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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Vernon F. Dunbar, Circuit Court Judge

Appellate Case No. 2026-001065

Roger Wayne Lynch, …….. Appellant,

v.

Angela West Einstein, …… Respondent.

REPLY BRIEF

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REPLY ARGUMENT

Einstein can only prevail by showing this is a highly unusual lawsuit. The parties agree, in all but the rare case, the factors affecting who is responsible for a car crash are too numerous and fact specific to be decided by anyone other than a factfinder. (Resp't Br. at 25). Yet, what is most notable from the record is just how typical this case is. Einstein says Mr. Lynch should not have been in the road and challenges the decisions leading him there. Mr. Lynch says Einstein's driving was unreasonable given her violation of South Carolina motor vehicle statutes. Despite her best efforts, Einstein cannot dismiss Mr. Lynch's argument as speculation because he bases it on her own words. Nor can Einstein belatedly challenge the documents containing these admissions—at least not without implicitly invalidating much of her own evidence. Precedent shows the rare case where comparative fault becomes a summary judgment issue is one where no evidence even suggests the defendant driver did anything wrong. Einstein's speeding, lane maneuvers, and lack of reasonable lookout mean this is not that case.

1. Einstein's attempt to minimize the factual disputes only emphasizes why a jury must resolve them.

Einstein takes a consistent approach in addressing the key factual disputes. She first attempts to deny their existence and then tries to minimize their importance. Neither tactic respects the record or complies with core summary judgment principles.

a. Lighting levels at the incident site

Einstein asks the Court to find as a matter of law that the lighting level at the incident site is an "undisputed issue." (Resp't Br. at 17). She never accounts for her own testimony acknowledging her headlights were on and the lighting at businesses bordering the roadway were "extremely bright." (R. pp. 677-79). She pushes aside the recorded statement of her own insurance agency investigator describing the incident site as a "fairly well-lighted area." (R. p. 395). In

Einstein's view, the "extremely bright" IHOP and Asada lights in this "well-lighted area" could not lead a reasonable jury to find adequate lighting at the precise spot of pavement where Mr. Lynch was struck. (Resp't Br. at 10).

Einstein's error is in ignoring the summary judgment standard to draw her conclusions. *Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 904 S.E.2d 889 (Ct. App. 2024) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)) (holding that a court considering summary judgment does not "make[] factual determinations"). She expressly asks the Court to pick a side when it comes to the competing lighting evidence. (Resp't Br. at 10) (arguing Lynch-friendly lighting testimony "does not negate the surrounding darkness to the point of creating clear visibility"). In fact, Einstein defends the circuit court's lighting conclusion ("not well illuminated") because the circuit court reviewed an investigating officer's bodycam video footage. (Resp't Br. at 17). But, Einstein never explains why the circuit court (or this one) should take on the role of inferring from video how effective the nearby lights were or how bright an incident scene actually was. *Chandelle Prop. Owners Ass'n v. Armstrong*, 444 S.C. 292, 906 S.E.2d 599 (Ct. App. 2024) (quoting *Byers v. Westinghouse Elec. Corp.*, 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992)) (all "ambiguities, conclusions, and inferences arising from the evidence" must be construed in the non-movant's favor).

For Rule 56, SCRCP's federal counterpart, summary judgment procedure allows a court to dismiss a factual dispute as not "genuine" when the non-movant's version of events is "blatantly contradicted" by unambiguous video evidence. *Scott v. Harris*, 550 U.S. 372, 380 (2007). If Einstein is attempting to apply this principle to South Carolina and to fit the circuit court's order within it, that argument fails for several reasons. First, this is not an instance of a plaintiff describing the facts one way, and the defendant's video depicting another. Mr. Lynch is relying on

Einstein's sworn testimony and the documented observation of her insurance investigator to show the incident site was well-lit. Second, the *Scott* principle is not meant to place courts in the role of interpreting video in this manner. *Scott* "is the exception, not the rule." *Harris v. Pittman*, 927 F.3d 266, 276 (4th Cir. 2019). When video can provide an unambiguous answer on an objective fact issue (e.g. whether stoplight was red or green, whether officer or suspect fired the first shot), *Scott* holds that a court can recognize contrary testimony does not create a genuine dispute. Yet, the vast majority of factual issues are not so black-and-white, and *Scott* does not abrogate the rule that a court must generally view matters in the light most friendly to the plaintiff and adopt the plaintiff-friendly version of events even if there is some documentary evidence questioning the plaintiff's account. *Id.*

Third, *Scott* is further limited to instances where the video evidence is capable of offering a definitive answer. *Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 277 (4th Cir. 2011) (finding video did not blatantly contradict non-movant's version of events because it was "ambiguous due to the unreliable quality of the video"). Einstein is relying on her preferred interpretation of the bodycam video, not any unambiguous depiction of precisely what she could and could not see as she approached the incident site. *See also Bass v. Walmart Inc.*, Civil Action No. 4:25-cv-00614-JD, 2026 WL 2389630 (D.S.C. Aug. 17, 2026) (citing *Brown v. Wal-Mart Stores E., LP*, 139 F.4th 356, 366-68 (4th Cir. 2025) ("where surveillance footage is limited, poor in quality, or reasonably susceptible to competing interpretations, the court may not resolve those competing inferences for the movant"). This is not even surveillance footage real time of an incident, it's post-incident video. Fourth, a court may only use video to declare a factual dispute non-genuine after finding the footage "blatantly" contradicts the non-movant's position. The circuit court order does not make this finding, and Einstein contends no such finding was required. (Resp't Br. at 17) ("This is simply

unrequired by Rule 56"). The Fourth Circuit disagrees. *Simmons v. Whitaker*, 106 F.4th 379, 385 (4th Cir. 2024) ("Here, the district court rejected [the plaintiff's] account based on the existence of the video evidence but did not decide whether the videotape 'blatantly' or 'clearly' contradicted [the plaintiff's] account, ***as Scott requires***.") (emphasis added).

In other portions of her brief, Einstein admits some dispute over the incident scene lighting but dismisses it as immaterial. (Resp't Br. at 11) (arguing Mr. Lynch's lighting evidence could show only that "the scene was somewhat brighter than Einstein claims"). A material fact is any one that is "of such a nature as to affect the result of the action." *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988) (citing *Austin v. Wilder*, 215 S.E.3d 794 (N.C. App. 1975)). Courts recognize lighting levels as a key fact for evaluating comparative fault in motorist-versus-pedestrian collisions. *Price v. Lowman*, 373 F.2d 390 (4th Cir. 1967) (applying South Carolina law) (reversing directed verdict to motorist after finding genuine dispute on headlight usage). Even if lighting alone is not conclusive, it is still part of the essential set of facts a factfinder must consider to evaluate the reasonableness of a defendant's nighttime behavior. *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (reversing summary judgment based on dispute over lighting in combination with divergent testimony on the parties' physical position and demeanor at the time of incident).[1]

[1] Despite Einstein's contentions to the contrary (Resp't Br. at 11 n. 6), numerous courts in other jurisdictions recognize lighting levels as a material fact for evaluating fault in a motor vehicle collision. *E.g. Pruitt v. Oliver*, 331 So.3d 99, 115 (Ala. 2021) (reversing summary judgment to driver since a witness stated that pedestrian in wheelchair was "very visible" in light of headlights and streetlights in the area); *Gonzalez v. The Cincinnati Ins. Co.*, 688 N.W.2d 783 (Table), 2004 WL 2169436, at * 3 (Wis. App. Sept. 29, 2004) (reversing summary judgment to driver who struck pedestrian and finding material factual dispute because "the summary judgment record would permit the conclusion that the area was sufficiently lighted by [driver's] headlights, lights from area businesses, and those street lights that were working"); *Comper v. Jones*, 400 N.E.2d 475, 480 (Ill. App. 1980) ("The resolution of the conflicting testimony on such matters as the parties'

Einstein certainly treats incident scene lighting as a material issue in her brief. In her three-sentence fact summary introducing her arguments, Einstein includes her position on lighting. (Resp't Br. at 1) ("roadway . . . was not well lit"). From there, the notion that the scene was poorly lit serves as a consistent backdrop for most of Einstein's conclusions. She uses it to excuse her driving errors. (Resp't Br. at 12-13) (dismissing her admission of speeding because Lynch was on ground in front of her "in a live travel lane that was not well lit"). She cites it to distinguish unfavorable precedents and to analogize to others. (Resp't Br. at 22) (arguing *Abdelgheny* was distinguishable because it presented a "fundamentally different visibility scenario"); (Resp't Br. at 30) (claiming this case is analogous to *Bloom* because of Lynch's dark clothes and "a roadway that was not well lit"). It is even part of the reason why Einstein says the comparative fault question should not reach a jury. (Resp't Br. at 26) (concluding Lynch was more than 50% at fault as a matter of law because "he wore dark clothing at night near a poorly lit highway . . .").

In sum, Einstein's testimony and the PURE investigator's observations genuinely dispute the circuit court's finding that the incident scene was poorly lit. That dispute is material for evaluating the reasonableness of both Einstein and Lynch's conduct, as evidenced by South Carolina case law.

b. Einstein's driving maneuvers

Einstein also incorrectly challenges the genuineness and materiality of the dispute over her driving maneuvers. Einstein repeatedly claims she was not speeding and there is no evidence to the contrary. (Resp't Br. at 12, 21). Yet, she plainly told the PURE investigator that she was traveling 50 miles-per-hour as she approached the incident site and later dropped down to 48 miles-

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ability to see, the presence or absence of a flashing yellow light . . . would certainly have a substantial, if not conclusive, impact on the outcome of the controversy.").

per-hour in a 45 miles-per-hour speed zone. (R. p. 398). Einstein offers no legitimate basis to question the genuineness of the dispute between her current litigation stance and what she told her insurance company shortly after the collision. Indeed, Einstein relies almost exclusively on her self-interested deposition testimony to argue there is no speeding. (Resp't Br. at 21) (citing R. p. 689; R. p. 231).

In other words, Einstein simply concludes that, because she testified to no speeding, the circuit court was justified in agreeing with her. The only other evidence Einstein cites is dubious as to its probative value and its admissibility. (R. p. 218). Einstein points to the deposition where investigating officer (Rachel Hamilton) stated she found no evidence of speeding. However, Officer Hamilton based this conclusion solely on her lay evaluation of the amount of damage to Einstein's car. Even if it had probative value, Officer Hamilton could not present that conclusion to a jury. *State v. Kelly*, 285 S.C. 373, 329 S.E.2d 442 (1985) ("A police officer may not give his opinions as to the cause of an accident. He may only testify regarding his direct observations unless he is qualified as an expert.").

Einstein is equally emphatic in denying there was any evidence of an illegal pass. (Resp't Br. at 21) ("Einstein certainly was not passing [Gaines], much less overtaking him"). Einstein contends Mr. Lynch's claim of an illegal pass "rests on speculation, not a reasonable evidentiary inference." *Id.* However, Mr. Lynch does not rely on speculation or inference, but Einstein's own words. It was Einstein who admitted speeding "to try to get ahead of the other vehicle to her left." (R. p. 397). So, when Einstein later sums up her argument by stating she "was not speeding" and "never truly attempted to pass Gaines" (Resp't Br. at 31), there is simply no way to square those assertions with the summary judgment standard Einstein asks the court to apply. *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997) ("In determining whether any triable issues

of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party"); *Cooper by Cooper v. Cnty. of Florence*, 306 S.C. 408, 411, 412 S.E.2d 417, 418 (1991) ("The determination of whether a motorist statute has been violated is ordinarily a question of fact for the jury").

Finally, the Court should reject Einstein's attempt to downplay her driving errors. She can argue to the jury there was only a "minimal speed differential" (Resp't Br. at 12), but precedent shows speeding and other moving violations are material facts for comparative fault in motorist-versus-pedestrian collisions. *Abdelgheny v. Moody*, 432 S.C. 346, 350-51, 852 S.E.2d 225, 228 (Ct. App. 2020) (finding jury question on motorist's liability where evidence suggested driver failed to keep proper lookout and car was traveling too fast for conditions). Plus, Einstein artificially contracts the inquiry. Under South Carolina law, whether a motorist's speed is reasonable or legal is not solely measured by the speed limit. S.C. Code Ann. § 56-5-1520(A) ("A person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions . . ."). Einstein's acknowledgment that she saw Mr. Lynch for the first time merely feet before hitting him is material evidence that she was driving too fast for conditions. *Abdelgheny*, 432 S.C. at 351, 852 S.E.2d at 228; S.C. Code Ann. § 56-5-1520(A) ("Speed must be so controlled to avoid colliding with a person . . .").

2. A jury could reasonably conclude Einstein's conduct was a proximate cause of the collision.

Einstein also errs in dismissing these factual disputes as nonfactors in the collision. (Resp't Br. at 12-13, 18). In her view, Mr. Lynch was going to be run over no matter how well-lit the roadway and no matter how illegal her driving choices. That dubious conclusion misunderstands the law and misapplies the facts.

Proximate causation is an important element of a negligence claim that includes both "causation in fact and legal cause." *Hurd v. Williamsburg County*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005). Causation in fact is established by proof that the injury "would not have occurred but for the defendant's negligence." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011) (citing *Mellen v. Lane*, 377 S.C. 267, 278, 659 S.E.2d 236, 245 (Ct. App. 2008)). Legal cause is established by determining foreseeability, a factor which focuses on "whether the injury is the natural and probable consequence of the alleged negligent act." *Id.* Proximate cause is so fact-dependent that it is rarely a matter that can be resolved at summary judgment. *Ballou v. Sigma Nu Gen. Fraternity*, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986) ("Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law"). It is even rarer in cases like this where the factfinder is tasked with analyzing the factors leading to a motor vehicle collision. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("exceedingly rare").

Einstein appears to build her proximate cause defense on causation-in-fact, arguing her poor driving was not a "but for" cause of the collision. However, her argument suffers from multiple structural problems. At times, Einstein's brief wrongly assumes a motor vehicle collision must be caused by one participant or the other. (Resp't Br. at 23) (arguing Mr. Lynch's actions "were the proximate cause of the collision"). There can be multiple proximate causes for a plaintiff's injuries, and assertions that Mr. Lynch contributed to the collision do not eliminate the jury question as to whether Einstein's conduct was also a proximate cause. *Roddey v. Wal-Mart Stores E., LP.*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016) ("The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury"). Plus, so much of Einstein's proximate cause defense is tied to her contention that her driving was reasonable or even

admirable. (Resp't Br. at 23) ("There is zero evidence of negligence on her part"). As discussed above, Einstein's own words belie that assertion and, for summary judgment purposes, the Court cannot be asked to assume Einstein is faultless.

Speeding, illegal passing, and failing to keep proper lookout can easily be deemed proximate causes of a collision. As the Supreme Court has held, "in most automobile accident cases, speed creates imponderable issues of time and distance which must be resolved by the jury." *Tubbs by Duren v. Bowie*, 308 S.C. 155, 158, 417 S.E.2d 550, 552 (1992). Einstein asks the Court to find her 50 miles-per-hour in a 45 miles-per-hour speed zone is a "minimal speed differential" that could not be a proximate cause of the collision. (Resp't Br. at 12-13). But Einstein compares her speed to the wrong standard. Being fairly close to the speed limit does not absolve a motorist from liability. The key is whether Einstein's speed was reasonably safe for the conditions she encountered. S.C. Code Ann. § 56-5-1520(A). That is why this Court has found speed may be a causative factor even if the defendant driver argues he was traveling *less than* the speed limit. *Bailey v. Segars*, 346 S.C. 359, 368, 550 S.E.2d 910, 915 (Ct. App. 2001) ("we cannot as a matter of law rule out speed as the proximate cause"); *see also Lester v. McFaddon*, 288 F. Supp. 735, 742 (D.S.C. 1968) (driver traveling 40-45 mph in 55 mph zone was direct and proximate cause of collision with pedestrian on side of road). Einstein's admissions of driving 48-50 miles-per-hour and to seeing Mr. Lynch only a few feet before the collision are proof of the kind of negligent driving that causes a collision. *Abdelgheny*, 432 S.C. at 351, 852 S.E.2d at 228 (holding that jury could find driver's speed was too fast for conditions "if his range of vision was a mere ten feet").

Einstein also offers nothing to counter the direct causal link between her illegal pass and the collision. By her own admission, Einstein's goal was to make a left turn as she approached the collision site. (R. p. 397). She would have to maneuver from the far right to the far left lane of

Wade Hampton Blvd. to make her turn. *Id.* Gaines's vehicle to Einstein's left prevented Einstein from making the lane change at her current speed—she would have to speed up or slow down. Choosing to speed up to pass Gaines on the right was an aggressive, illegal, and unreasonable maneuver. S.C. Code Ann. § 56-5-1850(b). Had Einstein chosen the reasonable option of slowing down and changing lanes behind Gaines's vehicle, a reasonable jury could conclude Einstein would not have been in the lane where Mr. Lynch was struck. Einstein's only retort is to deny the facts. (Resp't Br. at 21) ("Einstein certainly was not passing him . . ."). Yet, even if Einstein is permitted to deny her own prior statements[2], that would not entitle her to summary judgment. A jury must be the one to consider all of the evidence on Einstein's driving choices, especially since her driving errors are the very reason she was in the lane where the collision occurred.

Plus, the causation evidence here is in line with what has been offered in previous motor vehicle collision cases. The causal link between bad driving and a collision may be proved by direct or circumstantial evidence. *Player v. Thompson*, 259 S.C. 600, 606-07, 193 S.E.2d 531, 533-34 (1972). *Player* held that, when considering "all of the circumstances" of the collision—the driver's speed, road conditions, and even a dog darting into the roadway—the evidence supported a reasonable inference that the driver was responsible for the collision. The Supreme Court has found relevant factors on whether a motorist caused a pedestrian's injuries include evidence showing (1) the driver's excessive speed in violation of a city ordinance; (2) the driver's failure to keep a proper lookout; and (3) the driver admitting he did not see pedestrian until his truck was upon her. *Marks v. I.M. Pearlstine & Sons*, 203 S.C. 318, 26 S.E.2d 835, 840 (1943). The Supreme

[2] South Carolina courts are wary of attempts to affect summary judgment outcomes through litigation declarations contradicting a party's prior account of material facts. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (recognizing that a court may disregard a later affidavit as a "sham" where it contradicts the party's own prior sworn statement).

Court has also rejected claims of insufficient causation evidence by a driver who struck a stalled car in middle of a highway during a nighttime collision. *Benton v. Pellum*, 232 S.C. 26, 100 S.E.2d 534 (1957). Like here, the driver in *Benton* claimed (despite contrary evidence) that he was driving a reasonable 40-50 miles-per-hour and braked as soon as he saw the stalled car but was unable to avoid collision. *Id.* at 31, 100 S.E.2d at 536. Despite those assertions, the Supreme Court ruled that a reasonable jury could find the driver was reckless and that his misconduct proximately caused the collision. *Id.* at 31-32, 100 S.E.2d at 536.

Thus, this is not the "exceedingly rare" motor vehicle collision case allowing for a ruling on proximate cause as a matter of law. Einstein's self-serving claim that the collision was unavoidable (Resp't Br. at 3, 22) does not change the analysis. Neither does Einstein's repeated reference to the word "unavoidable" in Gaines's statement. (Resp't Br. at 3, 11, 26, 27, 29). Even accepted at face value, Gaines's statement does not clearly support Einstein's defense. Just as much as he uses the word "unavoidable," he also plainly states he "saw clearly" Mr. Lynch as he approached the collision site. (R. p. 792). Moreover, Einstein mischaracterizes the key portion of Gaines's statement, arguing "unavoidable" is probative evidence because Gaines limited his statement to "firsthand observations." (Resp't Br. at 29). That Gaines "saw" Mr. Lynch "clearly" as Gaines approached is an observation, but whether Einstein could have avoided him was a conclusion Gaines could not competently reach based on the limited information available to him. He could observe Einstein's location but had no basis for evaluating her execution of the dangerous driving maneuver she had planned. Testimony on whether a collision was "unavoidable" attempts

to usurp the jury's role, and an eyewitness's comment on this issue is generally disallowed by courts.[3]

Even assuming Gaines's characterization may be considered, it cannot establish that the collision was unavoidable as a matter of law. Gaines did not know Einstein's speed, whether she was attentive, when or how she braked, or that she had accelerated in an effort to get ahead of his vehicle. His statement also reflects that he saw Lynch clearly before the collision. A jury could credit Gaines's factual observations without accepting his characterization of the collision, particularly when he lacked knowledge of circumstances bearing directly on whether Einstein could have avoided it.

In short, the record permits a reasonable jury to connect Einstein's speed, lookout, and effort to get ahead of Gaines with the collision and Lynch's injuries. Gaines's characterization does not eliminate those reasonable inferences. Proximate cause therefore remains a question for the jury.

[3] Courts applying Rule 701 have similarly questioned the value of an eyewitness's opinion that a collision was unavoidable when the witness lacked knowledge of the other driver's speed, attentiveness, or conduct immediately before impact. *See e.g. Fino v. Nodine*, 646 So.2d 746, 749 (Fla. App. 1994) (finding trial court abused its discretion by admitting lay witness opinion on whether accident was avoidable because witness "could not testify as to [at-fault driver's] speed, when she began to brake, what she could or could not see, or as to her conduct as she approached the intersection, including her attentiveness"); *Blackburn v. Murphy*, 737 S.W.2d 529, 532-33 (Tenn. 1987) (finding witness "should not have been permitted to state her opinion as to whether the accident could or could not ultimately have been avoided" because "she was in no better position to make this inference than the members of the jury"); *Strasma v. Rager*, 495 N.E.2d 1343, 1346-47 (Ill. App. 1986) (reversing trial court and finding defendant could not testify that collision was unavoidable because "question improperly calls for a conclusory answer on an ultimate issue" and was "highly prejudicial"); *Jershin v. Becker*, 351 N.W.2d 48, 53 (Neb. 1984) (affirming exclusion of witness's opinion as to whether collision was avoidable because "[t]hese were the precise issues to be determined by the jury").

3. Einstein's admitted driving errors are properly before the Court.

Einstein leads her brief by asking the Court to cast aside records documenting her admission of speeding and other illegal driving maneuvers. (Resp't Br. at 7-8) (citing R. pp. 395-98). Einstein's argument is procedurally improper and wrong on the merits.

As Einstein's brief implicitly acknowledges, she raised no challenge to the PURE File's admissibility or its propriety as evidence to oppose summary judgment during any of the many circuit court proceedings. (Resp't Br. at 8) (citing Rule 220(c), SCACR). Now, however, she contends Rule 56(c), (e), SCRCP, strictly limit summary judgment opposition to affidavits, depositions, and interrogatory responses and that authenticity concerns and hearsay objections would render the PURE File inadmissible at trial. (Resp't Br. at 7-8). As a matter of appellate procedure and fairness to the parties, the Court should decline consideration of Einstein's flawed and belated evidentiary objections.

It is true issue preservation requirements do not apply the same way to appellants and respondents since Rule 220(c) grants appellate courts discretion to affirm a ruling based on any ground appearing in the Record on Appeal. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000). Still, Rule 220(c) has never been read to encourage a respondent to use her appellate brief to raise new arguments. *Id.* ("we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court . . ."). In fact, appellate courts are likely to perceive a respondent's new argument as "unfair" to the appellant or an "unwise" way to resolve the appeal. *Id.* Accordingly, while the rules do not bar a respondent's new issue, "the appellate court is likely to ignore it." *Id.* South Carolina appellate courts have declined to address a respondent's new argument on multiple occasions. *E.g.*, *S.C. Workers' Comp. Comm'n v. WestPoint Home, LLC*, 446 S.C. 625, 629–30, 922 S.E.2d 231, 233–

34 (Ct. App. 2025); *State v. Boston*, 433 S.C. 177, 182 n. 3, 857 S.E.2d 27, 29 n. 3 (Ct. App. 2021) (citing *I'On* and declining to address argument on precedent that was inconsistent with the respondent's conduct during circuit court proceedings).

These concerns about diluting important principles and unfairness to the parties are especially acute here. Einstein did not raise her Rule 56(c), authenticity, and hearsay challenges to the PURE File even when directly confronted with its contents in multiple summary judgment motions. Mr. Lynch's attorney referenced and discussed the PURE File contents during the circuit court hearing, and Einstein's counsel never argued the PURE File was inadmissible or beyond the permissible scope of summary judgment evidence. (R. p. 86, lines 15-18) (discussing "claim file materials"); (R. p. 107, lines 2-8) (noting Einstein's "admission that she's speeding"). If Einstein believed this evidence was out of bounds, she had every incentive to state her objections then, not to save them for this Court. Had Einstein raised these objections below, Lynch could have responded to them, and the circuit court could have addressed any asserted foundational deficiency before granting summary judgment.[4]

The fairness concern goes even further. Einstein's evidentiary objections are not only belated, they are applied inconsistently. Einstein wants the PURE File disregarded but uses similarly vulnerable documents as the backbone of her argument. If the PURE File is outside the Rule 56(c) and (e) categories of permissible summary judgment documents, then so are the medical records used to argue Mr. Lynch was impaired, the prescription records supposedly showing his medical condition was ignored, and the EMS records offered to mischaracterize Mr. Lynch as a

[4] Lynch obtained the PURE claim file only after Einstein's deposition. He then sought to reopen her deposition and to pursue discovery from PURE and Chubb concerning the file, but Einstein opposed those requests. (R. pp. 306-08*)*. That procedural history matters because Lynch had no opportunity during Einstein's original deposition to confront her with the prior account or develop the additional foundation Einstein now claims is missing.

drug abuser. (Resp't Br. at 5, 15; R. pp. 806-10; R. p. 210). Similarly, Einstein did not offer any path to admission for the multiple layers of hearsay in, for example, the handwritten Cortez statement, the narrative of the EMS run sheet, and the Prisma Health records she presented to the circuit court and asks this Court to rely on in the appeal. (Resp't Br. at 4, 5, 14, 15, 29); (R. pp. 788, 810-23). Einstein should not be permitted to ask the Court to impose evidentiary standards on Mr. Lynch that she is unwilling to apply to herself.

Einstein's arguments are also unsupported by substantive law. For one, Einstein defines the available evidence for summary judgment motions too narrowly. Rather than some rigid list, the Supreme Court has held a party may oppose summary judgment with "pretrial affidavits, depositions, or ***other documentary evidence***" to show a genuine issue of material fact. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (quoting *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124 125 (1980)) (emphasis added); *see also Doe ex rel. Doe v. Batson*, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001) ("affidavits or other supporting documents"). The PURE File is documentary evidence bearing directly on Einstein's driving. While Lynch still bears the burden of establishing its admissibility, Einstein's new objections do not justify deciding that question against him on an evidentiary record that was never developed below, especially in a case turning on the reasonableness of her conduct.

The record sufficiently authenticates the claim file. Authentication requires only evidence sufficient to support a finding that the document is what its proponent claims. Rule 901(a), SCRE. The burden is not high and does not require conclusive proof of genuineness. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 65–67, 773 S.E.2d 607, 611–12 (Ct. App. 2015). Authentication may also be established through the document's appearance, contents, substance, internal patterns, and distinctive characteristics considered with the surrounding circumstances.

Rule 901(b)(4), SCRE; *Kershaw County Board of Education v. United States Gypsum Co*., 302 S.C. 390, 398, 396 S.E.2d 369, 373–74 (1990).

The PURE claim file satisfies that threshold. PURE produced it in response to Lynch's subpoena, and the pages bear PURE Bates numbers. The file identifies the insured, claim number, policy number, date of loss, assigned adjuster, and other information corresponding to this collision. The disputed entry identifies David Bauck as its author and records when it was made. Howard Einstein also identified Bauck as the PURE claims representative and confirmed that Angela Einstein spoke with him. These internal and external characteristics support a finding that the entry is part of PURE's claim file concerning this collision. Rule 901 did not require testimony from a PURE custodian merely to satisfy the threshold authentication requirement.

Einstein's hearsay-within-hearsay objection likewise does not establish categorical exclusion. The statements attributed to Einstein are admissions of a party opponent and therefore are not hearsay. Rule 801(d)(2)(A), SCRE. The remaining layer is Bauck's dated memorialization of that conversation in PURE's claim system. The entry identifies its author, time, source, and relationship to the identified claim. Those circumstances bear directly on the regularity and reliability of the entry. Mr. Lynch acknowledges that the present record may not contain every fact necessary to resolve the second hearsay layer conclusively. But that is precisely the problem with deciding Einstein's new objection on appeal: because she never raised it below, Lynch had no occasion to offer additional foundation, and the circuit court was never asked to determine whether the entry satisfied a hearsay exception.

Moreover, the PURE File may be used to confront Einstein on her assertions that she complied with all driving regulations. *See*, *e.g.* (Resp't Br. at 20) ("Einstein did not violate any traffic laws"); (Resp't Br. at 21) ("the undisputed evidence reflects Einstein was not speeding . .

."); (Resp't Br. at 21) ("Einstein certainly was not passing" Gaines). At trial, Lynch could impeach Einstein with her prior account and ask her to explain the material differences between that account and her deposition testimony, including her descriptions of her speed and effort to get ahead of Gaines. *See* Rule 613(a), SCRE (allowing examination of witness with prior statement); Rule 613(b), SCRE (allowing extrinsic evidence of prior inconsistent statement in some circumstances). Because Einstein would testify and be subject to cross-examination, the jury could consider her prior inconsistent statements substantively and decide whether to believe her earlier account, her later testimony, or neither. *Copeland*, 278 S.C. at 581–82, 300 S.E.2d at 69 ("Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination"). Although Rule 613 and *Copeland* do not independently authenticate Bauck's entry or resolve the separate hearsay layer created by his memorialization, they refute Einstein's suggestion that her prior account could not be presented to or considered by the factfinder.

Nor can the materiality of the PURE File reasonably be disputed. It records an account of Einstein's driving that differs from the account on which her motion and the circuit court's order relied. According to that account, Einstein accelerated to approximately fifty miles per hour while attempting to position herself ahead of Gaines, reduced her speed to approximately forty-eight miles per hour, and did not slam on her brakes. Elsewhere, the claim file records the investigator's observation that the collision area was fairly well lit. Those facts bear directly on Einstein's speed, lookout, reaction, and ability to avoid or mitigate the collision. They reinforce the competing inferences discussed in Issue I and demonstrate why Einstein's new evidentiary objections cannot be treated as an immaterial technical dispute.

4. Einstein offers a distorted view of key comparative fault precedent.

The parties agree it is unusual for a court to decide on summary judgment whether a motorist like Einstein or a pedestrian like Mr. Lynch bear more fault for a collision. (Resp't Br. at 25); *Abdelgheny*, 432 S.C. at 350, 852 S.E.2d at 227. Einstein's brief argues the record here is like those few cases where South Carolina courts ruled against a pedestrian on comparative fault as a matter of law. Her argument misses what makes those cases so "rare."

Since the very notion of comparative negligence is "relative and dependent on the facts of a particular case," it is crucial for Einstein to show why this case is the same as her favored citations on the factors considered most important in each of those opinions. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). Einstein cites just two cases she contends are sufficiently analogous to support the circuit court's order. (Resp't Br. at 26-27) (citing *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000) and *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003)). Neither is a match to this case on the important issues. *Lydia* well illustrates how Einstein's analysis goes wrong. *Lydia* was a first-party negligent entrustment case arising out of a single-vehicle accident. 355 S.C. at 37, 583 S.E.2d at 581. A drunk driver sued the man who handed over the keys to his car. *Id.* In an opinion mostly about the public policy implications of recognizing negligent entrustment in this context, the Supreme Court included a few sentences concluding the drunk driver was predominately liable for the accident. *Id.* at 50, 583 S.E.2d at 752-53. The fault comparison of *Lydia* cannot be mapped on to this case. Mr. Lynch was not driving at all, and certainly had not chosen to operate a two-ton vehicle while intoxicated. The car owner in *Lydia* was not even present when the accident occurred. Einstein's driving errors here have no parallel in *Lydia* which means the abbreviated fact-specific comparative fault analysis from *Lydia* cannot carry the day here.

Einstein also advocates boldly for *Bloom*, arguing the record here is even more favorable for summary judgment than what the Supreme Court ruled on there. (Resp't Br. at 26). However, the *Bloom* pedestrian's alleged fault was more substantial in important respects. He chose to dart into the street from between two parked cars when he could have easily walked half a block in either direction and used a crosswalk. 339 S.C. at 420-21, 529 S.E.2d at 711-12. His reason for taking such a risk was also senseless. He attempted this dangerous, illegal street crossing on a busy street in a rainstorm all so he could deposit a stuffed pig in his car. *Id.* Mr. Lynch had no adjacent crosswalk in which he could seek refuge and was walking to retrieve medication for his chronic medical condition. (R. p. 599).

In fact, cases following *Bloom* have distinguished it on just these types of important distinctions. *Abdelgheny* specifically cited the manner in which the pedestrian got into the roadway as a reason that *Bloom* was critically different. 432 S.C. at 351, 852 S.E.2d at 228 (noting Bloom "'ran' into the street between two parked cars"). *Abdelgheny* also cited the character of the roadway itself, suggesting a pedestrian's entry of a narrow Charleston street "clogged . . . by cars parked upon it" as in *Bloom* is far more blameworthy than one attempting to cross the "broad upland expanse" of a state highway as in *Abdelgheny*. *Id.* Wade Hampton Blvd. is far closer to *Abdelgheny*'s broad highway than *Bloom*'s narrow, car-lined, and rain soaked city street.

Einstein's admission that she did not see Mr. Lynch until he was no more than five feet in front of her vehicle makes this case much closer to *Abdelgheny*. There, the motorist first saw the pedestrian when she was only ten feet in front of his truck. *Abdelgheny*, 432 S.C. at 349, 852 S.E.2d at 227. This Court held a reasonable jury could find that distance "incompatible with a careful lookout" or conclude the motorist was traveling too fast for the dark and rainy conditions. *Id.* at 351, 852 S.E.2d at 228. The same reasonable inferences arise here, especially when Gaines

reported that he saw Mr. Lynch clearly as he approached the collision site. (A. Einstein Dep. at 49; Gaines Statement).

The evidence concerning Mr. Lynch's own negligence does not change that result. Einstein offers eight reasons why she believes Mr. Lynch was more negligent than the pedestrian in *Abdelgheny*. Most concern his clothing, position in the roadway, alcohol consumption, medical condition, and conduct before entering the roadway. Those facts may give Einstein arguments to make to a jury, but they do not eliminate the evidence that she was also negligent. Nor do they allow a court to weigh the parties' respective conduct and decide the percentage of fault attributable to each. Her statutory duties as a driver are specifically intended to protect incapacitated and impaired people. S.C. Code Ann. § 56-5-3230.

Yet, more than anything else, what plagues Einstein's comparative fault analysis is her failure to actually make a comparison. Her six-page argument defending the circuit court's comparative fault ruling barely references her conduct at all. (Resp't Br. at 25-30). Einstein's unwillingness to credit evidence of her traffic violations also limits her ability to analogize this case to *Bloom*. *Bloom* had eyewitnesses testifying that the defendant motorist met the speed limit and was not driving recklessly. 339 S.C. at 421, 529 S.E.2d at 712. Here, Einstein admits she was speeding and was attempting an unsafe right-sided pass. That distinction matters. The *Bloom* defendant's reasonable speed and careful driving were essential to the Supreme Court's summary judgment analysis. 339 S.C. at 424, 529 S.E.2d at 713. Plus, when South Carolina's federal district court recently surveyed *Bloom* and the few other collision cases granting summary judgment on comparative fault, the absence of defendant driver error was identified as *the* distinctive feature. *Littrell v. Landmark Builders of S.C., LLC*, No. 2:19-cv-0637-DCN, 2021 WL 795579, at * 6

(D.S.C. Mar. 2, 2021) (citing *Bloom* among others and concluding "these cases are characterized by a total lack of competent evidence that the defendant acted negligently").

In sum, the circuit court's summary judgment order on comparative fault has no precedent in South Carolina law. *Bloom* took the issue from the jury because the only evidence of any fault was on the pedestrian's side of the collision. That is not true here. Mr. Lynch does not dispute that a jury could attribute some fault to him, but the circuit court could only declare him 51% or more at fault as a matter of law by overlooking Einstein's admitted driving errors. The established summary judgment standard does not permit that approach, and *Bloom* does not support Einstein's desired outcome.

CONCLUSION

Based on the arguments above and those in his earlier brief, Mr. Lynch respectfully requests the Court reverse the circuit court's summary judgment order.

Respectfully submitted,

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October 23, 2026
Rock Hill, SC