifestyle playing basketball, led to difficulties holding his daughter, and increased the difficulty in performing his job duties at work.

Prior to the subject collision, Appellant testified that he had not suffered from left wrist pain and that he only had problems with his wrist because of the collision. (Tr. 129: 2-8). Appellant's partner, mother, and grandfather corroborated this and discussed the years of pain and problems that Appellant has had, and continues to have, with his left wrist at home, at work, and in his leisure activities. Appellant's family gave emotionally compelling testimony as to the noneconomic damages suffered by him.

The Court's charge to the jury required the jury to compensate Appellant for all elements of actual damages related to the collision, including future damages. Clearly, Appellant suffered damages not only including the medical expenses incurred but also emotional and physical pain and suffering past, present, and future. The jury's verdict did not compensate him adequately for

those damages and therefore the Trial Court erred in denying Appellant's Motion.

### CONCLUSION

Based on the foregoing discussion and analysis, the Appellant respectfully requests that the Court reverse the orders issued by Circuit Court Judge denying the Appellant's motions for directed verdict, JNOV, thirteenth juror, and new trial absolute, or alternatively, for a new trial absolute.

Respectfully Submitted,

### BRINGARDNER INJURY LAW FIRM, LLC

*s/Mary K. Linton*

Mark J. Bringardner (SC Bar No.: 102465)

[mark@bringardner.com](mailto:mark@bringardner.com)

Mary K. Linton (SC Bar No.: 102815)

[mlinton@bringardner.com](mailto:mlinton@bringardner.com)

41 Broad Street

P.O. Box 100 (29402)

Charleston, SC 29401

Office: 843-400-0550

Facsimile: 843-350-8290

*Attorneys for Appellant Charles Shabazz*

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Charleston, South Carolina