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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No.: 2026-000050

Dianne Cromwell as the Guardian Ad Litem for AY,
a minor under the age of Fourteen, ... Appellant,

v.

The Oaks Horizontal Property Regime, Inc., and
Diamond Management, Inc., ... Respondents.

BRIEF OF APPELLANT

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INTRODUCTION

This case asks a simple question: when a jury returns a verdict for the defense, and the only evidence on the central factual dispute is unimpeached testimony pointing against the defendants, what, if anything, supports their side of the scale? The answer here is nothing. And nothing, under South Carolina law, is not enough. Scott Niepmann was bitten on the leg by a dog named Toby in the spring of 2020. Ten minutes later he walked to the management office of The Oaks, a condominium community on Hilton Head Island, and told Marco Sanchez, the onsite superintendent, a man Niepmann saw regularly and considered a friend, exactly what had happened. Niepmann wanted to know if he should be concerned about rabies.

Sanchez looked through his filing cabinet, found no vaccination records on file for the dog, and sent Niepmann to speak with the dog's owners. He wrote nothing down. Niepmann did not testify that he wrote anything down. Sanchez told no one. The dog stayed. Six months later, Toby darted out of his owner's front door and attacked seven-year-old A.Y., who had been playing outside his home a few doors down. A.Y. was knocked down and bitten at least four times, required two trips to the hospital, was pinned down by five people to receive his stitches, developed post-traumatic stress disorder, and has lived with hypertrophic scars and a fear of dogs that continues to this day.

When Appellant Dianne Cromwell brought this action against Respondents The Oaks Horizontal Property Regime, Inc., and its management company, Diamond

Management, Inc., the central factual question was straightforward: did Respondents have notice, before A.Y. was attacked, that Toby had previously bitten a resident in an aggressive manner? Scott Niepmann testified that they did. He told their agent, in their office, directly, in person, within minutes of being bitten. His testimony was unimpeached. It was uncontradicted. Not a single witness was called to dispute it. No prior inconsistent statement was produced. No motive to fabricate was suggested. Niepmann is not a party to this lawsuit and has no financial stake in its outcome.

Respondents nonetheless were able to plant a seed of doubt at the outset of trial. They told the jury during opening statements that Marco Sanchez, Respondent's agent and the one person who could have confirmed or denied Niepmann's account, "will testify" before them, and would tell them he had no "recollection of anyone reporting the Scott Niepmann incident." Respondents challenged the jury to hold them accountable, promising that "everything [we] said here will be supported by evidence that is admitted into this record." Marco Sanchez never testified. During deliberations, the jury sent a note to the circuit court asking whether Sanchez had given a deposition, searching for the testimony they had been promised. There was none. Rather than call their witness, Respondents had planted the substance of Sanchez's supposed denial through opening argument and a single leading question on cross-examination, asking Niepmann whether he would be "surprised to learn that Marco does not recall that conversation." A question is not testimony. An unkept promise is not evidence. The jury was left with Niepmann's account on one side and an evidentiary void on the other.

The jury returned a verdict for the defense.

This Court will now be asked by Respondents to affirm that verdict. Cromwell submits that the thirteenth juror doctrine, correctly applied, does not permit it. The standard of review expresses deference to the circuit court's role as the thirteenth juror: its authority to review a jury's verdict to determine whether it is justified by the evidence. It is not a mechanism by which any verdict, however untethered from the proof, can survive review. Where a party carries its burden of proof with direct, unimpeached testimony from a disinterested witness, and the opposing party responds with no competing, inconsistent evidence whatsoever, the resulting verdict is not the product of a credibility determination. It is the product of a vacuum. And South Carolina law, like the law of every American jurisdiction, does not permit verdicts to be built on nothing.

The arguments that follow demonstrate four grounds for reversal. First, there was no rational basis in the evidentiary record for the jury to decline to credit Niepmann's testimony, and the missing witness who Respondents promised would contradict it only deepens the problem. Second, it was undisputed in this case that notice to Sanchez was, as a matter of agency law, imputed notice to Respondents. Third, Respondents' own corporate representative admitted under oath that the conduct Niepmann described would have triggered their mandatory removal policy, that failure to enforce it after receiving notice "wouldn't have been proper procedure," and that if Sanchez was advised of the incident, the company violated its own rules. Fourth, there is no evidence supporting, or a rational basis for concluding, that

Respondents' conduct did not proximately cause A.Y.'s injuries. A verdict that requires this Court to look away from all of this, the unimpeached testimony, the broken promise, the missing witness, the admitted policy violation, and the entirely foreseeable second attack, is not a verdict the law can sustain.

STATEMENT OF ISSUES ON APPEAL

This case was pled and argued to the jury as a premises liability action seeking damages for Respondents' acts and omissions in failing to remove Toby from The Oaks upon actual notice that he had aggressively bitten Niepmann.

The issues presented are:

1. Actual Notice: Whether the jury's verdict in favor of Respondents on the issue of notice lacks any evidentiary basis, where the only witness with direct knowledge of the prior bite incident testified without contradiction or impeachment that he reported the incident to Respondents.

2. Breach of Standard of Care: Whether the verdict is supportable where Diamond Management's corporate representative admitted that the written policies and procedures of The Oaks required investigation and removal of any dog that exhibited aggressive behavior.

3. Proximate Cause: Whether the jury's verdict in favor of Respondents on the issue of proximate cause lacks any evidentiary basis, and specifically whether the Respondents' foreseeability defense is legally tenable where the evidence established that the same dog had bitten Niepmann on the leg several months prior to A.Y.'s attack, that Respondents had actual, imputed notice of that prior bite, and that Respondents' own written policies were designed to address exactly this risk.

STATEMENT OF THE CASE

This is a civil action for personal injuries sustained by A.Y., then seven years old, when a dog named Toby, owned by residents of a condominium regime administered by Respondents, attacked and bit A.Y. in the common elements of the regime on November 4, 2020. On January 20, 2021, Appellant Dianne Cromwell, A.Y.'s mother, brought this action against Toby's owners, John and Maggie Jolin, alleging negligence in failing to keep Toby under control and away from A.Y. (*See generally* Compl.).

On June 7, 2021, Cromwell added Respondents as defendants to the action, alleging that The Oaks Horizontal Property Regime, Inc. was the owner of the common elements, that Diamond Management, Inc. was an agent of the Oaks and was responsible for property management and enforcement of The Oaks' policies and procedures, that Diamond Management was acting within the course and scope of its agency at the time of the alleged acts and omissions, and that Respondents had breached a duty of care in permitting the Jolins to keep Toby at the Oaks after notice of his aggressive behavior in violation of The Oaks' own policies and procedures, in failing to warn A.Y., and in failing to take precautions to prevent Toby from harming A.Y. or other residents and children, in addition to causes of action for strict liability and violations of the South Carolina Unfair Trade Practices Act. (*See generally* Am. Compl.). In their answer, Respondents admitted to ownership of the common elements and that there was a property management agreement between them but denied having any knowledge of the prior incident. (*See generally* Answer). Respondents also raised lack of notice and lack of foreseeability as affirmative defenses.[1] (*Id.* at ¶¶ 31, 34).

The case was tried before a jury over two days, June 25 and 26, 2025. The jury returned a general verdict in favor of Respondents, finding that they were not negligent or that their negligence was not the proximate cause of A.Y.'s injuries. (Verdict Form; Form 4 Order, June 27, 2025). Cromwell filed a motion for a new trial pursuant to Rule 59, SCRCP on July 5, 2025, arguing that the circuit court was required to grant a new trial under the thirteenth juror doctrine because there was no evidence supporting that Respondents warned of, mitigated, or eliminated the foreseeable risk that Toby would bite someone else in the common elements of The Oaks, there was no evidence controverting Niepmann's unimpeached testimony regarding notice, and there was no evidence controverting the Respondent's internal policy which required the removal of any dog from the property that exhibited any type of aggressive behavior, and would have prevented the serious bites that A.Y. experienced. (Mot. for New Trial; Mem. in Supp. of Mot. for New Trial).

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[1] On December 15, 2023, Cromwell voluntarily dismissed John and Maggie Jolin as parties to the action. (Order, Dec. 15, 2023). On June 19, 2025, Cromwell filed a motion to amend the complaint to remove all causes of action against Respondents with the exception of her negligence claim. (Mot. to Amend, June 19, 2025). The motion was granted by the circuit court prior to the commencement of trial. (Trial Tr. p. 103, lines 22 – 25).

On December 10, 2025, the circuit court denied Cromwell's motion for a new trial. (Order, Dec. 10, 2025). Cromwell filed her notice of appeal on January 8, 2026. (Not. of Appeal).

STANDARD OF REVIEW

"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." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009). A trial court's ruling on a motion for a new trial absolute is reviewed by this Court for abuse of discretion. *Mills v. S.C. State Ports Auth.*, 435 S.C. 213, 230, 865 S.E.2d 910, 918 (Ct. App. 2021). While this standard is deferential, it is not without limits: the denial of a motion for a new trial will be reversed if the trial court's findings "are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

ARGUMENT

Cromwell acknowledges that the burden of proving notice rested with her at trial, and that under a general verdict a jury may find for the defense by concluding that the plaintiff failed to carry that burden. But the burden of proof framework presupposes a rational, evidence grounded basis for doubt. Where a party presents unimpeached, uncontradicted testimony from a disinterested witness on an essential element, and the opposing party offers nothing, no competing account, no impeachment, no circumstantial basis for skepticism, and inexplicably declines to call the one witness who could speak directly to the issue, the jury's refusal to find the element proven is not a legitimate credibility determination. It is an arbitrary rejection of evidence that South Carolina law will not sustain.

Respondents' own evidence is not only entirely consistent with the theory that Sanchez received the notice and failed to act on it, but at best the only inference favorable to Respondents that can be drawn from the evidence is that Diamond Management's owner had no personal knowledge of the Niepmann incident. To the extent that the jury relied on the absence of documentation of the incident in Respondents' records to find that Niepmann's testimony was not credible, no foundation was ever laid by Respondents explaining why the absence of documentation would tend to disprove that notice was given. In other words, without supporting, contradictory circumstantial evidence, "[t]he absence of evidence is not evidence of absence." *In re Bystolic Antitrust Litig.*, 657 F. Supp. 3d 337, 355 (S.D.N.Y. 2023).

I. Statement of facts.

A. The prior bite and notice to Respondents.

Scott Niepmann has lived at The Oaks for approximately thirty-five years. (Trial Tr. p. 288, lines 2 – 4). In early May 2020, Niepmann was walking on the sidewalk in front of The Oaks when he encountered one of the Jolins' sons walking Toby. (*Id.* at p. 125, line 24 – p. 126, line 6; p. 137, lines 3 – 17). Niepmann testified that Toby "always barks, he always just acts aggressive towards people." (*Id.* at p. 279, lines 3 – 4). The dog lunged at Niepmann, was pulled back, lunged again, and then bit him on the leg, tearing a hole in his pants and leaving a puncture wound just above the left knee. (*Id.* at p. 279, lines 4 – 19; p. 137, line 3 – p. 139, line 18; Pl.'s Ex. 5A).

Niepmann's response was immediate. "I actually walked down to the office," he testified, where he regularly socialized with Marco Sanchez, The Oaks' onsite superintendent, and a mutual friend, and "told him what happened." (Trial Tr. p. 279, line 22 – p. 280, line 3; p. 286, line 16 – p. 287, line 5). This occurred ten minutes after he was bitten by Toby. (*Id.* at p. 284, lines 16 – 19). Niepmann did not want anything to happen to the dog, but he did want to make sure that it was current on its rabies vaccination. (*Id.* at p. 283, lines 12 – 15). In response, Sanchez looked through the filing cabinet for the dog's vaccination records but did not find any. (*Id.* at p. 280, lines 3 – 5; p. 285, lines 12 – 19). Maggie Jolin has corroborated that Toby's vaccination records were not on file with Respondents at that time. (*Id.* at p. 261, line 2 – p. 265, line 24).

Sanchez then directed Niepmann to go speak with the dog's owners. (*Id.* at p. 285, lines 17 – 19). Niepmann saw the Jolins several days later, and when he informed them that he had been bitten by Toby and asked if Toby had his rabies shot, John Jolin denied that it had happened and suggested that Niepmann contact law enforcement. (*Id.* at p. 280, line 22 – p. 281, line 3). Sanchez took no further action. No written report was made, no incident file was created, and nothing was escalated to Diamond Management's main office or to The Oaks' board. (*Id.* at p. 323, lines 11 – 17).

On cross-examination, defense counsel asked Niepmann: "Would you be surprised to learn that Marco does not recall that conversation?" Niepmann responded, simply and without hesitation: "Yeah, I would." (*Id.* at p. 290, lines 16 – 18). No inconsistency was elicited on cross-examination. No motive to fabricate was suggested. Niepmann's testimony was fully consistent with the testimony of Maggie Jolin and a written statement he gave on November 13, 2020, after A.Y. was bitten. (*Id.* at p. 293, line 21 – p. 294, line 19). Sanchez was not called to testify at trial.

Beaufort County Animal Services Officer A.J. Montgomery responded to the May 2020 incident after being contacted by Niepmann, as suggested by John Jolin. He interviewed Niepmann, photographed the puncture wound, and spoke with the Jolins. (*Id.* at p. 123, line 4 – p. 125, line 22; Pl.'s Ex. 5A). Because Niepmann stated he did not want to pursue the matter further and wanted only to confirm the dog's rabies vaccination, Montgomery gave the Jolins a verbal warning, stating that if it happened again charges would be filed. (Trial Tr. p. 125, lines 7 – 14). In the following days, Maggie Jolin acquired the vaccination records from her veterinarian, gave a copy to Montgomery, and placed a copy in an inbox in The Oaks' office for Sanchez. (*Id.* at p. 261, line 2 – p. 265, line 24). She spoke to Sanchez about the vaccination records, but she could not recall at trial the specifics of the conversation. (*Id.*).

B. The November 4, 2020 attack on A.Y.

On November 4, 2020, A.Y., then seven years old, was playing outside his home at The Oaks when John Jolin, walking his other dog Milka, inadvertently allowed Toby to dart out through the front door unleashed. (Trial Tr. p. 127, line 23 – p. 129, line 10; p. 347, line 15 – p. 348, line 16). Toby ran between parked cars and attacked A.Y., knocking him down and biting him on the foot, the side, and the back of the leg. (*Id.* at p. 147, lines 8 – 23; p. 150, line 16 – p. 153, line 12; Pl.'s Ex. 5A). The attack was captured on the property's surveillance cameras. (Def.'s Ex. 3; Trial Tr. p. 128, line 1 – p. 129, line 10).

Dianne Cromwell, A.Y.'s mother, was at a nearby Publix grocery store when she received a phone call and returned home to find her son bleeding. (*Id.* at p. 147, lines 8 – 21). She took A.Y. to Hilton Head Hospital that day, but he could not immediately receive sutures because of the risk of infection, so his wounds were cleansed and left open, and he was sent home. (*Id.* at p. 147, line 21 – p. 148, line 8). After sleepless nights, Cromwell returned to the hospital on November 6 with A.Y. to have the wounds stitched. (Pl.'s Ex. 10; Pl.'s Ex. 11; Trial Tr. p. 148, line 8 – p. 150, line 15). Because A.Y. had to be physically restrained by five people for the stitching procedure, the experience was traumatic both for him and for his mother. (*Id.*) The wounds resulted in three hypertrophic scars, which are raised, permanent scarring. (*Id.* at p. 150, line 15 – p. 153, line 12; Dr. Brendan Smith Dep. p. 9, lines 2 – 25; p. 11, lines 3 – 4). Medical bills from the two hospital visits, as well as a proposed cost to surgically repair the scars, were introduced into evidence. (Pl.'s Exs. 2, 11, 26).

Following the attack, A.Y. developed post-traumatic stress disorder, which was diagnosed at Coastal Empire Mental Health where he has continued to receive treatment. (Trial Tr. p. 155, line 2 – p. 157, line 6; p. 158, line 13 – p. 160, line 3; p. 165, line 20 – p. 167, line 6; Pl.'s Exs. 20, 21, 22). He has experienced severe sleep disruption, nightmares, bedwetting, and a profound fear of dogs that has persisted through the time of trial. (*Id.*). Before the attack, A.Y. loved animals. Afterwards, he has refused to go near dogs, peeks out windows before going outside, and takes deliberate routes to avoid neighbors' dogs. (Trial Tr. p. 144, line 12 – p. 145, line 17; p. 161, lines 9 – 19; p. 168, line 3 – p. 169, line 3). A.Y. was evaluated by a plastic surgeon regarding his permanent hypertrophic scarring as it makes him self-conscious, and a surgical revision of the scars will require him to be put under general anesthesia and will cost $11,035.00. (*Id.* at p. 167, lines 14 – 25; p. 172, line 20 – p. 173, line 6; Dr. Brendan Smith Dep. p. 9, line 14 – p. 10, line 4; Pl.'s Exs. 26, 27).

C. Respondents' policies and corporate representative testimony.

The Oaks' rules and regulations were admitted into evidence. (Pls.' Ex. 18; Defs.' Ex. 1). Michael Hawanczak, the owner of Diamond Management and The Oaks' property manager since 2003, testified on behalf of Respondents. (Trial Tr. p. 316, lines 8 – 20). He confirmed that residents were required to register their dogs and provide vaccination records, and that dogs were required to be leashed at all times in common areas. (*Id.* at p. 320, lines 5 – 19). He confirmed that Respondents' written rules specifically provided that "any canine or other pet that exhibits any kind of aggressive behavior will be required to be removed from the property." (*Id.* at p. 330, lines 8 – 13). When asked whether that policy would have required Toby's removal based on the conduct Niepmann described, Hawanczak initially acknowledged it "quite possibly" would, and ultimately conceded that it would have required removal and that failure to enforce it "wouldn't have been proper procedure." (*Id.* at p. 331, line 1 – p. 333, line 7; p. 338, line 4 – p. 339, line 6).

Hawanczak also confirmed the following: (1) Marco Sanchez was the onsite superintendent who handled day-to-day resident matters, while Hawanczak's main office was off premises in Bluffton Village (*Id.* at p. 317, line 6 – p. 318, line 9; p. 321, lines 9 – 25); (2) Hawanczak and Sanchez communicated between two and seven times per week about The Oaks' operations (*Id.* at p. 322, lines 1 – 7); (3) Sanchez never told Hawanczak about the Niepmann incident (*Id.* at p. 323, lines 5 – 10); (4) no records of the Niepmann incident existed in Respondents' files (*Id.* at p. 323, lines 11 – 17); and (5) the surveillance footage of the Niepmann incident was not preserved. (*Id.* at p. 325, lines 2 – 5). Hawanczak never testified that Niepmann did not tell Sanchez of the incident or that Sanchez did not learn of the incident within the office at The Oaks. Hawanczak did not provide any testimony supporting that Sanchez always documented every incident reported by residents and passed it on to Hawanczak, nor did he provide any testimony supporting that it would have been out of character for Sanchez to ignore and fail to document a reported incident of a dog bite. He did not provide any testimony as to what procedures Respondents followed if a resident did not want anything to happen to a dog that bit him. When asked directly whether, if Sanchez had in fact been informed, he would have violated the rules by failing to act, Hawanczak ultimately agreed "[i]f he was advised." (*Id.* at p. 339, lines 2 – 5).

After learning of the A.Y. incident, The Oaks' board convened by email, consulted The Oaks' regime attorney Rick Haight, and Diamond Management sent a certified letter to the Jolins dated November 10, 2020, six days after the attack, requiring Toby's removal from the property. (*Id.* at p. 326, line 12 – p. 329, line 14; Defs.' Ex. 2). Hawanczak's testimony confirms that he took no comparable action following the prior incident because he was not personally aware that it had occurred. (Trial Tr. p. 323, lines 18 – 21). John Jolin was subsequently cited, fined, and required to register Toby as a dangerous animal with Beaufort County. (*Id.* at p. 129, line 13 – p. 133, line 15).

D. Respondents' opening promise that Sanchez would testify and its breach.

In opening statements, Respondents told the jury, explicitly and emphatically, that Marco Sanchez would take the stand and deny any recollection of Niepmann's report. Respondents stated: "The onsite superintendent at the time of this accident, who was employed with Diamond Management, not only did he work onsite, he lived onsite, that's Marco Sanchez. He will testify that he has no recollection of anyone reporting the Scott Niepmann incident to the HOA, or its management company, and that's critical." (*Id.* at p. 110, line 22 – p. 111, line 4). Respondents continued moments later, arguing to the jury that Sanchez would testify under oath, with penalty of perjury, that he had no knowledge and never had any knowledge of the Niepmann incident. (*Id.* at p. 111, lines 8 – 13). Respondents challenged the jury to hold them accountable:

> What [we] ask y'all to do is hold [us] accountable. Mr. Parker made statements, [we] suggest that a lot of them will not be supported by the evidence, [our] statements will. At the conclusion of this trial in [our] closing arguments, [we're] going to ask that you hold [us] accountable. Everything [we] said here will be supported by evidence that is admitted into this record . . . .

(*Id.* at p. 112, line 21 – p. 113, line 3).

Marco Sanchez did not testify. He was not called during the defense case, was not called as a rebuttal witness, and was not called at any point during the two-day trial. The jury, which had been specifically told by Respondents that Sanchez would take the stand and deny that he had any notice of the incident, was left with Niepmann's uncontradicted testimony and a conspicuous silence where Sanchez's denial was supposed to be.

E. The jury note and verdict.

During deliberations, the jury sent a note to the circuit court asking: "Did Marco (day manager) give a deposition? If so, is there a record of his statement?" (Trial Tr. p. 434, lines 10 – 16). No deposition of Marco Sanchez had been taken, and the circuit court answered accordingly. (*Id.* at p. 434, line 19 – p. 435, line 19). Shortly thereafter, the jury returned a general verdict finding that Respondents were not negligent, or that their negligence was not the proximate cause of A.Y.'s injuries. (Verdict Form).

II. A jury may not arbitrarily disregard the unimpeached, uncontradicted testimony of a disinterested witness and return a verdict supported by nothing.

Cromwell does not quarrel with the general proposition that credibility determinations belong to the jury. Nor does she dispute that the burden of proving notice rested with her, or that under a general verdict a jury may return a verdict for the defense by concluding simply that the plaintiff failed to carry that burden. These are bedrock principles, and this brief does not ask this Court to disturb them.

What Cromwell does ask this Court to recognize is that the burden of proof framework, properly understood, does not give a jury unlimited license to find an element unproven regardless of the state of the evidence. The framework presupposes that the jury has some rational, evidence-grounded basis for its conclusion when dispositive, unopposed testimony is discredited. There must be some inconsistency, some motive, some competing account, or some circumstantial basis for skepticism. Where there is literally nothing in the record providing any such basis except for the representations of counsel during opening statements, a finding of "not proven" is not the exercise of factfinding prerogative. It is the manufacture of doubt from an evidentiary vacuum. And that, South Carolina law has consistently held, a jury may not do.

In reviewing the denial of a motion for a new trial absolute, the standard of review does not permit the Court to point to any conceivable interpretation of the absence of evidence as a valid ground for affirmance. It requires evidence, something in the record that a rational factfinder could credit as a basis for the verdict returned, and that evidence must support the jury's rejection of unimpeached, direct testimony. *See Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 479, 567 S.E.2d 851, 854 (2002) ("This

Court's review is limited to consideration of whether evidence exists to support the trial court's order."). South Carolina courts have consistently found for decades that a verdict cannot rest on "speculation and conjecture," and that the uncontradicted testimony of a credible witness may not be arbitrarily disregarded. *See Hunsucker v. State Highway Dep't*, 182 S.C. 441, 447, 189 S.E. 652, 654 (1937) ("Verdicts cannot rest upon guess or conjecture"); *State v. Cook*, 204 S.C. 295, 300, 28 S.E.2d 842, 844 (1944) (stating that uncontradicted evidence may be disbelieved if it is "contrary to natural or physical laws, opposed to common knowledge, inherently improbable, inconsistent with circumstances in evidence, or somewhat contradictory itself, especially where the witness is a party or interested, or where in the very nature of things, it is impossible to secure opposing testimony."). These two propositions are in direct tension with a verdict that rests solely on the possibility that the jury, for no reason the record supports, simply chose not to believe the only witness with firsthand knowledge of the notice issue.

This Court must distinguish between two very different kinds of credibility determinations. The first, entitled to full appellate deference, is a jury's resolution of a genuine evidentiary dispute: two witnesses describe events differently, cross-examination exposes inconsistency or bias, or the testimony itself is inherently improbable in the face of circumstantial evidence, and the jury decides whom to believe. That is the classic function of a jury. The second, not entitled to deference, is a jury's bare refusal to credit the only evidence offered on a point, without any competing account, any inconsistency, any motive to fabricate, or any circumstantial basis for skepticism that would counterbalance the scales. The latter is not fact-finding. It is a verdict returned in an evidentiary vacuum.

This case squarely presents the second situation. Scott Niepmann testified without contradiction or impeachment that he walked to The Oaks' management office ten to fifteen minutes after being bitten and directly told Marco Sanchez what had happened. (Trial Tr. p. 279, line 22 – p. 280, line 3; p. 284, lines 16 – 19; p. 286, line 16 – p. 287, line 5). Niepmann is not a party to this litigation. He had no personal financial stake in the outcome. His account was detailed, internally consistent, and corroborated by his own conduct immediately afterward, walking directly to the office, and by the broader circumstantial context. After all, how could Niepmann have known that Toby's rabies vaccinations were not on file, a fact which was corroborated by Maggie Jolin, unless he had visited the office and spoken to Sanchez? (*Id.* at p. 261, line 2 – p. 265, line 24; p. 280, lines 3 – 5; p. 285, lines 12 – 19).

Niepmann gave a written statement memorializing the same account as early as November 2020 and confirmed on redirect that his trial testimony was entirely consistent with that prior statement. (*Id.* at p. 293, line 21 – p. 294, line 19). No witness was called to contradict him. No prior inconsistent statement was produced. No motive to fabricate was suggested. The defense's cross-examination elicited only that Niepmann had no written record of the conversation with Sanchez, had not texted or emailed anyone, and did not know the precise date of the incident. (*Id.* at p. 289, line 2 – p. 291, line 21). None of this constitutes impeachment. The absence of a text message or email is not inconsistent with and does not contradict a face-to-face conversation. Imprecision about an exact date does not undermine a clear account of what happened.

The United States Supreme Court has instructed that while courts reviewing a verdict must credit reasonable inferences in the verdict's favor, they must also "give credence to . . . evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000). Niepmann is a disinterested third party. Respondents' attempt on cross-examination to suggest that Sanchez did not recall the conversation ("Would you be surprised to learn that Marco does not recall that conversation?") is not evidence. (Trial Tr. p. 290, lines 16 – 17).

An attorney's question, or promises made during opening statements, are not testimony. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."). This is especially significant here because Respondents had promised the jury in their opening statement that Sanchez "will testify that he has no recollection of anyone reporting the Scott Niepmann incident to the HOA, or its management company." (*Id.* at p. 111, lines 1 – 4). That promise was never kept. Rather than call Sanchez to deliver the denial they had previewed, Respondents resorted to seeding the substance of that denial through a leading question that assumed facts that were not in evidence.

Sanchez himself was never called to testify, his alleged lack of recollection was never placed before the jury through a witness subject to cross-examination, and the broken promise was never acknowledged or explained. A leading question asked by an attorney is not a substitute for the witness testimony that was promised but never produced. That is precisely the kind of manufactured, unmoored skepticism that the Supreme Court of South Carolina and other jurisdictions have warned against. *See Bankers Health & Life Ins. Co. v. Fryhofer*, 114 Ga. App. 107, 110, 150 S.E.2d 365, 368 (Ga. Ct. App. 1966) (stating that a verdict based upon speculation and conjecture cannot stand).

The fact that Hawanczak testified that there was an absence of documentation of the incident is not a sufficient, rational ground to discredit Niepmann's uncontested testimony, especially where (1) Hawanczak's and Niepmann's testimony are not logically inconsistent, and both support the simplest and most reasonable explanation: that Sanchez did nothing, (2) no foundation was ever laid by Respondents explaining why the absence of documentation would tend to prove that verbal notice was never given, (3) Niepmann was a disinterested, nonparty witness, (4) Respondents never called Sanchez, their onsite property manager, to give opposing testimony as promised, and (5) Niepmann's testimony that he visited the office and spoke to Sanchez is corroborated by a prior written statement and Maggie Jolin's testimony.

Because the absence of documentation and Sanchez's failure to pass the information up the chain do not support that Niepmann reported the incident any more than they support that he did not do so, those facts are lacking in probative value, and the only inferences that can be drawn from them as to the notice issue are speculative:

> It is only where evidence points equally to inferences both favorable and unfavorable to the moving party that it lacks probative value; and its use to support one inference more than another, when in fact it will support both with equal plausibility, becomes mere conjecture and speculation.

Roberts v. Carroll, 377 So. 2d 944, 947 (Ala. 1979).

Respondents will argue that the jury simply disbelieved Niepmann and that this Court should defer to that credibility determination. But a credibility determination requires some inconsistency, some motive, some competing account, some inherent improbability, some basis for rational doubt. The record here is devoid of any such basis, and the jury's credibility determination cannot be based solely on statements made by Respondents' counsel. The defense evidence (no internal records, Hawanczak's lack of personal knowledge) is entirely consistent with Niepmann's account and adds nothing to the scales. Where the only evidence on point supports a finding for the plaintiff, and the opposing party offers nothing to place that evidence in doubt, the jury's failure to find the element proven lacks any rational evidentiary predicate. This Court should reverse.

III. Respondents had actual and imputed notice of Toby's aggressive behavior, and the verdict on notice lacks any evidentiary support.

A. Direct, unimpeached testimony established that Respondents received actual notice of the prior bite.

The evidentiary posture on the notice question is stark. Scott Niepmann, a thirty-five-year resident of The Oaks, testified that within ten to fifteen minutes of being bitten by Toby he walked directly to the management office and told Marco Sanchez, a man he saw regularly, played dominos with, and considered a friend, what had happened. (Trial Tr. p. 279, line 22 – p. 280, line 3; p. 284, lines 16 – 19; p. 286, line 16 – p. 287, line 5). Sanchez was the onsite superintendent employed by Diamond Management to handle day-to-day resident matters at the property. (*Id.* at p. 317, line 6 – p. 318, line 9; p. 321, lines 9 – 25). Niepmann identified Sanchez as the person he would go to for "business with the condominium complex, or [] to deal with some issue," and that there was "no question" that Sanchez knew that Toby had bitten Niepmann. (*Id.* at p. 287, lines 3 – 19). His testimony was direct, specific, and unshaken through cross-examination.

Respondents called no witness to contradict this account. Hawanczak, Diamond Management's owner and corporate representative, testified only that Sanchez had never told him about the incident and that no internal records of it existed. (*Id.* at p. 323, lines 5 – 21). But neither of these facts contradicts Niepmann or are inherently inconsistent with Niepmann having told Sanchez of the bite and asked for Toby's vaccination records. They are, in fact, exactly what one would expect if Sanchez received a resident complaint and failed to document or escalate it. Absence of internal documentation is consistent with Cromwell's negligence theory, not contrary to it.

Nor does the record support the suggestion that the jury weighed this circumstantial evidence against Niepmann's account and found it wanting. The record demonstrates the jury was focused on something else entirely: the previewed testimony of Marco Sanchez. Respondents promised the jury in their opening statements that Sanchez would testify and that Sanchez had no recollection of anyone ever reporting the Niepmann incident. During deliberations, the jury sent a note asking whether Sanchez had given a deposition or if there was a record of his statement. Shortly thereafter, the jury reached a verdict. The jury was not parsing the absence of paperwork. It was looking for direct testimony that it had been promised.

A verdict reached while searching for promised testimony that was never delivered is not a verdict grounded in a reasoned weighing of the circumstantial evidentiary record. While a jury is never legally compelled to believe any particular witness, the power to disbelieve is grounded in an evaluation of the evidence: demeanor, consistency, corroboration, the presence or absence of motive to fabricate, and the admission of inconsistent, contradictory circumstantial evidence. Where none of these factors points against a witness, and where the record affirmatively shows the jury's attention was fixed on an evidentiary void rather than on any evidence cutting against the witness, there is no principled basis for disbelief.

Maggie Jolin also testified that she spoke to Sanchez following the incident, corroborating that Niepmann was seeking Toby's vaccination records because he had been bitten, and that Sanchez did not have the records:

A. I do not recall that. I know that if – okay, I figured if Mr. Montgomery need the records, that somebody contact the office, and they could not provide it. I might be wrong, but I know I told Mr. Sanchez I put the – the shots –

Q. If I understand, what you're saying is you told Mr. Sanchez that you put the record of Toby's shots in his box; -

A. Uh-huh.

Q. - is that correct?

A. Yes, sir.

***

A. And the only thing that they say is that they needed the shot records, just to make sure that the dog was – had no rabies.

Q. And as I understand it, and – that you took the shot records and you put them in a box; is that correct?

A. Yes.

Q. And that would be at the office –

A. At the office.

Q. - of the condominiums?

A. By the pool.

Q. And then afterwards you had a conversation with Mr. Sanchez about that?

A. I may told him I left the shot records on – on the box. This happened five years ago, I can't just bring –

Q. You don't recall what you told Mr. Sanchez –

A. No, sir.

Q. - in particular, but you do recall talking with him –

A. Uh-huh. Yes, sir.

Q. - afterwards? And that was about the shot record that you recall talking to him?

A. Yes.

Q. And this would have been before Toby bit [A.Y.], correct?

A. Yeah, that happened in April. The incident with [A.Y.] happened in November.

(Trial Tr. p. 263, lines 9 – 20; p. 264, line 20 – p. 265, line 24).

In this case, nothing points against Niepmann. He is not a party to this litigation and has no financial interest in its outcome. He testified consistently with his prior written statement. The only challenge on cross-examination was an attorney's suggestion, not evidence, that Sanchez might not recall the conversation. (*Id.* at p. 290, lines 16 – 17).

> We recognize the general rule, of course, as stated by both courts below, that the question of credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility.

Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 216, 51 S. Ct. 453, 456, 75 L. Ed. 983 (1931).

"[P]ositive testimony of a witness must be accepted when the witness is unimpeached and disinterested, and when the circumstantial evidence does not tend to contradict his testimony but is consistent with it." *Central Truck Lines, Inc. v. Lott*, 249 F.2d 722, 724 (5th Cir. 1957). "[T]he court or jury cannot disregard the positive testimony of an unimpeached witness unless and until its improbability or inconsistency furnishes a reasonable ground for so doing, and this improbability or inconsistency must appear from the facts and circumstances disclosed by the record in the case. It cannot be arbitrarily disregarded by either court or jury . . . ." *O'Leary v. Wangensteen*, 175 Minn. 368, 371, 221 N.W. 430, 431 (Minn. 1928). In short, the record contains direct, unimpeached testimony establishing notice and nothing, not a competing account, not an inconsistency, not a circumstantial basis for doubt, that would give a rational jury any reason to withhold belief.

B. As a matter of agency law, notice to Marco Sanchez was imputed notice to Respondents, regardless of whether Sanchez reported it internally.

South Carolina has long followed the fundamental agency principle that notice to an agent acting within the scope of his authority is imputed to the principal. *See Equitable Trust Co. of Columbia v. Columbia Nat'l Bank*, 145 S.C. 91, 115, 142 S.E. 811, 817 (1928) ("Subject to certain qualifications and exceptions . . . it is well settled that, if an officer or agent of a corporation acquires or possesses knowledge of facts, in the course of his employment, and as to matters which are within the scope of his authority, his knowledge is imputable to the corporation."); *Citizens' Bank v. Heyward*, 135 S.C. 190, 190, 133 S.E. 709, 709 (1925) (recognizing general rule that notice to an agent is notice to principal, particularly in cases of corporations). The Restatement (Second) of Agency states clearly: "[A] notification given to an agent is notice to the principal if it is given . . . to an agent authorized to receive it." Restatement (Second) of Agency § 268(1) (1958).

The evidence on scope of authority is undisputed. Hawanczak testified that Sanchez's role as onsite superintendent included "onsite operations", "keeping an eye" on the property, and "dealing with the residents, vehicle passes, pool passes, things of that nature." (Trial Tr. p. 317, line 23 – p. 318, line 1). Niepmann identified Sanchez as the go-to person for any resident who "had business with the condominium complex, or wanted to deal with some issue." (*Id.* at p. 287, lines 13 – 16). Receiving and responding to resident complaints about potentially dangerous animals was precisely the kind of task within the scope of an onsite property manager's duties. There is no plausible argument that Sanchez did not have authority to receive a report of an onsite dog bite from a resident.

Courts in other jurisdictions have applied the principle directly in dog bite and property management contexts. In *King v. Hoffman*, 178 A.D.3d 906, 909, 114 N.Y.S.3d 467, 470 (N.Y. App. Div. 2019), the court held that notice to a property management company's property manager of a dog's presence on the property was imputed to the company, as receiving such information is within a property manager's actual and apparent authority.

> Generally, the principal is held liable to third persons in civil suits for the following: frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify or participate in, or indeed, know of such misconduct, or even if he forbade the acts or disapproved of them.

Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 300, 468 S.E.2d 292, 298 (1996). Thus, regardless of whether Hawanczak would have expected Sanchez to pass the information on to him, or whether Sanchez actually passed on the information, the information is imputed to Hawanczak and Respondents because Sanchez was authorized to deal with residents and onsite operations at The Oaks. The question of whether, if Niepmann's testimony is credited, the law treats that communication as notice to Respondents is a legal question reviewed de novo, not a factual one committed to the jury. The moment Niepmann reported the bite to Sanchez, Respondents had notice as a matter of law.

Critically, Respondents never disputed agency at trial. They conceded it, repeatedly and on the record. When the circuit court raised the imputation question during a mid-trial colloquy, Cromwell asked Respondents directly whether they were contesting that "Diamond Management is the agent for them – for the Regime" or that "the Regime is liable for Diamond Management's activities, as a matter of law," and counsel for Respondents answered "No." (Trial Tr. p. 250, lines 17 – 23). In that same colloquy, Respondents characterized the dispositive issue as purely one of credibility, whether Niepmann in fact told Sanchez, and not whether Sanchez was authorized to receive such a report. "[T]here's a Scott Niepmann, I think he's going to say that he told Marco Sanchez, who was a former employee of Diamond Management . . . I think that's the credibility question for - for the jury." (*Id.* at p. 249, line 23 – p. 250, line 5).

When the circuit court denied Respondents' directed verdict motion, it ruled expressly that "there is evidence upon which this jury can determine that Mr. Sanchez was told about it, and that he didn't do anything," and that "obviously, as an agent of both the management company and the Homeowners Association, certainly, the knowledge of it can be imputed." (*Id.* at p. 308, lines 12 – 17). Respondents did not object to or challenge that ruling. Later when discussing the verdict form, the circuit court observed that "there's been no allegation in this case that the management company did anything outside its course in the scope of duties" and that Sanchez was acting "on behalf of the board because that's his job," to which defense counsel responded, "Correct." (*Id.* at p. 379, lines 5 – 15). Respondents later affirmatively agreed that "the management company was acting as the agent of the HOA." (*Id.* at p. 381, lines 14 – 16).

The jury was then charged, without objection from Respondents, that actual notice means information "brought to the attention of the party, or its agent, or its employees prior to the occurrence." (*Id.* at p. 381, line 19 – p. 382, line 5; p. 418, line 24 – p. 419, line 1). And in closing argument, Respondents' counsel argued only that the report to Sanchez never occurred and that Niepmann had failed to submit a written complaint under paragraph twenty-six of the regulations. (*Id.* at p. 403, line 25 – p. 405, line 25). He never argued that an oral report to the onsite superintendent, if made, would fall outside Sanchez's authority or fail to bind Respondents. Having conceded the agency relationship at every stage of trial, Respondents cannot now defend the verdict on an alternative theory they never advanced: that notice to

Sanchez could not be notice to them. The only theory Respondents actually litigated, that the report never happened, is the theory refuted by the unimpeached evidence discussed above.

C. Respondents' broken promise that Sanchez would testify, combined with the jury's own question, confirms the missing witness problem and requires an adverse inference.

The missing witness issue in this case is not a matter of the jury's own speculation within the jury room about an equally available but uncalled witness. It is the direct consequence of a promise made to the jury and broken. Respondents opened their case by telling the jury explicitly "[t]he onsite superintendent at the time of this accident, who was employed with Diamond Management, not only did he work onsite, he lived onsite, that's Marco Sanchez. He will testify that he has no recollection of anyone reporting the Scott Niepmann incident to the HOA, or its management company, and that's critical." (Trial Tr. p. 110, line 22 – p. 111, line 4). Moments later, Respondents added that Marco Sanchez would "testify under oath, with the penalty of perjury, that he has no knowledge, never had any knowledge of the Niepmann incident." (*Id.* at p. 111, lines 8 – 13). Respondents then challenged the jury to hold them to their word: "[We're] going to ask that you hold [us] accountable. Everything [we] said here will be supported by evidence that is admitted into this record . . . ." (*Id.* at p. 112, line 25 – p. 113, line 3). Marco Sanchez never testified. The jury waited for the witness they had been promised. He never came.

During deliberations, the jury sent a note to the circuit court asking if Sanchez gave a deposition and if there was a record of "his statement." (*Id.* at p. 434, lines 10

– 17). This question makes unmistakably clear that the jury understood Sanchez to be the dispositive witness on the central factual dispute of notice and was actively searching for his account as a result of what they had been told by Respondents at the opening of the trial. The answer, that no deposition transcript or statement existed, left the jury with a conspicuous void precisely where Respondents had said their evidence would be strongest. The only thing remaining to fill the void, and that the jury could have relied upon in finding for Respondents, were the promises and arguments of counsel, which are not evidence.

South Carolina recognizes that when a party fails to produce a witness who is peculiarly within that party's control and whose testimony would naturally be expected, the jury is entitled to draw an adverse inference that the witness's testimony would have been unfavorable to the party who failed to call them. *Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959). The adverse inference doctrine applies with particular force where, as here, the party not only failed to call the witness but affirmatively promised the jury that the witness would give favorable testimony as pronounced during opening. Having previewed Sanchez's purported denial in the opening statement, Respondents assumed a heightened obligation to produce him. Their failure to do so is not merely the absence of evidence, it is the abandonment of a promise made to the trier of fact, with no explanation given.

> In the absence of explanation, the failure or refusal of a party to produce evidence may create an adverse inference where such evidence is within his knowledge, and within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him . . . . Generally, the rule is applied when the uncalled

> witness is an agent, employee, relation, or associate of the party failing to call him, or within some degree of control of said party.

Id. Respondents did not merely fail to call a witness they could have called. They told the jury the witness was coming, allowed that promise to shape the jury's expectations through the entirety of the trial, including during Niepmann's cross-examination, and then quietly rested without ever producing him.

The only rational explanation for this sequence is that Sanchez's actual testimony would not have been as helpful to the defense as Respondents' opening statement suggested, or worse, that it would have corroborated Niepmann's account instead. This Court should account for the broken promise, the adverse inference it warrants, and how that promise molded the jury's deliberations in evaluating whether the defense verdict has any evidentiary foundation. It does not.

IV. Respondents violated their own written policies by failing to remove Toby after receiving notice of aggressive behavior, and this violation constitutes a breach of the standard of care.

Separate from and in addition to the notice sufficiency argument, the verdict cannot be sustained because Respondents' own corporate representative admitted facts that establish, as a matter of law, a breach of the applicable standard of care. The written regulations of The Oaks expressly provide that "any canine or other pet that exhibits *any* kind of aggressive behavior *will be required* to be removed from the property." (Trial Tr. p. 330, lines 8 – 13; Pl.'s Ex. 18; Defs.' Ex. 1). This policy is not aspirational. It is mandatory in its terms and was presumably adopted for the precise purpose of protecting residents from exactly the kind of harm that A.Y. suffered.

Diamond Management, as the entity charged with enforcing the rules and regulations of The Oaks, was responsible for acting on that policy when triggered.

Michael Hawanczak, Diamond Management's owner, admitted on cross-examination the following sequence:

> Q. The – the regulations dealing with pets that The Oaks enforces says that any canine or other pet that exhibits any kind of aggressive behavior will be required to be removed from the property, correct?
>
> A. Correct.
>
> Q. And so if a dog bites someone and management learns of it, it's required that the dog be removed, correct?
>
> A. In most cases, yes.
>
> ***
>
> Q. And you heard Mr. Niepmann's testimony, correct?
>
> A. Yes, I did.
>
> Q. And if management learned of that, it was required that that dog be removed?
>
> A. It would have certainly been investigated.
>
> Q. If the dog is a rule, it would require removal; would it not, if the regulation is used?
>
> A. In most cases, yes.
>
> Q. In his case, but what Mr. Niepmann testified it would require the dog being removed, correct?
>
> A. Quite possibly, yes.
>
> ***

Q. And, if, in fact, Mr. Sanchez was advised of the estimate – the incident with Mr. Niepmann, then you violated them.

A. If he was advised.

(Trial Tr. p. 330, lines 8 – 17; p. 331, lines 1 – 15; p. 339, lines 2 – 5).

This testimony is the functional equivalent of an admission. The owner of the management company confirmed, under oath, that the conduct Niepmann described would have triggered the removal policy, that receiving notice and failing to act on it "would not have been proper procedure," and that if Sanchez was in fact advised of the incident, the company violated its own rules. (*Id.* at p. 336, lines 14 – 18). The only escape hatch Hawanczak attempted to open, that he would have undertaken a "case-by-case specific analysis" was elicited on redirect examination through leading questions and directly contradicted by the plain, mandatory language of the written policy: "any canine . . . that exhibits *any* kind of aggressive behavior *will be required* to be removed . . . ." (*Id.* at p. 334, line 4 – p. 335, line 2). There is no discretion built into the text of Respondents' policy.

South Carolina has long recognized that a party's voluntary adoption of safety standards and procedures establishes the applicable standard of care. "Evidence of a company's deviation from its own internal policies is relevant to show the company deviated from the standard of care, and is properly admitted to show the element of breach." *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016). Cromwell's claim against Respondents rests on their independent duties as the enforcers of community safety rules that The Oaks adopted. Their failure to enforce the removal policy is the proximate cause of A.Y.'s injuries, separate and apart from the Jolins' own liability.

Courts across the country have recognized that property managers and homeowners' associations that adopt pet or animal control policies assume a duty of reasonable enforcement and may be held liable when their negligent failure to enforce those policies proximately causes injury. In *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986), the court held the owner of a trailer park liable when a tenant's pit bulls mauled the plaintiff within the confines of the property leased to the offending tenant. The court concluded that the defendant had undertaken to control vicious dogs in the trailer park by inserting a provision in the lease prohibiting tenants from keeping vicious dogs. *Id.* at 948. The court's holding of liability was specifically grounded on the defendant's failure to enforce the prohibition in the lease regarding the keeping of vicious dogs on the premises. *Id.*; *see also McCullough v. Bozarth*, 232 Neb. 714, 724-25, 442 N.W.2d 201, 208 (1989) ("We hold that as a general rule, a landlord is liable for injuries caused by the attack of a tenant's dog only where the landlord had actual knowledge of the dangerous propensities of the dog and where the landlord, having that knowledge, nevertheless leased the premises to the dog's owner or, by the terms of the lease, had the power to control the harboring of a dog by the tenant and neglected to exercise that power."); Annotation, *Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant*, 87 A.L.R. 4th 1004, 1012 (1991) ("The general rule regarding the liability of a landlord to a third person for an attack by a tenant's animal on the leased premises appears to be that the landlord is not liable unless the landlord had knowledge of the animal's presence and its dangerous tendencies, and had control of the premises or otherwise had the ability to eliminate the danger by having the animal removed or confined.").

Respondents argued at trial that Diamond Management was not itself "governed" by The Oaks' rules and regulations, that only residents were, and that the company merely "enforced" them. (Trial Tr. p. 337, line 2 – p. 339, line 6). Hawanczak quickly retreated from this position on re-cross, acknowledging that "it wouldn't be good for us to violate them" and confirming that the rules applied to the company in how it operated the common elements of the regime. (*Id.*). The argument is in any event legally unavailing. The standard of care applicable to Diamond Management is defined both by the written policies it undertook to enforce and by the general duty of reasonable care owed to residents of the properties it managed. Having voluntarily assumed responsibility for enforcing a mandatory dog removal policy, Diamond Management cannot escape liability for failing to do so when the conditions triggering enforcement were met. The causal chain here is as direct as any the law recognizes. Respondents had a policy. Sanchez received notice that it had been triggered by an aggressive dog bite incident. The policy was not enforced. Toby remained on the property.

V. The verdict cannot be sustained on proximate cause grounds, as the removal of Toby would have prevented the attack, and a defendant with notice of a prior bite cannot claim a second bite was unforeseeable.

Proximate cause requires proof of causation in fact and legal cause. *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). "Causation in fact is proved by establishing the plaintiff's injury would not have occurred but for the defendant's negligence." *Hurd v. Williamsburg Cnty.*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005) (quotation marks and citation omitted). As to legal cause, "foreseeability is considered the touchstone and it is determined by looking to the natural and probable consequences of the defendant's act or omission." *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (quotation marks and citation omitted).

A. Causation in fact: but for Respondents' failure to enforce the removal policy, Toby would not have been on the property on November 4, 2020.

Because the jury returned a general verdict finding that Respondents were not negligent or that their negligence was not the proximate cause of A.Y.'s injuries, Cromwell addresses each component of proximate cause to foreclose affirmance on any alternative ground. Legal cause is addressed in Section IV.B. below. Causation in fact warrants only brief discussion, because the record contains no rational dispute on the question, and notably, Respondents never disputed causation in fact at trial.

The but-for causal chain here is short, direct, and proven by Respondents' own evidence. The Oaks' written regulations mandated that any dog exhibiting aggressive behavior "will be required to be removed from the property," and Respondents' corporate representative admitted that the conduct Niepmann described, an aggressive, non-playful dog bite, would have triggered that requirement. (Trial Tr. p. 330, line 8 – p. 331, line 15; p. 339, lines 2 – 5). The record contains direct proof of exactly what enforcement of that policy looks like: when Respondents received notice of the attack on A.Y., the board convened by email, consulted counsel, and within six days served the Jolins with a certified letter requiring Toby's removal from the property. (*Id.* at p. 326, line 12 – p. 329, line 14; Def.'s Ex. 2).

That is precisely the action the policy required after the Niepmann incident. Had it been taken then, Toby would have been removed from The Oaks months before November 4, 2020, and a dog that is not on the property cannot dart out of a door, run between parked cars, and attack a child playing outside his home. The injury simply does not occur but for Respondents' failure to act on the notice they received. Cromwell made this precise argument to the jury: had Sanchez done what the rules required, "that dog would not have been present on November 4th, 2020, because he would have been gone for having bit another resident." (Trial Tr. p. 396, lines 23 – 25).

Nothing in the record supports a contrary finding. Respondents offered no evidence that the removal policy, if invoked, would not have been carried out. Their own conduct after the second attack proves the opposite. Respondents offered no evidence of any intervening or superseding cause. And critically, Respondents never argued at trial that causation in fact was lacking. Their causation defense, in the directed verdict motions, at the charge conference, and in closing argument, was framed exclusively in terms of foreseeability. (*Id.* at p. 359, lines 19 – 25; p. 403, lines 1 – 7; p. 406, line 19 – p. 407, line 15). Respondents' closing walked the jury through notice, reasonableness of response, foreseeability, and damages. At no point did they suggest that enforcement of the removal policy would have failed to prevent the attack. A but for finding against Cromwell would therefore suffer from the same defect as the notice finding addressed in Section I: it would rest on no evidence at all.

The two issue rule provides that where a general verdict may rest on either of two grounds, the verdict will be affirmed if either ground is sustainable. *Cole v. Raut*, 378 S.C. 398, 407, 663 S.E.2d 30, 34 (2008). Cromwell raises causation in fact for precisely that reason, to demonstrate that no component of the verdict, not notice, not breach, not causation in fact, and not foreseeability, finds any support in this record. Each potential basis for the general verdict fails independently, and the verdict cannot be saved by resort to any of them.

B. Legal cause: a second bite by a dog known to have bitten before is foreseeable as a matter of law.

Respondents argued at trial that it was not foreseeable that Toby would attack anyone and that the November 4 incident could not have been anticipated. (Trial Tr. p. 403, lines 3 – 7). The defense called John Jolin, Toby's owner, who testified that Toby had never darted out the door before and that he had no reason to believe Toby was dangerous. (*Id.* at p. 344, line 20 – p. 345, line 24; p. 348, line 11 – p. 349, line 15). This foreseeability argument is a straw man. It mistakes the relevant precipitating event, is irreconcilable with the remaining evidence, and the jury's possible acceptance of it cannot stand.

Foreseeability is measured by what *the defendant* knew or reasonably should have known at the time of the alleged negligence. *See Hurd*, 353 S.C. at 613, 579 S.E.2d at 145 (stating that foreseeability is determined from the defendant's perspective). The relevant question is not what John Jolin, the dog's owner, knew or foresaws. It is what Respondents, the property manager and owner, knew. It is irrelevant whether John Jolin could foresee that Toby would dart out of the door. What is relevant is whether Respondents could foresee that Toby would bite someone else if he remained on the property. And what the evidence establishes is that Respondents had actual and imputed notice that this specific dog had already bitten a resident on the leg in an aggressive manner several months earlier.

South Carolina's foreseeability doctrine requires only that the defendant have reason to anticipate the general type of harm that occurred, not the precise mechanism or specific identity of the victim. *See id.* ("It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone."). Here, the general type of harm, a resident being bitten by Toby, is precisely what occurred in both incidents. A defendant who knows a dog has bitten one person cannot claim that the dog subsequently biting another person was unforeseeable. That is not an argument about foreseeability. It is a claim of willful blindness.

Moreover, Niepmann himself testified that Toby had exhibited aggressive behavior on multiple occasions before the actual bite: "he always barks, he always just acts aggressive towards people." (Trial Tr. p. 279, lines 3 – 4). John Jolin acknowledged on cross-examination that unlike his other dog Milka, Toby would bark at anyone who came near him, and that this behavior was different from Milka's. (*Id.*

at p. 352, line 23 – p. 353, line 8). The pattern of aggressive behavior was not a surprise. It was observable and documented, and it culminated in a bite that was reported to the onsite management.

Respondents adopted a written policy specifically addressing aggressive animals. The very existence of that policy reflects Respondents' own advance recognition that dangerous dogs on the premises create a foreseeable risk of harm to residents. Having acknowledged that risk prospectively in a written policy, Respondents cannot stand before a court and claim that a dog bite was unforeseeable after they received a specific report that a resident dog had already exhibited precisely the dangerous behavior their policy was designed to address.

This principle is foundational to premises liability and negligence law. As the Restatement (Second) of Torts explains, one who keeps an animal with knowledge of its dangerous propensities is subject to liability for harm resulting from those propensities. Restatement (Second) of Torts § 518 cmt. g (Am. L. Inst. 1977). The requirement of notice of dangerous propensities is satisfied, as a matter of well-established law, by a single prior bite. *See Hossenlopp v. Cannon*, 285 S.C. 367, 370-71, 329 S.E.2d 438, 440-41 (1985) (finding that an owner's notice of a single prior attack was sufficient to put the owner on notice of dog's dangerous propensities); *see also Doe v. ATC, Inc.*, 367 S.C. 199, 207, 624 S.E.2d 447, 451 (Ct. App. 2005) ("We hold that a single isolated incident of prior misconduct . . . may support a negligent retention claim, provided the prior misconduct has a sufficient nexus to the ultimate harm."). Toby's prior bite of Niepmann, documented in Beaufort County Animal

Control's case view report, corroborated by Officer Montgomery's investigation, and reported to Sanchez within ten to fifteen minutes of its occurrence, was established by unimpeached testimony at trial.

In *Matthews v. Amberwood Associates Limited Partnership*, 351 Md. 544, 560-51, 719 A.2d 119, 127-28 (Md. 1998), the Maryland Court of Appeals rejected a possible foreseeability defense in terms directly applicable here, holding that a defendant who had direct notice of a dog's prior aggression and failed to act could not claim that the predictable consequences of that inaction were unforeseeable. The same principle applies here with equal force, because Respondents not only had notice of prior aggressive behavior, but also had a mandatory written policy requiring them to act on it.

The fundamental principle is one courts across the common law world have recognized. A defendant who has specific advanced knowledge of a dangerous condition and takes no steps to prevent it is in the worst possible position to argue that the harm resulting from that condition was unforeseeable. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."). Where the risk that materialized is the precise risk of which the defendant was specifically warned, a bite by a dog known to have bitten before, the foreseeability element is established as a matter of law, and no jury verdict that disregards this can rationally stand.

The defense's emphasis on the particular mechanism of A.Y.'s attack (Toby darting out an open door, a supposedly unprecedented event) fundamentally misunderstands the foreseeability inquiry. The question is not whether the exact sequence of events was foreseeable. The question is not whether John Jolin could foresee that Toby would escape from his home on that day. The question is whether it was foreseeable to Respondents that Toby might bite another resident. The answer, given everything Respondents knew, is unambiguously yes.

CONCLUSION

For the foregoing reasons, Appellant Dianne Cromwell respectfully requests that this Court reverse the order denying her motion for a new trial and remand this matter. The facts of this case are not complicated. Scott Niepmann was bitten by Toby on the sidewalk at The Oaks. He walked to the management office ten minutes later. He told Marco Sanchez what had happened. Sanchez looked through his files, found no vaccination records on file, and told Niepmann to talk to the dog's owners. He wrote nothing down. He told no one. The dog remained on the property. Six months later, the same dog attacked a seven-year-old child who had done nothing but step outside to play with his friends.

Respondents sent the Jolins a certified removal letter within six days of learning about A.Y.'s attack. They promptly, professionally, and decisively did exactly what their own rules required. The tragedy is that they had the chance to do that six months earlier, when Scott Niepmann walked into their office and told their representative exactly what had happened.

Respondents told the jury in their opening statement that Sanchez would take the stand and deny any recollection of Niepmann's report. They told the jury to hold them to their word, and that their assertion regarding Sanchez's forthcoming testimony would be supported by evidence that would be admitted into the record. Sanchez never testified. The jury looked for him, asking during deliberations whether a transcript of a deposition existed, searching for the testimony they had been promised. There was no deposition. There was no testimony. There was nothing, because Respondents chose to produce nothing.

Respondents will argue that the jury simply chose not to believe Niepmann, and that this Court should defer to that determination. But a credibility judgment requires a reason. There is none in this record. No inconsistency. No motive. No competing account. No surveillance footage showing Niepmann never went to the office. No explanation that Sanchez religiously kept records or faithfully reported every resident complaint up the ladder. No testimony from the one witness whose job it was to receive exactly this kind of complaint and who had been previewed by Respondents as a key witness, only to disappear without explanation before ever taking the stand. The burden of proof framework does not empower a jury to manufacture doubt from nothing. The standard of review does not permit a verdict untethered from the evidentiary record. This Court should hold that neither standard was satisfied here and should reverse.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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