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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.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondents' brief rests on a single proposition. A jury, they say, "has the absolute power to believe or disbelieve a witness's testimony," and so the verdict must stand no matter what the record contains. (Resp'ts' Br. 9). The word "absolute" appears in none of the cases Respondents cite, and none of them holds any such thing. Each states a narrower rule with a condition attached. A jury may reject uncontradicted testimony when something in the record gives it a reason to. Interest in the result will do. So will inherent improbability, inconsistency, or circumstantial evidence pointing the other way. What will not do is nothing at all. Our supreme court has reversed a jury verdict on exactly that ground, and that decision, which Respondents do not mention, controls this appeal.

Respondents also devote a page to arguing that no objection was preserved to their opening statement. No objection was made to the opening statement, and none is argued for here. The point is the opposite one. The circuit court told the jury before openings that what the lawyers said was not evidence, and that instruction was correct. It is also the reason the verdict cannot stand. Once counsel's promise that Marco Sanchez would testify is set aside, as the court directed, nothing is left on Respondents' side of the scale but an empty chair.

ARGUMENT

I. Respondents' own authorities hold that uncontradicted testimony should be accepted unless the record supplies a reason for disbelief, and this record supplies none.

Respondents cite five cases for the proposition that a jury may disregard uncontradicted testimony at will. (Resp'ts' Br. 8 – 9). Not one of them involved a disinterested nonparty witness whose account was corroborated, unimpeached, and met by no contrary evidence. Every one involved an interested witness, contrary circumstantial evidence, or evidence too imprecise to compel a finding. And the rule they announce, when quoted in full rather than in part, is the rule on which this appeal rests.

The rule originates in a passage our supreme court adopted in 1935 and has repeated ever since.

> The fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result. To justify a Court in instructing a jury that a witness has told the truth, and in directing a verdict based on the truthfulness of his evidence, there must be nothing in the circumstances or surroundings tending to impeach the witness or to throw discredit on his statements. If there is anything tending to create distrust in his truthfulness, the question must be left to the jury.

Terwilliger v. Marion, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952) (quoting *Green v. Greenville Cnty.*, 176 S.C. 433, 439-40, 180 S.E. 471, 473 (1935)). Respondents paraphrase the first sentence of this passage and stop. (Resp'ts' Br. 8). The second and third sentences are the ones that matter.

They explain when the jury's prerogative arises and, by necessary implication, when it does not. The prerogative arises when there is "anything tending to create

distrust." Where there is "nothing in the circumstances or surroundings tending to impeach the witness," a court is justified in directing a finding "based on the truthfulness of his evidence." *Id.* The supreme court later compressed the same idea into a single sentence. Uncontradicted evidence "should be accepted unless there is reason for disbelief." *Johnson v. Painter*, 279 S.C. 390, 392, 307 S.E.2d 860, 861 (1983) (citing *Elwood Constr. Co. v. Richards*, 265 S.C. 228, 217 S.E.2d 769 (1975)).

The court in *Johnson* did not merely recite the rule. It enforced it against a jury. The plaintiff there sued for abuse of process on the theory that the defendant had offered to drop criminal charges in exchange for money, and the only account of how that offer arose was the defendant's uncontradicted testimony that the plaintiff's own lawyer had telephoned him and asked. *Id.* at 391-92, 307 S.E.2d at 860-61. The jury found for the plaintiff, which it could do only by rejecting that testimony. The supreme court reversed, holding that uncontradicted evidence "should be accepted unless there is reason for disbelief," finding no such reason in the record, and concluding that "the verdict for abuse of process is without evidentiary support." *See id.* at 392, 307 S.E.2d at 861 (reversing where "the only reasonable inference that can be drawn from the evidence" contradicted the verdict). The dissent argued that the witness was a party with "a vital interest in the outcome" who had failed to mention the telephone call at his earlier criminal trial, and that those circumstances supplied a reason for disbelief. *Id.* at 394-95, 307 S.E.2d at 862-63 (Lewis, C.J., dissenting). The majority reversed anyway. If the supreme court will set aside a verdict that rejected the uncontradicted testimony of an interested party, a verdict that rejects

the uncontradicted and corroborated testimony of a disinterested witness cannot survive.

Respondents' cases fit the same pattern from the other direction. In *Black*, the plaintiff testified that a collision had injured her, and the court of appeals held the jury could disbelieve her because the collision was "slight, to say the least," an eyewitness described the vehicles as having "just like tapped," and the plaintiff had "an obvious interest in the outcome of the case." *See Black v. Hodge*, 306 S.C. 196, 197-98, 410 S.E.2d 595, 596 (Ct. App. 1991) (holding that inherent improbability and party interest were "sufficient to cast doubt" on uncontradicted testimony). In *Ross*, the plaintiff testified that a television fell on him, and the court held the jury could disbelieve him because the defense offered circumstantial evidence that the chains holding the television could bear its weight, that the plaintiff had likely stood on a tabletop under the television then pulled it down after the tabletop broke, that the trajectory of a falling television was inconsistent with his story, and that his expert had done little testing. *See Ross v. Paddy*, 340 S.C. 428, 434-35, 532 S.E.2d 612, 615-16 (Ct. App. 2000) (holding that "the issues of credibility and the circumstantial evidence supporting the defense's theory" made the plaintiff's account a jury question). And in *Terwilliger*, the supreme court sustained a verdict against a party claiming adverse possession after observing that the evidence "[o]n neither side" was "very precise or definite." *Terwilliger*, 222 S.C. at 188, 72 S.E.2d at 166. Interest, improbability, contrary circumstances, imprecision. In every case, something was there.

Hoard adds nothing to Respondents' side and takes something away.[1] The supreme court there described the principle of *Black* and *Ross* as "sound," and there is no quarrel with that description. *See Hoard*, 387 S.C. at 549, 694 S.E.2d at 6 (calling the jury's prerogative to disregard uncontradicted testimony "a sound principle of law" that "has no application in a summary judgment setting"). But the holding of *Hoard* is that the argument Respondents now make, that a jury might simply choose not to believe a witness, is a "speculative hypothetical" that cannot substitute for evidence. *See id.* at 547-49, 694 S.E.2d at 5-6 (holding that a party "cannot create a genuine issue of material fact with the argument that the jury does not have to believe a witness"). The procedural posture differs. The point does not. The bare possibility of disbelief is not a fact in the record. It is a guess about what happened in the jury room, and the supreme court has already declined to treat such a guess as evidence.

Respondents' two remaining cases are criminal jury charge decisions and say nothing about civil verdicts. *See State v. Smith*, 227 S.C. 400, 408, 88 S.E.2d 345, 349 (1955) (disapproving a credibility charge in a capital case as having invaded the province of the jury by mandating consideration of corroborating evidence while permitting consideration of contradicting evidence); *State v. Brisbon*, 323 S.C. 324, 330-32, 474 S.E.2d 433, 437-38 (1996) (reviewing jury instructions in a murder

[1]Respondents describe *Hoard* as having "endorsed the principle from *Black v. Hodge* and *Ross v. Paddy* . . . ." (Resp'ts' Br. 8). It did so in the course of reversing a court of appeals decision that had relied on that very principle to deny summary judgment, and it characterized the argument that a jury "could have disregarded" an uncontradicted witness as a "speculative hypothetical." *See Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 548, 694 S.E.2d 1, 5-6 (2010) (rejecting the contention that a jury might disbelieve uncontradicted testimony as insufficient to create a question of fact).

prosecution). If anything *Smith* illustrates how jealously South Carolina guards the jury's role in weighing evidence, which is precisely why that role must be exercised on evidence.

The circuit court charged this jury on the considerations that bear on credibility, namely whether the witness has an interest in the result, whether the witness is prejudiced toward a party, the witness's opportunity to observe, and the witness's demeanor on the stand. (Trial Tr. p. 412, line 16 – p. 413, line 8). Take them in order. Niepmann has no interest in the result. He is not a party, sought nothing from the Jolins, and told Animal Control he wanted nothing done to the dog. (*Id.* at p. 284, lines 1 – 3). He harbors no prejudice toward Respondents and was friends with their superintendent. (*Id.* at p. 279, line 22 – p. 280, line 3). His opportunity to observe was unmatched, because he was the man who was bitten and the man who walked to the office. And as to demeanor, Respondents do not suggest that anything in Niepmann's bearing gave the jury pause, and the circuit court, which sat as the thirteenth juror and watched him testify, identified nothing of the kind. (Order, Dec. 10, 2025). The only attempt at impeachment was the question whether Niepmann would be "surprised to learn" that Sanchez did not recall the conversation, which assumed a fact never placed in evidence. (Trial Tr. p. 290, lines 16 – 18).[2]

[2]The only other attempt to impeach Niepmann, a question about how often he drank alcohol, drew an immediate objection and was abandoned at the bench without an answer. (Trial Tr. p. 291, line 20 – p. 292, line 5). The jury was never told that Niepmann drank to excess, had a poor memory, or had ever said anything inconsistent with his testimony, because no such evidence exists.

On the other side of the ledger stands corroboration Respondents never mention. Niepmann knew that Toby's vaccination records were not on file with Respondents, a fact he could have learned only by going to the office and asking, and Maggie Jolin confirmed that the records were not on file and that she later placed them in Sanchez's box and spoke to him about it. (*Id.* at p. 261, line 2 – p. 265, line 24; p. 285, lines 12 – 19). Niepmann's account at trial matched the written statement he gave in November 2020, and Animal Control's report documented the bite, the puncture wound, and the warning to the Jolins. (*Id.* at p. 282, line 7 – p. 284, line 12; p. 293, line 21 – p. 294, line 19; Pl.'s Ex. 5A). Every particular of Niepmann's story that could be checked was checked, and every particular held.

Respondents now tell this Court that the jury "saw contradicting evidence of Mr. Niepmann's testimony through both Mr. Montgomery and Mr. Hawanczak," and that there was "competing testimony in regard to notice of the previous incident." (Resp'ts' Br. 4, 6). That is not what Respondents told the circuit court. At the hearing on the motion for a new trial, counsel described Officer Montgomery, the corporate representative, and the dog's owners alike as witnesses who were "not aware" of the prior incident, and then told the court that "[t]he only evidence before the jury as to notice was from Scott Neipmann." (Oct. 31, 2025 Hr'g Tr. p. 5, line 25 – p. 6, line 11). Counsel repeated the point later in the hearing, stating that "Scott Neipmann was the only individual who testified as to notice, whereas all the others did not." (*Id.* at p. 8, lines 12 – 14). The argument advanced below was that Niepmann's account was "greatly outweighed by the testimony of all the other individuals," which is an

argument about weight and not an assertion of conflict or contradiction. (*Id.* at p. 6, lines 16 – 19). Respondents were right the first time. A witness who did not testify about notice cannot have contradicted the testimony about notice, and a witness who does not know about something cannot deny that the thing exists.

Respondents ask this Court to uphold a verdict premised on the jury's rejection of testimony without any basis in the record for doing so. South Carolina law does not permit that result. Where the record contains nothing "tending to create distrust," uncontradicted testimony "should be accepted," and a verdict that rejects it is "without evidentiary support." *Johnson*, 279 S.C. at 392, 395, 307 S.E.2d at 861-62; *see Terwilliger*, 222 S.C. at 188, 72 S.E.2d at 166 (describing the circumstances in which a court may direct a finding based on uncontradicted testimony).

II. The preservation argument answers a contention that was never made.

Respondents contend that Appellant "did not raise the issue of Respondents opening statement nor request a curative instruction," and that any argument concerning the opening statement is therefore waived. (Resp'ts' Br. 5). No such argument has been made, in the circuit court or here. Nothing in this appeal contends that Respondents' opening was objectionable or that the jury should have been told to disregard it specifically. The Rule 59 motion asserted that the verdict was against the weight of the evidence, and the supporting memorandum argued that "there was no evidence presented at trial which questioned the truthfulness of the evidence or the credibility of Plaintiff's witnesses." (Mot. for New Trial; Mem. in Supp. of Mot. for New Trial at 4 – 5).

The circuit court heard argument and ruled on that motion. (Order, Dec. 10, 2025). The issue on appeal is the same issue, whether any evidence supports the verdict, and a party who has raised an issue is not required to have recited every fact in the record that bears on it. *See Herron v. Century BMW*, 395 S.C. 461, 465-66, 719 S.E.2d 640, 642 (2011) (explaining that preservation requires an issue to be "raised to and ruled upon by the trial judge" and that a party "is not required to use the exact name of a legal doctrine in order to preserve the issue"); *cf. State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (holding that a party may not argue one ground at trial and a different ground on appeal). One ground was argued below, and the same ground is argued here.

The hearing on that motion confirms the point. Counsel for Appellant argued that "there was no evidence to speak of from the defendant" and that the verdict was "clearly against the weight of the evidence." (Oct. 31, 2025 Hr'g Tr. p. 4, lines 9 – 11; p. 5, lines 3 – 4). Responding directly to Respondents' reliance on witnesses who disclaimed knowledge, counsel argued that "even though they had people that said we didn't know about it, that's not evidence, they just didn't know about it," and that "the only evidence was that the -- through the manager, Mr. Sanchez, they did know about it and he required the rabies information from the owner of the dog shortly thereafter." (*Id.* at p. 7, lines 7 – 12). Counsel pressed the corroborating inference as well, reminding the court that the dog's owner had furnished the vaccination information to Sanchez within a couple of weeks after the first bite, to which counsel for Respondents replied, "I think I agree. I'm not saying that that wasn't the case."

(*Id.* at p. 8, line 25 – p. 9, line 9). Counsel for Appellant then asked why Sanchez "would [] be getting the rabies information if it wasn't related to the first dog bite?" (*Id.* at p. 9, lines 12 – 15). Every contention advanced in this section was placed before the circuit court, and the circuit court ruled.

Respondents' suggestion that an objection should have been lodged during the opening statement, or a curative instruction requested at that time, assumes there was something to object to. There was not. A promise that a witness will testify is not objectionable when it is made. It is a preview of anticipated evidence, which is what an opening statement is for, and no lawyer could have known on the morning of the first day that the preview would never be honored. The promise became a broken promise only on the afternoon of the second day, when Respondents rested without calling Sanchez. By then the curative instruction Respondents say should have been requested, that what the lawyers say is not evidence, had already been given. (Trial Tr. p. 92, lines 4 – 14). What remained at that moment was not an objection to be lodged but a void to be evaluated, and the vehicle for evaluating whether a verdict rests on a void is a motion for a new trial. That motion was made, argued, and ruled upon. (Mot. for New Trial; Order, Dec. 10, 2025). The purpose of the preservation rule is to give the trial court a fair opportunity to rule on the question presented, and the circuit court had exactly that opportunity here. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642 (explaining that preservation rules "are designed to give the trial court a fair opportunity to rule on the issues"). A rule that required a party to object to a promise before it was broken would be a rule that no one could satisfy.

The opening statement matters for one reason only. It is the sole place in the record where anyone asserted that Sanchez did not recall Niepmann's report. Before openings, the circuit court instructed the jury that "what these attorneys tell you in their opening statements is not evidence in this case" and that "the evidence comes from the witness stand." (Trial Tr. p. 92, lines 4 – 14). The instruction was correct. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (holding that statements of fact appearing only in argument of counsel will not be considered). That is the whole point. When the promise is subtracted, as the circuit court directed, the record contains no denial from Sanchez at all.

Respondents' answer is that they "produced this testimony through a different witness," meaning Hawanczak. (Resp'ts' Br. 6). They did not. Hawanczak testified that no one told *him* about the Niepmann incident and that *his files* contained no record of it. (Trial Tr. p. 323, lines 5 – 21). He did not testify, and could not have testified, to what Sanchez recalled or was told. What Respondents promised was that Sanchez himself 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). Hawanczak's knowledge is not Sanchez's knowledge, and Respondents said as much when they told the circuit court, outside the jury's presence, that the question was whether "Diamond was informed" and that they anticipated Sanchez would say "I don't recall anyone telling me that." (*Id.* at p. 249, lines 14 – 17; p. 250, lines 7 – 10). The witness who could answer that question was in Respondents' employ, lived on the property, and was never called.

There is a famous dramatic principle known as Chekhov's Gun which provides that all elements of a story must come into play over the course of its telling. A common articulation of Chekhov's Gun is that a rifle hung on the wall in the first act must be fired by the third. Respondents hung Sanchez's purported testimony on the wall in the first act, told the jury to watch for it, and then struck the set without a shot. The jury noticed. During deliberations it asked whether "Marco (day manager)" had given a deposition and whether there was "a record of his statement." (Trial Tr. p. 434, lines 10 – 16). Respondents cannot have it both ways. If the opening statement is off limits, as they contend, then nothing in evidence suggests that Sanchez did not hear what Niepmann told him. If the opening statement is on the table, it is counsel's word, and counsel's word is not evidence. Either way the void on Respondents' side of the notice question is real, and the inference South Carolina law permits when a party fails to call its own employee on the decisive question is an inference drawn from that void, not a separate issue. *See Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959) (recognizing that an unexplained failure to produce evidence within a party's control gives rise to an inference that the evidence would have been unfavorable).

III. Respondents' proposed interpretations of the evidence are conjecture, not evidence.

Respondents next suggest that there were "many ways a jury could have interpreted all testimony." (Resp'ts' Br. 7). This is a curious argument for Respondents to make, because every interpretation they offer assumes that Niepmann spoke to Sanchez and quarrels only with what he said. Respondents

cannot argue in one breath that the conversation never happened and in the next that what was said in it was too mild to count. The interpretations fail on their own terms in any event.

A. A puncture wound is not a nip.

Respondents lean on Officer Montgomery's remark that the incident "wasn't [] an attack, it was just a nipping at the front knee." (Resp'ts' Br. 7; Trial Tr. p. 123, lines 20 – 22). The very next question was "And he bit him on the left knee?" and the answer was "Correct." (Trial Tr. p. 123, lines 23 – 24). Montgomery photographed a "puncture wound" above the knee, recorded that the dog had "lunged to bite," and warned the Jolins that "if he does this again, charges should be filed." (*Id.* at p. 283, line 6 – p. 284, line 12; Pl.'s Ex. 5A). If the behavior was not aggressive, why would charges be filed if he did it again? The answer is that a dog that lunges twice and breaks the skin has exhibited "aggressive behavior," and Respondents' rule requires removal for "any kind" of it. (*Id.* at p. 330, lines 8 – 13). Hawanczak, who has managed The Oaks under that rule since 2003, conceded that the conduct Niepmann described would require removal and that failing to act on it "wouldn't have been proper procedure." (*Id.* at p. 331, lines 1 – 15; p. 333, lines 2 – 6; p. 339, lines 2 – 5).

B. Notice is of the bite, not of the victim's wishes about it.

Respondents make much of the fact that Niepmann "only wanted to know if the dog had his rabies vaccine" and "did not want anything to happen to the dog." (Resp'ts' Br. 6 – 7). Two answers. *First*, notice is of a fact, not of the victim's feelings about the fact. The regulation does not provide that a dog will be removed if the

person bitten asks for its removal, or that the dog will not be removed if it is against the victim's wishes. It provides that a dog which exhibits aggressive behavior "will be required to be removed," full stop. (Trial Tr. p. 330, lines 8 – 13). Niepmann told Sanchez that Toby had bitten him. (*Id.* at p. 285, lines 2 – 4). Whether he also wanted the dog punished is beside the point, because the rule exists to protect every resident of The Oaks and not merely the one who happened to be bitten first. Hawanczak offered no testimony that a victim's forgiveness suspends the rule, and Respondents' conduct after the second bite, when no one asked them to act and they acted within six days, shows that it does not. (*Id.* at p. 326, line 12 – p. 329, line 14; Defs.' Ex. 2).

Second, Niepmann's forbearance is the strongest evidence in the record of his disinterest. Here was a man who asked for nothing, not from the Jolins, not from Respondents, not from the county. He wanted to know whether he needed a rabies shot. A witness with so little to gain has no reason to invent a conversation, much less a conversation with someone he considered a friend, that never happened, and Respondents' effort to convert his restraint into a reason for doubting him turns the inference on its head.

C. An empty file proves only that no one filled it.

Respondents' principal circumstantial point is that no record of the Niepmann incident exists in their files, from which they say the jury could infer that Niepmann never spoke to Sanchez. (Resp'ts' Br. 7 – 8). The inference has a missing premise. The absence of a record is evidence that nothing happened only if there is evidence a record would likely have been made had something happened, and that is a fact

Respondents were required to prove rather than assume. They did not prove it. No witness testified that Sanchez kept a log of resident complaints, that he had ever documented a dog bite, or that it would have been out of character for him to hear about a bite and let the matter drop. Hawanczak, the only witness Respondents called on the subject, described what "would be the proper procedure" if Respondents were "made aware" of an incident, and then admitted that as to the Niepmann bite "[n]o investigation" was done. (Trial Tr. p. 324, line 22 – p. 325, line 1; p. 332, lines 18 – 21).[3] He never stated Respondents had routine practice of documenting complaints, or that Respondents regularly and reliably documented all dog bite incidents. A description of what should have happened is not evidence of what customarily did happen.

A missing entry in a diary proves that a man did not write that day. It does not prove that nothing happened to him, and it proves even less when no one has shown that he kept a diary in the first place. Respondents' file is that diary. Its silence fits the account Niepmann gave in every particular, that he reported the bite to a superintendent who checked a drawer, found nothing, sent him to the dog's owners, and wrote nothing down. That is in fact the more natural reading of the record,

[3]Respondents state that Hawanczak "testified that it was regular policy to investigate and document the complaint." (Resp'ts' Br. 7). The cited transcript segments contain Hawanczak's concession that "[n]o investigation" was conducted, his admission that failing to act on a report "wouldn't have been proper procedure," and a series of leading questions on redirect, one of which drew an objection, about whether the response would have been "case specific." (Trial Tr. p. 332, line 9 – p. 333, line 7; p. 333, line 8 – p. 334, line 22). Nothing in them describes what Sanchez customarily did with resident complaints or that he documented dog bites as a matter of course. In fact, there is no evidence in the record of what Sanchez's customary practice was with any of Respondents' business, or that he ever complied with any of Respondents' policies.

because Maggie Jolin later placed Toby's vaccination records in Sanchez's box and spoke to him about them. (*Id.* at p. 261, line 2 – p. 265, line 24).

Regardless, evidence that fits two competing accounts equally well is not evidence for either one. *See Roberts v. Carroll*, 377 So. 2d 944, 947 (Ala. 1979) (holding that evidence pointing equally to favorable and unfavorable inferences "lacks probative value" and that its use to support one inference over the other "becomes mere conjecture and speculation"). At best for Respondents, an empty file is equally consistent with a report that was never made and a report that was never written down, which means it does not tend to prove either. On this record the balance is not even that close. The only reasonable inference from the surrounding facts is that the Niepmann incident generated no response not because it was never reported, but because it was reported to a man who did nothing with it. That is a breach of the standard of care, not the absence of notice.

D. The remaining points fare no better.

Respondents assert that Niepmann never followed up with Sanchez. (Resp'ts' Br. 6). The lines they cite end with Niepmann agreeing that he did not speak to Sanchez again "specifically about it," and the two lines that follow, which Respondents omit, are "We talked about it, but not specifics." (Trial Tr. p. 286, lines 16 – 22; p. 287, lines 1 – 2). Respondents also repeat their trial theme that Animal Control "did not write a citation" and ask why they should be held to a higher standard than the county. (Resp'ts' Br. 7). The answer is that Respondents wrote themselves a higher standard. The county's ordinances are the county's. The rules of

The Oaks are Respondents', and a company's deviation from its own policy is evidence that it breached the standard of care. *See Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016) (holding that evidence of a company's deviation from its own internal policies is relevant and admissible to show breach). Nor did the county do nothing. Montgomery warned the Jolins that a second incident would bring charges, which is to say that the county recognized the risk of recurrence months before it recurred. (Trial Tr. p. 125, lines 7 – 14).

IV. Even crediting Niepmann, Respondents identify no evidence that could sustain the verdict on any other element.

Respondents close their statement of facts by asserting that "even if the jury did accept his testimony, they were not obligated on his testimony alone to find for Appellant." (Resp'ts' Br. 4). They do not say why, and the record forecloses every possibility. Notice to Sanchez was notice to Respondents, because Respondents conceded on the record that Diamond Management was the agent of The Oaks and that Sanchez acted within the scope of his duties. (Trial Tr. p. 250, lines 17 – 23; p. 379, lines 4 – 15; p. 381, lines 14 – 16). The circuit court ruled that Sanchez's knowledge "can be imputed," and Respondents did not object. (*Id.* at p. 308, lines 11 – 18). The removal rule is mandatory on its face, Hawanczak admitted that the Niepmann incident triggered it, and Respondents' own conduct after the second bite shows what compliance looks like. (*Id.* at p. 326, line 12 – p. 329, line 14; p. 331, lines 1 – 15; p. 339, lines 2 – 5; Defs.' Ex. 2).

Respondents' brief does not mention agency, does not mention the removal rule, and devotes a single uncited sentence to foreseeability, asserting that the attack

was unforeseeable because the dog escaped from the Jolins' home. (Resp'ts' Br. 4). The question was never whether Respondents could foresee the escape. It was whether they could foresee the bite, and a dog that has bitten one resident is foreseeably likely to bite another. *See Hossenlopp v. Cannon*, 285 S.C. 367, 370-71, 329 S.E.2d 438, 440-41 (1985) (holding that knowledge of a single prior attack was sufficient notice of a dog's dangerous propensities). A general verdict may be affirmed on either of two grounds only when one of them is sustainable, and Respondents have not shown that any ground is.

CONCLUSION

Respondents' brief amounts to a request that this Court presume the jury had a reason it never heard. The law does not indulge that presumption. Uncontradicted evidence "should be accepted unless there is reason for disbelief," and the reasons our courts have recognized, interest, improbability, inconsistency, and contrary circumstances, are absent from this record. What is present is a disinterested witness, corroborated in every particular that could be checked, and an empty chair where Respondents' promised witness was supposed to sit. The order denying the motion for a new trial should be reversed and the case remanded.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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