

**The State of South Carolina
In the Court of Appeals**

**Appeal from Aiken County Court of Common Pleas
The Honorable Doyet A. Early, III Circuit Court Judge
The Honorable Clifton Newman, Circuit Court Judge**

Civil Action No.: 2011-CP-02-00868

**Paige Weeks Johnson, as Personal Representative of the Estate of Christie Lane
Valenzuela,**

versus

Sam English Grading, Inc.,

Respondent,

Appellant.

Initial Reply Brief

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- B. After skidding instead of stopping, then throwing down the motorcycle on the road after which it high sided or flipped, throwing the passenger, Ms. Valenzuela, over the motorcycle resulting in her death.**
- C. There is no evidence of any negligent act or breach of duty by Sam English Grading that caused the driver of the motorcycle to decide not to stop his motorcycle or decide to throw down the motorcycle.**

Question II (p.5)- The Trial Court committed reversible error in the admission a series of connected evidentiary rulings from a private contract between two parties which created no additional duties to the plaintiff.

- A. Admitting a private contract between Owens Corning and Sam English Grading about the grading work at the Owens Corning land fill which created no duties between Sam English Grading and the public.**
 - 1. Admitting an encroachment permit issued by the SC DOT to Owens Corning which was performed and expired in 1984 that had been referenced in the contract.**
 - 2. Admitting the contract's references to Construction Zone Warning signs, flagmen, and private driveway stop signs.**
- B. Admitting witnesses and their testimony about times they thought vehicles coming out of the Owens Corning driveway were dangerous.**

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Questions Presented

Question I - The negligence that caused this single vehicle motorcycle accident was the negligence of its driver in:

- A. Applying only his rear brakes to skid his rear tire to draw attention to himself and keep going; instead of applying both his front and rear brakes to stop.**
- B. After skidding instead of stopping, then throwing down the motorcycle on the road after which it high sided or flipped, throwing the passenger, Ms. Valenzuela, over the motorcycle resulting in her death.**
- C. There is no evidence of any negligent act or breach of duty by Sam English Grading that caused the driver of the motorcycle to decide not to stop his motorcycle or decide to throw down the motorcycle.**

Question II - The Trial Court committed reversible error in the admission a series of connected evidentiary rulings from a private contract between two parties which created no additional duties to the plaintiff.

- A. Admitting a private contract between Owens Corning and Sam English Grading about the grading work at the Owens Corning land fill which created no duties between Sam English Grading and the public.**
 - 1. Admitting an encroachment permit issued by the SC DOT to Owens Corning which was performed and expired in 1984 that had been referenced in the contract.**
 - 2. Admitting the contract's references to Construction Zone Warning signs, flagmen, and private driveway stop signs.**
- B. Admitting witnesses and their testimony about times they thought vehicles coming out of the Owens Corning driveway were dangerous.**

Question III - If the erroneously admitted prejudicial evidence is removed, this defendant then is entitled to a Directed Verdict and Judgment Not Withstanding the Verdict as a matter of law.

Question IV - If the acts of employees are not negligent, then there is no negligence to impute to the employer under the doctrine of respondeat superior.

Question V - After the jury reported it could not reach a unanimous verdict, the Trial Court gave a coercive improper variant of an Allen charge.

Conclusion

Reply Brief of the Appellant

Replies to some general statements from the Respondent's brief that are not specific to the questions presented.

The Respondent argues that Sam English Grading knew what it was doing because it had been doing it since 1982. []. It is true that Sam English Grading had been doing its work since 1982 (actually since 1978) []. That would seem to be strong evidence in opposition to the plaintiff because it shows there had been no similar accidents in 30 years. This is no indicator of a procedure that is negligent.

The Respondent asserts that "If the machine had not been able to double back on itself, the scraper would have crossed over Valenzuela's lane." The statement is true but it does not support the plaintiff's case. The statement actually establishes facts that show the company was not negligent. The machine does have the ability to double back on itself, so it can stop appropriately. While the implied tone of the assertion is a negative tone, it is actually saying "if he didn't have good stopping ability it wouldn't have stopped so good." The fact is, it did have good stopping ability and it did stop without entering the road. In contrast, the motorcycle also had good brakes but they were not used to stop.

The Respondent says that Valenzuela could not understand how the scraper could stop. Valenzuela doesn't need to know the specifications of the scraper. He needs to know the capability of his motorcycle. He did know that, but he decided not to use his

motorcycle's stopping capability and decided instead to skid his rear wheel to draw attention.

The Respondent cites *Hurd v. Williamsburg County*, 353 S.C. 596, 579 S.E.2d 136 (Ct. App. 2003) in support of some evidence of negligence. In *Hurd*, a common carrier discharged a passenger on the side of the road and he was subsequently hit by a vehicle coming in the opposite direction that was obscured by the bus. It has no applicability to this case.

The Respondent cites several cases for the principle that a trial court has discretion in ruling on evidence if it is relevant and not unduly prejudicial. *Busillo v. City of North Charleston*, 404 S.C. 604, 610, 745 S.E.2d 142, 145 (Ct. App. 2013). *Dorrell v. South Carolina Dep't of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 14-15 (2004). Nobody disputes that when evidence is relevant, the trial court has discretion to admit it if it is not unduly prejudicial.

The Respondent cites *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997) for the proposition that even if evidence is improper, admitting cumulative evidence is not reversible error. As a hypothetical abstract statement, that is correct, but the implication is based on a false assumption. The contract and the testimony of neighbors about their non-accidents at other times under other circumstances are not mere cumulative evidence. They constitute powerful inadmissible corroborating evidence. Just because there is more than one item of evidence does not mean corroborating evidence is merely cumulative. If that were so, in all of the cases of inadmissible evidence, any bad evidence would merely be cumulative and harmless.

Reply to the particular Questions Presented.

Question I - The negligence that caused this single vehicle motorcycle accident was the negligence of its driver in:

- A. Applying only his rear brakes to skid his rear tire to draw attention to himself and keep going; instead of applying both his front and rear brakes to stop.**
- B. After skidding instead of stopping, then throwing down the motorcycle on the road after which it high sided or flipped, throwing the passenger, Ms. Valenzuela, over the motorcycle resulting in her death.**
- C. There is no evidence of any negligent act or breach of duty by Sam English Grading that caused the driver of the motorcycle to decide not to stop his motorcycle or decide to throw down the motorcycle.**

The Respondent has not responded to the Question Presented but has stated a different question in two different wordings in the three places it appears in the Respondent's Brief.

Respondent's Table of Contents	Respondent's Statement of Issues	Respondent's Body of Brief
"Evidence supports the jury's allocation of fault." p. i.	"Is there any evidence that the Company was more at fault than Valenzuela in causing his wife Christie's death?" p. 1.	"Evidence supports the jury's allocation of fault." p. 7.

In an analysis of fault or the degree of fault, it is error to limit the analysis to only whether there is evidence of fault. It must also be fault that is the proximate cause of an injury. Even if we label Sam English Grading's acts, for purposes of argument, as negligent, which we strongly maintain they are not, it would still not impose liability unless they are also a proximate cause of the injuries.

The motorcycle driver caused this accident and not Sam English Grading. The

motorcycle driver was riding upright. If he has stayed upright and driven on through, he and his passenger would have been ok.

If the motorcycle driver had stopped, instead of first skidding for attention, and, then changing his mind after he mistakenly thought it was too late, he and his passenger would have been ok.

If the motorcycle driver, even after skidding when he should not have, and even after mistakenly changing his mind about whether it was too late to stop, had not laid the motorcycle down, he and his passenger would have been ok.

There is no conflict in the evidence on these points about what he did. The facts come exclusively from the motorcycle driver's own testimony. Here, in his own words, is what he did.

“All I seen was a dust tornado coming off the front tire that was spinning and in my mind I was like, What in the world -- what -- I just couldn't -- I couldn't comprehend that he was not going to stop. I couldn't. Why won't he look, you know? So I laid in my back brake. I started skidding. We were coming -- we were going to hit right in the intersection. I mean, just like if you shot two bullets at each other. We're coming just like that. I'm looking at him, begging him, please acknowledge me, man. Just hit the brakes please and I'll hold upright, you know, but I couldn't. [TT 338] [ROA].”
.... [TT 338] [ROA].

I skidded as long as I could to see if he would see me, you know. I stayed upright, but right there at the last”

After Valenzuela next concluded it was too late to stop, and too late to continue to drive through, he decided to throw the motorcycle down on the road. [TT 338] [ROA].

“Just hit the brakes please and I'll hold upright, you know, but I couldn't. He kept coming; never did see me. I threw the bike down. I slid it out hoping we could stay behind it. The bike could crash into him. We could survive it -- because there was no way in the world we was going to miss him.”

....
He never would look up the road. I was like I got to lay this bike down and that's what I did. I don't know how many feet it was he never would acknowledge me; so I just threw the motorcycle at him, laid it down hoping

that we would stay behind it and we would survive it. He would get caught up in the motorcycle himself. That was my plan. [TT 39][ROA]

As it turned out, the scraper was able to stop. The scraper did not come out of the driveway and never entered onto Redd's Branch Rd. The accident is a single vehicle motorcycle accident. The only thing in the road are the skid marks and the motorcycle. Plaintiff's Exhibit 39.

Valenzuela did not try to stop using both brakes. He did not even try to stop using his rear brake. Instead, he skidded with his rear brake to draw attention. Valenzuela also did not keep the motorcycle upright and threw it down on the pavement.

Had Valenzuela stopped the motorcycle with both of his brakes instead of skidding his rear wheel to draw attention, this accident would not have occurred.

Had Michael Valenzuela continued driving through as he originally had planned to do, this accident would not have occurred.

Had Michael Valenzuela kept the motorcycle upright instead of throwing it down on the road, this accident would not have occurred.

Sam English Grading did not cause this accident and is entitled to judgment as a matter of law. This verdict should be reversed and judgment entered for the defendant, Sam English Grading.

Question II

The Trial Court committed reversible error in the admission a series of connected evidentiary rulings from a private contract between two parties which created no additional duties to the plaintiff.

- A. Admitting a private contract between Owens Corning and Sam English Grading about the grading work at the Owens Corning land fill which created no duties between Sam English Grading and the public.**

1. **Admitting an encroachment permit issued by the SC DOT to Owens Corning which was performed and expired in 1984 that had been referenced in the contract.**
 2. **Admitting the contract's references to Construction Zone Warning signs, flagmen, and private driveway stop signs.**
- B. Admitting witnesses and their testimony about times they thought vehicles coming out of the Owens Corning driveway were dangerous.**

The Respondent has not responded directly and has stated a different question in two different wordings.

Respondent's Table of Contents	Respondent's Statement of Issues	Respondent's Body of Brief
<p>The Owens Corning contract was properly admitted to show the Company's awareness of the danger and need for precautions.</p> <p style="text-align: center;">p. i.</p>	<p>Must the Court reverse because the jury heard evidence that the Company caused Christie's death by breaching its contract to provide a flagman and maintain road crossing signs at an intersection?</p> <p style="text-align: center;">p. 1.</p>	<p>The Owens Corning contract was properly admitted to show the Company's awareness of the danger and need for precautions.</p> <p style="text-align: center;">p. 8.</p>

The meanings and legal issues in the two versions are completely different from each other, and, more importantly, neither addresses the Question presented set forth by the Appellant.

The contract which was admitted into evidence established no public duties to the traveling public on the highway and no public rules of the road. Those duties are established exclusively in the S. C. Code.

Private parties may contract to do many things they are not otherwise obligated to do, but, private contracts between two parties do not create duties to third parties. If one party wants to require the other party to perform certain actions beyond what the law requires, and the corresponding party agrees, they may do so. But, this private

contracting does not modify or change the existing law. It is enforceable by the parties to the contract, but not by strangers to the contract.

Some companies often require safety measures that are beyond what the law requires. DuPont and Milliken are familiar examples. That they may exceed their legal duties is commendable, but they should not be punished for failing to exceed what the law requires of them.

If provisions in private contracts which exceed legal safety obligations are used to impose increased legal liability, then the incentive to excel would be reversed, and businesses would better protect themselves by avoiding any extra contractual safety measures.

Question III

If the erroneously admitted prejudicial evidence is removed this defendant then is entitled to a Directed Verdict and Judgment Not Withstanding the Verdict as a matter of law.

The Respondent argues two different concepts. One seems to speak to the inadmissible evidence about a course of conduct, and, the other seems to speak about the inadmissible statements of other members of the public about other times under other circumstances.

Neither refutes the error of the Trial Court in admitting inadmissible material.

Respondent's Table of Contents	Respondent's Statement of Issues	Respondent's Body of Brief
The course-of- conduct evidence was properly admitted to show a sudden emergency and the company's willfulness.	Must the Court reverse because the jury heard evidence that the Company's failure to provide a flagman, maintain road crossing signs, or require that its drivers stop	The course-of- conduct evidence was properly admitted to show a sudden emergency and the company's willfulness.

p. i.

at a stop sign threatened others who were more familiar with the intersection?

p. 11.

p. 1.

The Respondent is seeking to justify the admission into evidence of testimony from the plaintiff's friends and neighbors about other occasions in which they were concerned by large vehicles entering the highway from the landfill. If these two versions mean the same thing, perhaps they argue that the failure to provide a flagman, signs, and stop in their driveway constitute a course of conduct to show a sudden emergency and willfulness.

One way to see clear error in admitting these stories about when neighbors driving near the landfill were concerned is to assume the stories were worse. Assume they were accidents. Other accidents would not be admissible in this case. Our courts try one case at a time. The potential for prejudice when bringing in unrelated events is one of the most recognized in the law. In both criminal trials and civil trials our courts have guarded against letting facts of other events come before the fact finders who are deciding a current dispute. We don't let proof that a defendant robbed some other bank to come into a trial in which it is alleged the defendant robbed this bank. And, we don't allow any clever ways around the obvious prejudice by admitting the inadmissible to prove some manufactured incidental point.

To introduce other facts in a current dispute violates principles of logic; it violates common concepts of fairness; and it violates fundamental, long established rules of evidence. It is classic historically recognized prejudice. It is more than strong enough to require a new trial.

How many other accidents would be admissible that actually took place at that intersection of a driveway and the road? None. We should only be trying this case on these facts.

And this was not even prior conduct that resulted in other accidents. It was just prior conduct where nothing happened but the neighbors didn't like it.

If this kind of evidence were admissible, any business involved in an accident that has vehicles entering and leaving a road could expect to face a parade of witnesses about other times and events, real or imagined. Residential neighbors are always inconvenienced or annoyed by businesses that increase traffic. Every case could easily have this kind of neighborhood complaining in every accident case at the business's location.

The Vulcan Materials quarry in the Midlands, the BMW plant in the Upstate, the Boeing plant in the Low Country, Fort Jackson, the Charleston Air Force Base and hundreds of others have traffic entering and leaving that other drivers find irritating or in their opinion a safety problem. The operators of those businesses know it. That is a natural aspect of the location of any business and it is not a basis for imposing liability.

On Sundays, some churches hire off duty police officers to assist parishioners as they enter and leave their parking lots. This is commendable, but if the churches decided not to provide this assistance it would not increase the churches' liability to third parties driving on the street where the church is located.

Whether extra measures are taken or omitted in other instances never proves the case in dispute, but it always introduces prejudice into the case in dispute.

Question IV

If the acts of employees are not negligent, then there is no negligence to impute to the employer under the doctrine of respondeat superior.

The Respondent says that this issue was not raised before and cannot be raised now.

The Respondent is correct that this issue of the plaintiff's judicial admission of no liability in the opening statement was not raised before. However, it may be raised now.

Your Appellant stands corrected in calling this issue an additional sustaining ground and apologizes for the confusion that label creates. However, properly understood, the statement of no fault by any of the employees of Sam English Grading is correctly viewed as asserting the trial court and this court have no subject matter jurisdiction. If the employees are not at fault there is nothing for the court to litigate.

Despite your Appellant's unartful way of saying there is no subject matter that invokes the need for the court to resolve, subject matter jurisdiction is the proper label for an event which has no claim of actionable conduct, and the judgment should be reversed and judgment entered for the defendant.

Chapter 3 of Appellate Practice in South Carolina is entitled "Issue Preservation." Subsection III deals with Issue Preservation at Trial and below that is subsection b. [p. 61] entitled Exceptions. The very first exception to the requirement that an issue must be raised and preserved when it arises during trial is the exception for "(1) Subject Matter Jurisdiction."

The authors point out that it "may be raised at any time, even for the first time on appeal." P. 61 citing *Carter v State*, 329 S.C. 355, 495 S.E. 2d 773 (1998); and other earlier cases.

The authors go on to point out that it may not be waived by consent. *Amisub of South Carolina, Inc. v Passmore*, 316 S.C. 112; 447 S.E. 2d 207 (1994). The trial and appellate courts have a duty to raise the issue on their own if it has not been raised by either of the parties. *Id.*

The Respondent, in response, cites *Stephens v. CSX Transp., Inc.*, 400 S.C. 503, 519-520, 735 S.E.2d 505 (Ct.App. 2012). This citation is puzzling because *Stephens v. CSX Transp. Inc.*

is a case about an accident at a railroad crossing. The plaintiff attempted to introduce a subsequent remedial measure by claiming that post accident trimming of brush was to impeach the railroads position that the crossing was reasonable safe. The Court held that “The trial court correctly saw past the “impeachment” label Stephens put on the evidence and determined that his purpose for admitting the evidence was to prove that the crossing was not safe because CSX was negligent in failing to cut the trees.” “The admission for that purpose is precisely what Rule 407 forbids.”

The Stephens case has nothing to do with statements made during opening arguments or opening statements.

Probably the Respondent means to refer to *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010) which he later cites, so that case will be addressed here. Robinson is a medical products liability case with an opinion written by Judge Posner of the 7th Cir. It analyzes the Illinois conflict of laws rule to determine whether the federal court should be applying the strict contributory negligence substantive law of Virginia or the comparative negligence law of Illinois. The Court held that Virginia law controlled but that the same result would obtain under Illinois law. “To summarize, there was enough evidence that the plaintiff was contributorily negligent to bar her claim under Virginia law, and enough evidence that her contributory negligence exceeded the defendant's negligence to bar her claim even if Illinois rather than Virginia law applied.”

The Robinson opinion then goes on to say “But the plaintiff makes the further argument that in **closing argument** McNeil's lawyer made a "judicial admission" that the plaintiff had not been contributorily negligent. What the lawyer said was: "We are, of course, not blaming Karen

Robinson for her own injuries. We never have. We never will." She had taken a particular medication.

Posner's opinion notes that: "A judicial admission is a statement, **normally in a pleading, that negates a factual claim that the party making the statement might have made or considered making.**"

The differences between the present case and the Robinson case are several. It is of course a federal case, employing federal procedural law. But there are other more important distinctions.

In Robinson the statement was made, not in the pleadings, and not in the opening statement explaining the pleadings, but, rather, in an argument, specifically the closing argument to the jury. This is the argument in which it is common for the court to tell the jury that lawyer arguments are not evidence. But, judicial admissions are the place for binding statements about what is the position of a party.

In the case at bar something very different from closing argument in *Robinson* was taking place as part of the proceedings. The Opening Statement in South Carolina is not an argument. It is the time in which the lawyer explains the pleadings.

The South Carolina Rules of Civil Procedure describe the nature of this part of a case.

"RULE 43 CONDUCT OF TRIAL

(g) Statement of Pleadings to Jury. Counsel for any party may read his pleadings to the jury or make a statement to the jury of the facts alleged in the pleadings and the theory of his case; but counsel shall not argue his case during his opening statement. The pleadings shall not be submitted to the jury for its deliberations."

It is not argument as was the closing argument in *Robinson*. It is an opening statement of what is being claimed. It is a judicial statement and admission and it is binding. Here is the language from the Respondent's Opening Statement:

“...I want y'all to understand this from the very get-go. These people -- Mr. Tindel, Mr. Jeffery Lewis, who was operating the pan -- they were doing exactly what they were told. What they thought about what they were doing, I don't know, but they were doing as we all do when you listen in your work -- your boss says do it, you do it. You're on a job. You do it. **It's not their fault.** They were doing their job, you know, but it was the fault of Sam English Grading Company.

It is an understandable tactic to try to persuade a jury to stick a corporation with a verdict even when the jury is not likely to find fault with the individuals who were acting for the corporation. That is why plaintiffs often only name a corporation as a defendant. While it is possible to manipulate appearances, it is ultimately not legally possible to have it both ways.

The corporation can only act through its individual employees. If an employee commits a negligent act, then the negligent act is imputed to the corporation because it is done on behalf of the corporation. If an employee does not commit a negligent act, then there is nothing to impute.

If the employee is not at fault, the corporation is not at fault. This principle of law cannot be avoided by saying it one way in stating what is being pled in order to appear nice to the individual employees and then having it the other way in a verdict.

In its brief, the Respondent makes the same kind statement of opposites. “Following ordersbecause the Company required it.” Following orders is what takes place in almost every case in which a corporation is sued for negligence. Either the acts undertaken in following orders are negligent or they are not.

The Opening Statement of the plaintiff is synonymous with Complaint. This Opening Statement says the employees are not at fault. That also happens to

be what the evidence demonstrates. Mr. Tindal and Mr. Lewis are not at fault and in such a case, the law provides there is no negligence to impute to Sam English Grading. Kirby v. Gulf Refining Co., 173 S.C. 224, 175 S.E. 535 (1934); Collins v. Johnson, 245 S.C. 215, 139 S.E.2d 915 (1965); Federated Mut. Ins. Co. v. Piedmont Petroleum Corp., 314 S.C. 393, 444 S.E.2d 532 (Ct. App. 1994); McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 426 S.E.2d 770 (1993).

The Opening Statement is accurate under the evidence and is no mere slip of the tongue. This is a single vehicle accident caused only by the combination of acts of the motorcycle driver.

- 1.) The motorcycle driver wrongly did not even try to stop when he first saw the scraper. He skidded his rear tire to draw attention to himself.
- 2.) He next wrongly concluded that the scraper could not stop. So he wrongly concluded that he now had to stop. He didn't have to stop because the scraper was able to stop and never entered the highway.
- 3.) He next wrongly decided that instead of staying upright and continuing to try to stop or reduce his speed or in the alternative to continue on through, he would lay the motorcycle down.

Despite the fact that each of these decisions was wrong, he would have still been safe if he had stayed with the decision. He could have stopped first instead of skidding. He could have stopped or driven through either, because the scraper could and did stop. He could have driven through even though he wrongly thought he gone past the point of no return, if he just had not laid the motorcycle down. The road remained open. The scraper not only did not hit the motorcycle, the scraper did not enter the roadway.

This accident was a single vehicle motorcycle accident. The employees of Sam English Grading were at the same location but they did not commit any negligent acts that proximately caused this single vehicle accident. There is no fault by these employees to impute to their employer, Sam English Grading.

Question V After the jury reported it could not reach a unanimous verdict the Trial Court gave a coercive improper variant of an Allen charge

Even with these extraordinary prejudicial items of evidence, the jury could not arrive at a unanimous verdict and reported that to the Trial Judge. The jury only produced a “verdict” after being improperly coerced with the Trial Court’s “Valenzuela charge” which went much further beyond the limits of any approved Allen charge. This was not a true verdict of the independent and unanimous conclusion of the twelve jurors. It was a verdict to release the deadlocked jurors from any further involuntary presence over the Labor Day weekend if they did not reach a verdict.

The Respondent says it is not coercive because trial courts must encourage verdicts, an Allen charge fulfills the duty to encourage verdicts, and accommodating the jury is not coercive.

First, the Respondent has not said a trial court should not encourage verdicts. That is not an issue and the cases which confirm this principle add nothing to the issues that are disputed.

Second, the jury charge in this case was not an Allen charge. It includes an Allen charge, but it also goes far beyond any previously approved charge in the cases the Respondent cites, and actually violates the principles described in all of

the cases. The cases uniformly say that trial courts should encourage verdicts, **but not coerce them.**

Third, this charge in its context is a threat, not an accommodation, and, the jury took it that way and responded to it as coercion.

Although many jurisdictions have abandoned the charge from the Old West case of *U.S. v Allen*, the South Carolina courts have continued to find that an Allen charge does not coerce verdicts.

The charge in this case is not an Allen charge. It does coerce a verdict. It has produced a verdict based not on the free and independent considered conclusions of 12 jurors. It has produced a verdict that 12 jurors produced so they could avoid further confinement to the courthouse during their Labor Day weekend, much of which they had already lost.

The Respondent says that accommodating the jury's needs is not coercive. As an abstract proposition that is a correct statement. It just is not what happened in this case. It is possible to couch a threat in candied language. In fact that is a common way of imparting a threat when trying to coerce someone into doing what the speaker wants. The jury clearly took what was said here as the threat it was designed to be.

The context in which the charge was given leaves no doubt of both the intent of the trial court and the understanding and response of the jury.

The judge announced in open court, on the record, in the presence of the lawyers and the court staff exactly what he was going to do.

“THE COURT: I am going to bring them out. I am going to read verbatim the Allen versus United States charge that it requires to read when we have a potentially hung jury and then I am going to tell them that I'll let them continue on. I'll buy them supper. If we can't reach a verdict by nine, we'll come back tomorrow. **We're going to push it until we get it concluded.**” [ROA]

He then brought the jury in and gave them an Allen charge but he enveloped it with a threat that the jury fully understood. While the court used slightly different language to the jury than to the lawyers, the meaning was clear to the jury and the response of the jury is not only clear but loud. The jury side stepped its true duty because the charge was coercive. The jury skipped the "offer" of dinner and proceeded on to produce a verdict at the last possible time before the court would carry out its threat to keep the jury on Saturday or Tuesday.

He said:

"So, here is where we are. It is a quarter 'til six. I'll be glad to order you supper. We can stay here until nine, ten, eight, whatever you want to stay to. If we can't agree, we can come back tomorrow, Saturday. If you don't want to come back tomorrow we'll come back Tuesday morning, but these lawyers have -- this case was filed over a year ago. They have put untold hours into it. The facts aren't going to change.

Y'all are twelve -- y'all have paid super attention. You have done a super good job and I ask that you go back and let's give it a good faith stab. If you can't get it done tonight, we'll come back in the morning or if you don't want to come back on Saturday we can come back Tuesday and I'll be glad -- you're probably tired of pizza. I am. It's the third time I've had it this week. My wife is out of town. I'm sick of it; so we'll get something different or if you want to -- if you want to go home about 8 o'clock or 9 o'clock and come back fresh in the morning if we can't reach -- but we're going to give it a shot.

The jury knew the context. The judge told them. The judge's wife was out of town and had been during the trial. The judge had been staying late each afternoon in a situation in which the judge had an empty home to return to in Bamberg with no meal prepared. There is nothing wrong with this in and of itself, but as part of the context it was true, and he described it to the jury, so they knew what was going on.

Having a late meal was not an accommodation to the jury, it was a threat that they would not be able to go home on Friday night of the Labor Day weekend and

would have to eat dinner at the courthouse and then stay even longer at the courthouse working on the case.

The only way the court offered the jury a way out of being forced to stay late and eat at the courthouse and then stay later after they ate, was to agree to come back on Saturday morning of their holiday weekend.

The option of leaving the courthouse on Friday night to go home for dinner was not an accommodation to the jury, it was simply an alternative threat because it was at the cost of Saturday of the holiday weekend.

Then the trial court put forth another alternative threat that was not an accommodation to the jury. The jury was given the option of avoiding being forced to choose between having to stay for a meal at the court and stay later after supper on the one hand, or, come back on Saturday morning of their holiday weekend on the other hand, by yet a third option of threat. They could go home for dinner on Friday night and not come in on Saturday of the holiday weekend if they would come back on Tuesday of the holiday weekend and continue to work on the case.

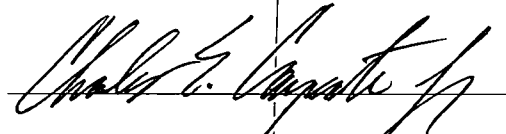
There are good reasons why South Carolina and the remaining states which still permit an Allen charge scrutinize not just the charge but also the surrounding circumstances. The parties are entitled to a unanimous verdict of each individual juror who reaches their own conclusion. The jurors also have a right to not be put to an improperly onerous performance of their civic duties. The rights of the defendant and the rights of the jury were violated here.

Conclusion

The verdict and judgment against the defendant should be reversed and judgment entered for the defendant Sam English Grading.

In the alternative, if the Court disagrees and sees 1.) evidence of negligence by the employees of Sam English Grading 2.) that was also 50% or more of the proximate cause of the plaintiff's injuries, then the errors in the admissibility of evidence and in coercive jury charge should require reversal of the verdict and a new trial.

January 6, 2014



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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Appellant, Sam English Grading, Inc., do hereby certify that I have this date served the foregoing, **Initial Reply Brief**, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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SC Court of Appeals

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Dated: January 6, 2014.