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SC Court of Appeals

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,

Respondent,

versus

Sam English Grading, Inc.,

Appellant.

Final Appellant's Brief

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2. Yet the Trial Court used the private contract and the encroachment permit to come in and to allow evidence about no warning signs when there was no duty to have warning signs; evidence about no flagman when there was no duty to have a flagman; evidence about running a private stop sign when there was no public road requirement for stopping or a stop sign; evidence that using a lookout to assist the pan driver in crossing the road was a violation of the contract.

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IV. Additional Sustaining Ground for Judgment Not Withstanding the Verdict.

If the acts of an employer-principal's employee-agents are not negligent, then there is no negligence to impute to the employer-principal under the doctrine of respondeat superior. Therefore, as a matter of law, there is no liability on the part of the employer-principal.

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Statement of the Case

This case was initiated by a Summons and Compliant dated and filed April 18, 2011 and served August 15, 2011. The nature of the case is a single vehicle motorcycle accident brought by the estate of a passenger on the motorcycle. It is not brought against the driver of the motorcycle but against Sam English Grading, a small company that performed the dirt moving work for Owens Corning at its fiberglass landfill.

Sam English Grading answered and denied it breached any duty to the plaintiff that was the proximate cause of the accident. There is a companion case brought by Michael Valenzuela. The defendant moved to have the cases consolidated and the motion was denied by Order as the trial got under way. The defendant did not yet have the order from Judge Newman who heard and decided the motion to consolidate, but plaintiff's counsel reported to Judge Early there was a signed Order.

The bifurcated case was tried before Circuit Judge Doyet Early and a jury from Monday, August 27, 2012 through Friday, August 31, 20112 to a verdict on actual damages and Tuesday, September 4, 2012 for no punitive damages. The jury initially reported to the Trial Court that it was not able to reach a unanimous verdict. This was at approximately 5:20 p.m. on August 31, 2012. The Trial Court then fashioned a unique version of an Allen charge in which he told the jury they must continue deliberating that Friday evening of the Labor Day weekend and if they did not reach a verdict by 9 p.m. Friday night, they would have to come back to court the next day, which was Saturday of the Labor Day weekend, or if they preferred they would have to come back Tuesday after Labor Day to continue deliberating. The jury produced a verdict within just a few minutes of 9 p.m. which meant they did not have to come back

to Court on Saturday morning of Labor Day weekend to continue for an unknown undefined period of time. The amount of the verdict was $2.9 million. The full amount is being appealed

Sam English Grading made timely motions for a directed verdict and judgment not withstanding the verdict, which were denied by Order dated September 27, 2012. The Notice of Appeal was timely served and filed on October 31, 2012.

Statement of Facts

The Motorcycle Accident and How It Happened

This case arises from a single vehicle motorcycle accident on Redd's Branch Road that occurred at about 11 a.m. on a clear day, Friday, August 7, 2009. [Coffin Testimony, R. p. 723; McLaurin Testimony, R. p. 513]. The plaintiff's decedent, Christie Valenzuela, was a passenger on the back of a 2001 Softtail Heritage Harley Davidson driven by her husband, Michael Valenzuela. [Valenzuela Testimony, R. p. 464; 466].

The accident happened on Redd's Branch Rd. at a point just before it intersects with a private driveway of Owens Corning. The driveway is the entrance and exit for the Owens Corning landfill.

The Owens Corning driveway is the entrance and exit to the Owens Corning landfill by vendors and contractors such as Waste Management, Sam English Grading and others who would go to the landfill.

Most of the work of Sam English Grading is done within the landfill without using the driveway because Sam English Grading's daily operation of the landfill involves taking dirt that is already on hand in the landfill, and using it to cover the next deposit of fiberglass waste as it is brought to the landfill. [English Testimony, R. p. 807].

Sam English Grading also occasionally used the driveway to cross Redd's Branch Rd. to Owens Corning's dirt borrow pit on the opposite side of Redd's Branch Rd. [English Testimony, R. p. 807].

Michael Valenzuela's View Toward Where He Threw Down The Motorcycle.

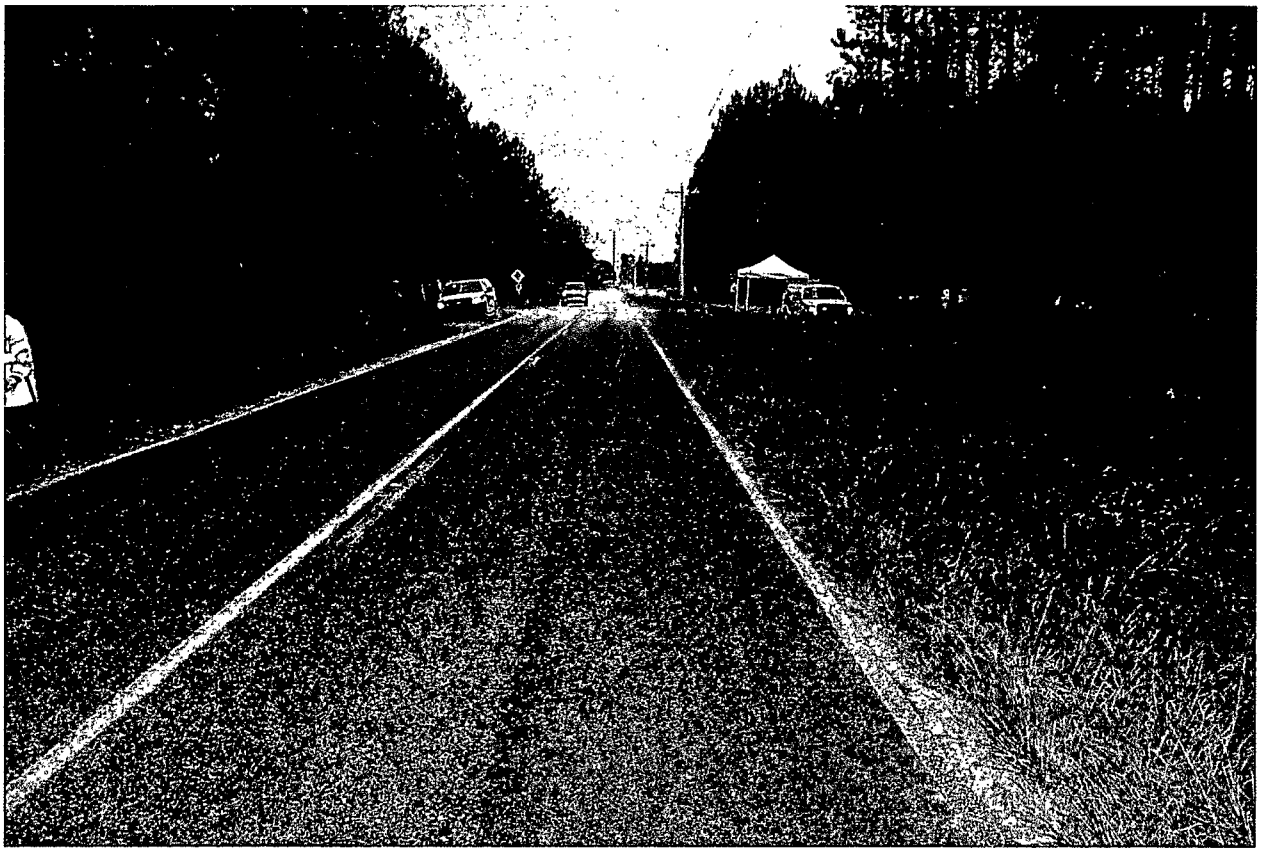
As Michael Valenzuela, with his wife on the back of the motorcycle, was driving down Redd's Branch Rd., and was approaching the location of the Owens Corning driveway, a pan (sometimes also called a scraper) was being driven toward the intersection to cross over to the borrow pit to get dirt. [English Testimony, R. p. 807].

Plaintiff's Exhibit 30 [R. p. 1321]
This photo shows the view for Michael Valenzuela as he rounds a curve and drives toward the intersection with the driveway.

As Michael Valenzuela continued toward the intersection his wife tapped him as a warning that something was wrong and he began to look around. [Valenzuela Testimony, R. p.467]. In retrospect, we know that she had seen the scraper approaching the intersection but Michael did not yet see what she had seen.

Michael Valenzuela's View Getting Closer To The Intersection With The Driveway.

Plaintiff's Exhibit 39 [R. p.1322]. This photo shows the Redd's Branch view for the motorcycle and it shows some vehicles through the trees on the driveway along which the scraper was moving. The photo also shows the skid mark.



Valenzuela thought the pan was going to enter the road and that he might collide with it. [Valenzuela Testimony, R. p. 468]. Unfortunately, instead of trying to stop his motorcycle by applying both front and rear brakes, Valenzuela decided to put his rear brake on to skid his rear tire making it smoke, hoping the pan driver would see him, and he could drive on through. [Valenzuela Testimony, R. p. 468].

Here are his own words describing 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 [R.p. 468]."

...

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" [R. p. 469].

After Valenzuela next decided it was too late to stop, and too late to continue to drive through, he decided to throw the motorcycle down on the road.

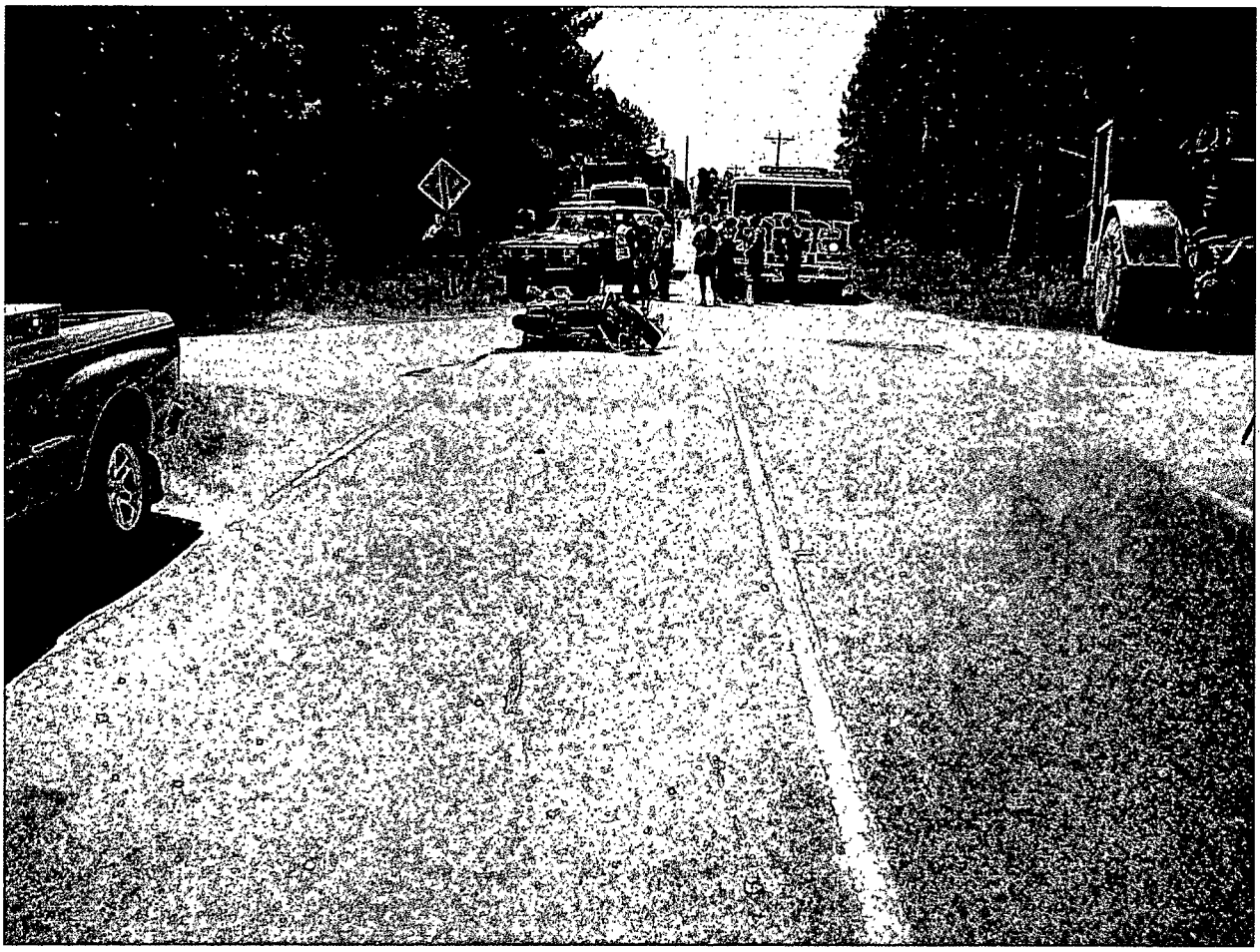
"Just hit the brakes please and I'll hold upright, you know, but I couldn't. He kept coming; never did see me. I threw the bike down. I slid it out hoping we could stay behind it. The bike could crash into him. We could survive it -- because there was no way in the world we was going to miss him." .....[R. p. 468].

....

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. [R. p.469].

As it turned out, the pan was able to stop and did not come out of the driveway and never entered onto Redd's Branch Rd. The accident is a single vehicle motorcycle accident and the picture from **Plaintiff's Exhibit 12** [R. p.1315] shows the scene immediately afterward. The only things that appear in the road are motorcycle and the gouge marks and appear as the motorcycle is tumbling, and the motorcycle,

which is in its opposite lane of travel. (The skid marks which are not seen in this photo because it is closer to the motorcycle than where the skid marks appear. [Coffin Testimony, R. p. 725].



Plaintiff's Exhibit 12 [R. p. 1315]

Michael Valenzuela did not try to stop using both brakes but, instead, skidded with his rear brake to draw attention. Michael Valenzuela also did not keep the motorcycle upright and threw it down on the pavement, then it "high sided" flipping over and then it tumbled. Christie was thrown over the motorcycle and died from her injuries.

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

The Motorcycle

Plaintiff's Exhibit 85 is a picture of the motorcycle which shows where the driver sits down low over the engine, and where the passenger sits above and behind the driver. **[R. p. 1323]**.

On the day of the accident, Sam English's employee, Jeffrey Lewis was driving the pan and Johnny Tindel was posted across Redd's Branch Rd. looking out for oncoming traffic. [Lewis Testimony, R. p.404-405]. Both were experienced at

their job. Initially traffic was clear and Tindel signaled for Lewis to come on across. [Lewis Testimony, R. p. 380; Tindel Testimony, R. p. 1020]. Then almost immediately Tindel signaled for Lewis to stop. [Lewis Testimony, R. p. 422]. The pan is an articulated machine that can turn its front and stop quickly, which it was able to do. [Lewis Testimony, R. p. 383]. It did not enter Redd's Branch Rd. [Lewis Testimony, R. p. 422]. See Plaintiff's Exhibit 12 for a clear photograph of the pan. [R. p. 1315]

There was another vehicle approaching from the opposite direction on Redd's Branch Rd. [Pruitt Testimony, R. p. 558]. It was a Waste Management truck driven by Eric Pruitt which came to a stop on Redd's Branch Rd. preparing to turn into the landfill. (Id.). This truck was visible from Michael Valenzuela's position. It was not just a truck, it was a truck waiting on the scraper to come out and was preparing to turn across Michael Valenzuela's lane into the Owens Corning driveway. [Pruitt Testimony, R. p. 559]. This made the driveway even more obvious than normal and it showed a large vehicle about to cross his path. [Pruitt Testimony, R. p. 559]. See Defendant's Exhibit 17 for a photograph of the placement of the Waste Management Truck behind the red emergency vehicle. [R. p.1346]

Ms. Valenzuela, riding behind her husband on the motorcycle, was coming in the opposite direction of the Waste Management truck. [Pruitt Testimony, R. p. 560]. When a driver is travelling as the motorcycle was travelling, the driver

rounds a soft curve and then is looking down a straight stretch. From the curve to the driveway is about 500 feet. [English Testimony, R. p. 809].

As the motorcycle came closer to the driveway, Tindel, the spotter, saw the motorcycle and signaled the pan to stop, which it did. [Tindel Testimony, R. p. 409]. The plaintiff's decedent also saw something and tapped her husband but he initially did not know what she was warning him about. [Valenzuela Testimony, R. p. 467]. Then he saw the pan which was stopping and kicking up dust in the process. [Valenzuela Testimony, R. p. 468].

Mr. Valenzuela applied his rear brake putting his rear wheel in a skid but did not apply his front brake as is prescribed by the S. C. Driver's manual. [Valenzuela Testimony, R. p. 468-469; Dawes Testimony, R. p. 898]. This did not bring the motorcycle to a stop. Id. Valenzuela was afraid the pan was not going to stop and he next "laid down" the motorcycle on the pavement. Id. Ms. Valenzuela was thrown over the motorcycle and died from her injuries. [Smith Testimony, R. p.924].

Owens Corning. Sam English Grading and their contracts over the years.

Owens Corning has a landfill on Redd's Branch Rd. for waste fiberglass material. [English Testimony, R. p. 807; Pruitt Testimony, R. p. 558]. To support the landfill, Owens Corning has a corresponding borrow pit across Redd's Branch Rd. from which it can excavate dirt to cover the fiberglass material.

A driveway to a public road by its nature encroaches on the right-of-way of the S. C. Dept. of Transportation. [Merritt Testimony, R. p. 1214-1215]. The

landowner can request and obtain an encroachment permit from the S.C. Dept. of Transportation to do any construction that impedes the right of way. (Id.) When the construction is completed the encroachment permit expires. (Id.) The S.C. Dept. of Transportation encroachment permit contains certain requirements during the construction involving the public road. [Merritt Testimony, R. p. 1215-1216]. These include the kinds of familiar actions commonly seen during highway construction projects such as warning signs, flagmen, etc. [McLaurin Testimony, R. p. 539-540].

There have been three kinds of contracts between Owens Corning & Sam English Grading. There has been one encroachment permit to build the crossover roads between Owens Corning and the South Carolina Department of Transportation.

1. One type of contract is for the normal ongoing operation of the landfill. Owens Corning needs daily operation of the landfill and from time to time uses a bidding process to award a contract to operate the landfill. Sam English Grading was the successful bidder and was awarded the contract for the regular operation of the landfill. A substantial amount of dirt is kept at the landfill and only occasionally is it necessary to go across to the borrow pit to get dirt. [English Testimony, R. p. 804-805; 807-808].

2. Periodic construction of a new berm every four or five years. Owens builds large dirt berms around the location where waste fiberglass is placed. One of these berms is sufficient to contain incoming fiberglass for four or five years. When a new berm is to be built, Owens contracts the work. Building a berm takes about one to two months and requires trips to the borrow pit for the amount of dirt necessary for a berm. Sam English Grading has been awarded contracts to build berms. [Merritt Testimony, R. p. 1208]; English Testimony, R. p. 806; 808].

3. The 1984 contract to build the driveway under the encroachment permit. When Owens Corning decided to build the crossover roads in 1984, it obtained an encroachment permit between itself and the South Carolina

> Department of Transportation. Owens then contracted with Sam English Grading to construct the driveway.
>
> While this was a construction zone, the encroachment permit required posting warning signs on the approach to the construction site and flagmen at the construction site. The encroachment permit was not needed after construction was complete and was allowed to expire. Construction was completed in 1984 and both the permit and the contract between Owens Corning and Sam English Grading have ended. [Merritt Testimony, R. p. 1214-1216].

Sam English Grading is a small business owned by a mother and her son. [English Testimony, R. p. 804]. It has been doing this at the landfill since 1980 or 1982. [English Testimony, R. p. 804]. In the normal operation of the landfill, Sam English Grading rarely takes its scraper or pan on the driveway from the landfill and cross Redd's Branch Rd. to the driveway for the borrow pit to get dirt. [English Testimony, R. p. 807-808].

The pan is very slow so Sam English Grading uses the following procedure. It assists the pan driver by posting a spotter man across the road on the other side of the driveway to look for oncoming traffic. [English Testimony, R. p. 813]. When the pan approaches Redd's Branch Rd., if traffic is approaching, the spottter signals the pan driver to stop before crossing the road. (Id.) If no traffic is approaching, the spotter signals the pan driver to continue rolling without stopping. (Id.) There is a private stop sign posted at the end of the driveway but this is only a private sign on a private driveway and is not used when it is preferable to keep a bit of momentum and roll past the sign. [English Testimony, R. p. 1034].

This can be done not just when Sam English Grading crosses the road to the borrow pit. It can be used by Waste Management and any other driver of whatever

trucks and cars come in and out of the landfill. At any given time one of these vehicles may exit the driveway turning to their right and go in front of Michael Valenzuela in his same direction of travel. Those trucks have a duty to yield the right of way to a motorist already approaching closely, but they do not have any legal obligation to stop at the private driveway stop sign.

If a driver exiting the Owens Corning driveway does a rolling stop at the location of the private stop sign, that driver has committed no violation of the South Carolina motor vehicle code provisions. [McLaurin Testimony, R. p.526; 548-549].

In the present case, it is worth noting that whether or not a driver exiting the Owens Corning driveway has a duty under South Carolina law to stop at a private stop sign on a private driveway, it should be a moot point in this case because: The Sam English Grading Scraper did in fact stop.

The pan or scraper never entered the road. It stopped.

By any standard, this accident is a tragedy and understandably it is a double tragedy for Mr. Valenzuela because he lost his wife, and, also, he was the driver in the accident in which she lost her life. This lawsuit is an attempt to shift the responsibility and blame for this accident onto Sam English Grading. It is a common method through which a person can cope with the pain of guilt.

Placing blame on a third person can ease the pain of guilt. This denial is not a matter of dishonesty. It is a psychological defense through denial and is not a conscious misrepresentation. It is an unrecognized shifting of blame that helps one to cope with guilt. This may ease the pain of the person who is actually responsible.

However, whether done consciously or not, an attempt to impose the burden and responsibility on another is itself an additional wrong.

Sam English Grading believes it was unfairly singled out as the cause of this single vehicle motorcycle accident which occurred entirely in Redd's Branch Rd. Not only was there no contact between the motorcycle and the pan, the pan never even entered Redd's Branch Rd.

In an attempt to blame Sam English Grading, the plaintiff reached back to Owens Corning's 1984 encroachment permit and a contract between Sam English Grading and Owens Corning. Sam English had agreed in its contract with Owens Corning that it would comply with the SC DOT encroachment requirements. This was more than 20 years before the motorcycle accident and the permit has long expired.

The trial judge erroneously allowed the encroachment permit and the contract to be placed in evidence and the trial judge gave corresponding jury charges that gave improper legal imprimatur to these irrelevant and highly prejudicial documents.

The contract establishes rights between Owens Corning and Sam English Grading. The two companies have done business with each other since 1980 or 1982. The landfill, the borrow pit, and the driveway belong to Owens Corning. If Owens Corning were unsatisfied with the manner in which Sam English Grading was performing its contractual duties in an accident free manner since 1980 or 1982, Owens Corning has had years in which to insist on some different performance. Enforcement of this contract is upon Owens Corning and no one else. The driver of the motorcycle or his passenger are not intended third-party beneficiaries of this

contract and have no right to enforce the contents of the private contract between Owens Corning and Sam English Grading.

Sam English Grading is small, five person company and does its work, not on its own property, but on Owens Corning Property. [English Testimony, R.p. 803-805]; Merritt Testimony, p. 39, ll. 24-25]. Owens Corning is a large company. It rebids these contracts from time to time. [Merritt Testimony, R.p. 1208-1209]. Its own employees routinely see and know what it going on at Owens Corning's landfill. [Boozer Testimony, R. p. 353]. In addition, Owens Corning does business with Waste Management and others at the landfill location and they too would be a source of information about Sam English Grading's performance of their contract duties to Owens Corning. [Lewis Testimony, R. p. 426].

It is Owens Corning's right to insist on what it desires in contract performance; it is not the right of every person who drives down the road near their business.

Summary of Facts

The facts in the Record show that Sam English Grading was entitled to a Directed Verdict and JNOV because the evidence reveals only one negligent actor who caused this accident and it is not Sam English Grading.

If there is any sliver of probative evidence which came in but should not have, then subtracting this inadmissible evidence is certainly a Record under which Sam English Grading was entitled to a Directed Verdict and a JNOV.

A lesser degree of relief for the inadmissible evidence being allowed is for a New Trial to which Sam English Grading is entitled to as a minimum.

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". This was the Trial Court's own improvised way of forcing a verdict with coercion that enshrouded an Allen charge, and, 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, but is a verdict to release the jurors from any further involuntary custody over the course of the Labor Day weekend for not reaching a verdict.

Argument

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

a. Not stopping correctly and 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. Valenzuela only used his rear brake. [(Valenzuela Testimony, R. p. 468-470].

There is no dispute that Michael Valenzuela only applied his rear brakes and did not engage his front brakes. He confirms that. His lawyer

confirms that. The Trial Judge confirmed that. [Id.] Stopping correctly requires both front and rear brakes. [Dawes Testimony, R. p. 898].

There is no dispute that the South Carolina Driver's Manual published by the South Carolina Department of Motor Vehicles states on page 133:

> **"Brake"**
> Use both brakes every time you slow or stop. Using both brakes for even "normal" stops will permit you to develop the proper habit or skill of using both brakes properly in an emergency. Squeeze the front brake and press down on the rear. Grabbing at the front brake or jamming down on the rear can cause the brakes to lock, resulting in control problems."
> (Defendant's Exhibit Number 5) [R. p. 1324]

The proper way to stop a motorcycle is to apply both brakes. Michael Valenzuela did not do that. He testified that while he has a beginner's permit that he needs no further license, and he has been riding for many years and is an experienced rider.

The day was clear. The view down the road as he was driving in the direction of the Owens Corning driveway was long, open, and visible. His wife tapped him when she saw the scraper to alert him. He did not yet see the scraper. When he did see the scraper, he only applied his rear brakes.

We know he did not apply his brakes in the best way to stop. He was a long time rider of motorcycles. The question of why he didn't brake using the best way to stop naturally arises. Michael Valenzuela himself gives the answer.

He used an improper method of braking to stop because he wasn't even trying to stop. He was skidding his rear tire with his rear brake not because he didn't know to stop the correct way.

He was not even trying to stop. He was trying to create enough disturbance by skidding his rear tire so that the scraper driver would see him and let him drive on through.

> Q Tell us about what happened.
> A All right. So I'm coming up down Redd's Branch Road and my wife Christie taps me on the side; so I know I sense something is wrong. So I look. I look in my rear view mirror. I look up ahead. I look everywhere. I let off my throttle. I'm looking. I am trying to figure out is it a deer, is it a dog? Something is going on. [R. p. 467].

> Q Describe for the jury the type braking you did when you saw that that pan was coming out in front of you.
> A I just stayed on the back brake because what I was hoping he was going to do is when we started to hit brakes maybe he could get stopped that I could continue my path is what I was hoping. I wasn't going to lay the bike down. That was not my intention until I realized he is not going to stop. That's when I had no other choice but to just completely slide her out, to throw it straight at him -- come off the bike, let the bike go and hopefully we would be just fine. [R. p. 470] .

b. Having committed to his decision not to try to stop the correct way, but instead to skid to get the attention of the other person who was driving the scraper so he could keep going through; he made a second negligent decision when he decided to throw down the motorcycle.

> I was like I got to lay this bike down and that's what I did. 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 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. [R. p. 469].

After Valenzuela threw down the motorcycle on the road it "high sided" or flipped, throwing Ms. Valenzuela, over the motorcycle resulting in her death.

In his second act of negligence, Valenzuela misjudged the consequences of his first act of negligence. While Valenzuela's first reaction was skidding his motorcycle to attract someone's notice, the pan driver's first reaction was to stop, which he did. Valenzuela decided he had no choice and a collision was inevitable and he threw his motorcycle down. But he judged the situation wrongly in his second reaction. There was no inevitable collision. The pan driver's first reaction of stopping was successful. He never entered the road. Valenzuela could have driven through.

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 pan or scraper of Sam English Grading did get a signal from his posted lookout man facing him from the opposite side of the road.

The pan driver promptly applied his vehicle's best stopping procedure and he stopped while he was still in the private driveway

of Owens Corning. The pan driver never entered Redd's Branch Rd. He did not fail to yield. He did not fail to lookout because he saw and responded. He did not fail to maintain proper control over his vehicle because he was able to stop and he did stop.

What the pan driver did was react correctly to the direction and signal he got from his own vision and that of his spotter man. There was never any contact between the vehicles. The pan was never in the road. He had the tragic experience of watching a motorcycle with a passenger make two mistakes followed by the tragic consequences of this single vehicle motorcycle accident.

The pan driver did not commit any negligent acts.

Nothing the pan driver did was the proximate cause of this accident.

Sam English Grading is entitled to judgment as a matter of law. The Trial Court was in error when it failed to direct a verdict and when it failed to grant Judgment Notwithstanding the Verdict.

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

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

In 1984 Owens Corning decided to relocate its driveway to the place the driveway occupied at the time of the accident. Owens Corning had to get

an encroachment permit from the South Carolina Department of Transportation because in order to build the driveway which would connect with the highway, the driveway would have to encroach on the Departments rights in the road. In addition, the location for the encroachment permit would require a temporary construction zone while the driveway was being built.

Owens Corning contracted with Sam English Grading to construct the driveway and required that the construction be done in accordance with the requirements of the S.C. DOT.

This work was done and completed in 1984 and the encroachment permit expired in that year.

In subsequent years there have been other contracts between Owens Corning and Sam English Grading. Sam English Grading has been hired to build the earth berms in the landfill when the previous berm is at capacity. This happens every several years. Sam English Grading also has a contract to operate the landfill. These contracts refer to the encroachment permit.

The encroachment permit issued by the SC DOT to Owens Corning required that in building the driveway encroachment the permit holder would put up warning signs (it was a construction zone during that construction) and have flagmen (lanes and portions of the road would be closed or partially closed) and flagmen were necessary during the construction.

Sam English Grading had no contract or permit from the SC DOT. It wasn't their driveway. They were not the entity needing the permit.

a. **The trial court admitted into evidence the 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. This private contract referenced the 1984 encroachment permit. The Court then treated all of the terms under which Owens was allowed to encroach in 1984 to become duties to the general public.

2. This private contract was the vehicle which the Court used to justify admitting provisions about warning signs, flagmen, and all the state requirements under an encroachment permit. Private contracts do not generate new and additional rights to persons who are not party to the contract and therefore they should not be competent admissible evidence in an action brought by a third party based upon the terms of a contract to which the third party is a stranger.

3. Yet the Trial Court used the private contract and the encroachment permit to come in and to allow evidence about no warning signs when there was no duty to have warning signs; evidence about no flagman when there was no duty to have a flagman; evidence about running a private stop sign when there was no public road requirement for stopping or a stop sign; evidence that using a lookout to assist the pan driver in crossing the road was a violation of the contract.

South Carolina case law is consistent in declining to create rights in third parties under contracts to which they are not parties but strangers.

They have no privity and they do not have the right to enforce the contract nor do they have rights to sue for non-performance of the contract. The contracting party may be satisfied with performance and not choose to assert rights under the contract.

That is plain enough in this case because Sam English Grading had been doing work under contract with Owens Corning since 1978 without incident. It was Owens Corning's landfill. It was Owens Corning's driveway. Other vendors and suppliers and anyone else with Owens Corning's business came in and out of the driveway. It was not something that only Sam English Grading used exclusively. There were trucks and vehicles in and out routinely.

Owens Corning is right there where the driveway is located and interacts with it all the time. It is Owens Corning's property. If Owens wanted to change the level of performance it was their right but not anyone else's.

Whatever performance or forbearance Owens Corning and Sam English Grading agreed to between them only creates rights between them. They are the only two parties who can insist on performance or choose not to enforce some provision of a contract. There may be ideas and agreements that are well thought out and good to do, but, that does not make it the legal obligation to everyone who happens to ride by.

An example of that rule in the opposite direction would be this. Suppose that a driver of a car and a motorcycle rider was a student at a school or camp. And, the school or camp had a rule that everyone must wear a seatbelt when

driving a car and a helmet when riding on a motorcycle. And suppose one of the students decides not to wear a helmet or a seatbelt and is injured in an accident. Those agreements between schools and students or camps and campers do not have the force of law and do not reach out and establish the equivalent of a legal duty.

In *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.* 373 S.C. 43; 644 S.E.2d 43; (2007). This certified question asks whether South Carolina recognizes a secured creditor's right to bring a claim against a third party for causing a reduction in the value of the secured party's collateral. The S.C. Supreme Court answered "no."

In reaching that result the Court said that:

> "In order for *liability* to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). An affirmative legal duty may be *created* by statute, a contractual relationship, status, property interest, or some other special circumstance. *Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006). However, this Court will not extend the concept of a legal duty of care in *tort liability* beyond reasonable limits."

b. The Trial Court allowed multiple witnesses to testify about previous times when they thought vehicles entering the highway were dangerous.

The trial began with three people who should not have been allowed to testify and whose testimony was not only irrelevant but it laid the table with prejudice against the defendant before any real witness told the jury anything about the accident in the case.

None of these witnesses knew of the facts in this case. None of the witnesses offered anything connecting what they had to say to the events in the accident. It was a prejudicial attempt to appeal to bias or to create bias.

Since they don't have evidence of negligence in this case they resorted to trying to dig up some unattractive things that were done in the past to create enmity and to attempt to persuade by an inference that if the defendant did something negligent some other time, then the defendant probably did it this time.

The prior conduct witnesses had no information about the accident but were allowed to vent about their own dislike of how the trucks and equipment were driven on other unrelated occasions.

This non-probative but highly prejudicial testimony was the opening bell. They started the trial by telling the jury about their own negative experiences. The lay witnesses who had no information about the accident in this case, but were happy to vent their personal complaints about the landfill operation.

These first three "witnesses" didn't witness anything related to the accident but they kicked off the case by saying that unsafe things had occurred when they drove past the landfill.

The first "witness" was Ann Johnson who said she had a near miss a couple of days before the accident and went home and told her husband that somebody was going to lose their life there.

The second "witness" was Laura Boozer who lived on Redd's Branch Road and thought it was dangerous because she and her hubby had to put on brakes.

The third "witness" was Virginia Gunter, married to Floyd Gunter 63 years. She said there is traffic in and out and they don't always stop. She thought they didn't think anybody else exists.

The appellate courts of South Carolina do not allow evidence of prior conduct except in very limited instances in which established a habit or pattern may an element of the case. In *Holcombe v. W. N. Watson Supply Co.* 171 S.C. 110; 171 S.E. 604 (1933) the Court analyzed this issue and said:

> In Jones on Evidence at page 168, the learned writer says: "We have already seen that in actions based on negligence it is irrelevant to prove that the plaintiff or the defendant has on similar occasions been careful or negligent; in like manner it is irrelevant to show that either party has hitherto had the reputation of being prudent or negligent."
>
> In *Bedenbaugh v. Railway Company,* 69 S.C. 1, 48 S.E. 53, 58, the Court quoted with approval the following from *Chase v. Ry. Co.,* 77 Me., 62, 52 Am. Rep., 744: "It was said in *Eaton v. Telegraph Company,* 68 Me. 63, that the best authorities clearly sustain the doctrine that the fact of a person having once or many times in his life done a particular act in particular way does not prove that he has done the same thing in the same way upon another and different occasion."

Testimony of prior acts that are not part of the case at bar are not allowed into evidence. Long experience in the common law has taught that this kind of evidence is both misleading because it is not probative and it is

unfair because it establishes a false linkage that can improperly attract a jury to make a leap over a gap in the evidence.

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.

Your defendant appellant has described how and why there is no negligence by any employees or agents of Sam English Grading and that no acts of any employees or agents of Sam English Grading caused the motorcycle to skid its rear tire and then throw down on the asphalt road.

If for any reason this Court should discern any such evidence in the irrelevant and inadmissible contracts, encroachment permit, or testimonies of strangers to the accident who described previous unrelated possible accidents when they drove on the highway past the landfill, it should not be considered.

Evidence from the contract should not have been admitted because the contract is only between Owens Corning and Sam English Grading and it does not create any rights in any third parties not in privity with the parties to the contract.

IV. Additional Sustaining Ground for Judgment Not Withstanding the Verdict. If the acts of an employer-principal's employee-agents are not negligent, then there is no negligence to impute to the employer-principal under the doctrine of respondeat superior. Therefore, as a matter of law, there is no liability on the part of the employer-principal.

The rule that an employer is held liable for negligent acts of an employee is the common law doctrine of respondeat superior. The Latin phrase means "let the master answer." This doctrine imputes an employee's negligent acts to the employer.

The applicability of the rule presupposes there is some negligent act of an employee in the first instance that can then be imputed to an employer.

In the present case, there is general accusatory rhetoric but there has been no evidence of any identifiable acts of negligence by either Mr. Tindal or Mr. Lewis, the two employees of Sam English Grading who were present at the time of Michael Valenzuela's accident. One employee was driving the scraper and the other employee was looking out for traffic and signaling when to come across. There is no evidence either did anything wrong. There is no evidence anything they did caused the accident.

This is in contrast to the specific evidence of Michael Valenzuela's actions. He elected not to try to stop his motorcycle, but, instead, to use his rear brake to skid the rear wheels to make his motorcycle more noticeable. Then he threw the motorcycle down in the road. If he was not stopping that is negligence. If he was stopping using only his rear brake, that was negligence. In either event, throwing the motorcycle down was negligent.

Had Michael Valenzuela stopped, there would have been no accident. Had Michael Valenzuela stayed upright and driven through, there would have been no accident.

Sometimes a person recognizes an unwanted truth so clearly that even though it is unwanted, when the subject is being described from a different perspective, the unwanted but unavoidable truth slips out anyway. Plaintiff's Counsel himself recognized there were no acts of negligence by either of the employees (while hoping to obtain a verdict against the employer). In his opening statement he said: [R. p. 314].

> "...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.

If Mr. Tindal and Mr. Lewis were not guilty of negligence, then 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 verdict and judgment against the defendant should be vacated and reversed and judgment entered for the defendant Sam English Grading.

V. After the jury reported it could not reach a unanimous verdict, the Trial Court gave a coercive improper variant of an Allen charge that should require a new trial.

Our rules for litigation have long recognized that a jury is not always able to reach a unanimous verdict. When a jury is not able to reach a unanimous verdict our procedures say what the trial court is to do. A jury that is not able to reach unanimity is not a failure of the system. It is not a reason for the trial process to be embarrassed. It is simply one of the outcomes the system can and does produce.

The evidence may be so close that twelve reasonable people are not persuaded to the same findings and are not unanimous. If the court coerces the members to be unanimous, the court has violated the rights of the parties to a lawful verdict.

This Coercive "Valenzuela Charge" was not the "Allen Charge" it purported to be.

The trial court's erroneous improvised expansion of the standard Allen charge to the hung jury on Friday night of Labor Day weekend, with a threat of being kept until it reached a verdict, deprived the jury and this defendant of an independent unanimous verdict. This improperly forced verdict should be set aside and the case remanded for a new trial.

Prohibitions against Coerced Verdicts or Over Burdened Jury Service.

There are at least two major prohibitions on the court when a jury reports that it is unable to reach a unanimous verdict: 1.) the court may not coerce a verdict through an improper charge to the jury; and, 2.) the court may not send a jury back

after it has twice reported it is unable to reach a unanimous verdict unless the jury consents.

Introduction to an Allen Charge

Even an Allen charge that can pass muster, in jurisdictions which still allow it, is sufficiently coercive to have acquired names like "the dynamite charge," "the nitroglycerine charge," "the shotgun charge," and "the third-degree instruction."

The Valenzuela charge in this case went beyond a "dynamite" charge.

The Deadlocked Jury

The jury reported to the trial judge that they could not reach a unanimous verdict.

The Reaction of the Trial Court

The trial judge immediately made it clear that he was going to get a verdict from this jury. He did.

He also said he was going to give the Allen charge verbatim. He did not.

Here is what the trial judge said on the record that he was going to do:

> "THE COURT: All right. As I shared with y'all in chambers I received a note about 15 minutes ago, question -- or the note says, 'At what point do we declare a hung jury?' As I told y'all in chambers I am going to bring them out. I am going the 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." [R. p. 1137].

The Trial Court's force multiplier to an Allen charge.

The trial judge then brought the jury into the courtroom. However, instead of giving the verbatim Allen charge, he added his own unique wrappings which were force multipliers. This supercharged Allen charge on steroids should be reversed for either, or both, of two independently sufficient reasons.

One – It tells the jury they have to reach a verdict. That is reversible error.

Two – It threatens a penalty if the jury doesn't reach a verdict. It tells the jury, on the Friday night of Labor Day weekend, that if they don't reach a verdict by 9:00 pm that night, they will have to come back Saturday of the Labor Day weekend, or Tuesday after Labor Day. It makes no mention of any point in time at which they might be released if they do not reach a verdict. That is reversible error.

The Trial Judge also dropped a hint by letting them know he had been, and would continue to be, eating the same meals with them, because his wife was out of town. No doubt that seemingly vanilla comment was not lost on the jury.

The admonition and threat worked because the jury came out with a verdict just minutes before their witching hour of 9:00 p.m., that Friday night. They were dismissed at 8:49 pm. [R. p. 1151].

A standard Allen charge is sufficiently coercive that *Allen* charges have been rejected, in whole or in part, by at least twenty-four states: Alaska,[1] Arizona,[2] California,[3] Colorado,[4] Hawaii,[5] Idaho,[6] Louisiana,[7] Maine,[8] Michigan,[9] Minnesota,[10] Montana,[11] Nebraska,[12] Nevada,[13] New Hampshire,[14] New Mexico,[15] North Dakota,[16] Ohio,[17] Oregon,[18] Pennsylvania,[19] Rhode Island,[20] Tennessee,[21] Wisconsin,[22] and Wyoming,[23] Kentucky.[24]

1 Fields v. State, 487 P.2d 831 (Alaska 1971).

2 State v. Thomas, 342 P.2d 197 (Ariz. 1959).

3 People v. Gainer, 566 P.2d 997 (Cal. 1977).

4 Taylor v. People, 490 P.2d 292 (Colo. 1971).

5 State v. Fajardo, 699 P.2d 20 (Haw. 1985).

6 State v. Brown, 487 P.2d 946 (Idaho 1971).

7 State v. Nicholson, 315 So. 2d 639 (La .1975).

8 State v. White 285 A.2d 832 (Me. 1972).

9 People v. Sullivan, 220 N.W.2d 441 (Mich. 1974)

10 State v. Martin, 211 N.W.2d 765 (Minn. 1973).

11 State v. Randall, 353 P.2d 1054 (Mont. 1960).

12 State v. Garza, 176 N.W.2d 664 (Neb. 1970); Potard v. State, 299 N.W. 362 (Neb. 1941).

13 Azbill v. State, 495 P.2d 1064 (Nev. 1972).

14 State v. Blake, 305 A.2d 300 (N.H. 1973).

15 State v. Minns, 454 P.2d 355 (N.M. 1969).

16 State v. Champagne, 198 N.W.2d 218 (N.D.1972).

17 State v. Howard, 537 N.E.2d 188 (Ohio 1989).

18 State v. Marsh, 490 P.2d 491 (Or. 1971).

19 Commonwealth v. Spencer, 275 A.2d 299 (Pa. 1971).

20 State v. Patriarca, 308 A.2d 300 (R.I. 1973).

21 Kersey v. State, 525 S.W.2d 139 (Tenn. 1975).

22 Kelley v. State, 187 N.W.2d 810 (Wis. 1971).

23 Elmer v. State 463 P.2d 14 (Wyo. 1969).

24 Ky. R. Crim. P. 9.57. See Israel v. Commonwealth, 2003 WL 22227193 (Ky. 2003); Commonwealth v. Mitchell, 943 S.W.2d 625 (Ky. 1997).

The beginning part of the Valenzuela charge is not part of an approved Allen charge, it is an improvised charge:

> "THE COURT: Okay. I got your note. You know, it's not unusual that you can't come to a unanimous verdict.
>
> Let me just tell you that oftentimes we're faced with this situation and the United States Supreme Court a long time ago -- this case is in 1896. It's called Allen versus United States of America and I am going to read to you what it says. This is in our charge book that our South Carolina Supreme Court requires that we read when we have problems with a jury not being able to reach a unanimous verdict." [R. p. 1137-1138].

Sandwiched between the two additional improvised charges is the actual verbatim Allen charge which is generally recognized as the outside limit of coercive charges:

> "It simply says this: You told me that you've been unable to reach a verdict in this case. As I've instructed you earlier the verdict of the jury must be unanimous. So when a matter is in dispute, it's not always easy for even two people to agree. So when twelve people

must agree, it becomes even more difficult. In most cases absolute certainty cannot be reached or expected. However, you have a duty to make every reasonable effort to reach a unanimous verdict.

In doing this you should consult with one another, express your own views, listen to the opinions of your fellow jurors, tell each other how you feel, and why you feel that way, and discuss your differences with open minds. Although the verdict of the jury must be unanimous every one of you has the right to your own opinion. The verdict you agree to must be your own verdict, the result of your own convictions, and you should not give up your firmly held belief merely to be in agreement with the other jurors.

The majority should consider the minority's view and the minority should consider the majority's view. I ask that each of you carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and reexamine the questions before you based on the law and evidence in the case.

If you cannot agree on a verdict in this case, obviously, I have to declare a mistrial, and in that case it does not mean that anybody wins or loses. It simply means this: That come next month or the month after next I will have to try this case again. I'll try it with the same parties, the same witnesses, the same facts, and with a jury of twelve people from Aiken County just like the twelve of you. It's not going to go away. It's here. The lawyers will come in and they'll ask basically the same questions. They can't change the facts. The facts will be the same. The witnesses will be the same and we'll have to go through this whole process again.

You were selected in the same manner and from the same source as any future jury will be. You're chosen from driver's licenses and voter registrations and from the citizens of Aiken County and the case will be submitted to twelve other jurors -- the same case on the same facts and those jurors will be just like you. I will ask for impartial, conscientious jurors. So, it's not going to be anything any different. So, I just trust the twelve of y'all can come to some understanding. [R. p. 1138-1140].

Following that standard Allen charge is this Valenzuela jury threat:

"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.

I ask, you know, please, on behalf of these parties and all my court personnel have been here all week. We've all put in a lot of time. Nobody has put in any harder time than y'all have. Y'all have the hardest decision. I am going to ask that you respect each other and try to work it out.

Now, do you want me to order you supper or do you want to wait a little while and let me know? Why don't you send me a note 6:30 or a quarter 'til 7 and let me know how we are.

THE FOREPERSON: Okay.

THE COURT: Y'all don't go back there and fuss at me now, please. That's what the law requires me to do when we reach this situation. That was -- what I was citing y'all was an 1898 case of the US Supreme Court; so y'all aren't the first jury or the first trial that couldn't come to an agreement. You won't be the last, but every one of them that's faced with this situation I urge you, please, consider each other's opinion and in the spirit of compromise or whatever let's reach a verdict in this case. Thank you.

Madam forelady, I'll just wait to hear from you about whether you want me to order you something or whether you want to come back tomorrow.

THE FOREPERSON: You want me to find out?

THE COURT: Well, just keep going a little while.

We're not going to quit yet.

THE FOREPERSON: Oh, yeah, I know. Okay."

(Whereupon, the jury exited the courtroom at 5:47) [R. p. 1140-1142].

Here is the defendant's objection and response:

"THE COURT: Any objection by the plaintiff to those remarks?

MR. DETRICK: None, Your Honor.

THE COURT: By the defense?

MS. PAYNE: Your Honor, our concern is -- I know you aren't surprised that I had something to say. Our concern is that you -- the instruction just kind of indicated that they had to reach a verdict and I don't think that's what the law requires.

THE COURT: Well, I don't think my instructions said that at all. I asked them, urged them to try to. I told them we'd come back, but we hadn't been out but less than six hours; so that's not -- I certainly didn't indicate that to them. Thank you." [R. p. 1012]

The jury got the message the defendant was concerned about. The jury ignored the offer of a meal and did not submit a request for dinner. Instead, the jury came back with a verdict at 8:47 p.m. [R. p. 1149-1150].

The genius of our jury system is based on twelve individuals coming to a common unanimous conclusion in the verdict. This principle becomes subverted if a jury member is pressured to defer to the opinion of peers. The pressure destroys the genuine unanimity that is the heart of the jury system.

There are reasons why those states which permit an Allen charge scrutinize not only the charge but the surrounding circumstances. The parties are entitled to a unanimous verdict of each individual juror who reaches their own conclusion. If the verdict is the result of an improper compromise to get a verdict, or a capitulation to pressure from the trial judge or the other jurors, it is a verdict not based on due process of law but on coercive factors that the courts uniformly condemn.

The jurors also have a right to not be put to an improperly onerous performance of their civic duties. This too, subverts the designed purpose of our system.

In this case both the rights of the defendant and the rights of the jury were violated because: 1.) the defendant did not get a lawful verdict, and 2.) the jury was subjected to a threat to spend Labor Day weekend in the jury room unless they reached a verdict by 9:00 pm Friday night of Labor Day weekend.

The Trial Court spoke to the jury as if the Allen charge was venerated national law still being used in the form in which it was handed down in 1896. The implication is that it is fundamental law and has stood unchanged and unchallenged

for over a century. This instruction by the Trial Court added authoritative credence that the jury must do what the judge says. It is another factor in the jury's perception that it had no choice but to somehow produce some kind of verdict or spend not only the entire week including the late Friday night, but also Saturday and perhaps more.

The Trial Judge's describing the Allen charge as having stood the test of time is erroneous for several reasons.

The Actual Allen Case - *Allen v. U.S.*, 164 U.S. 492 (1896).

The original Allen charge had nothing to do with South Carolina or any other state. The U.S. Supreme Court upheld the charge in its supervisory authority over the federal courts. The original Allen charge never has applied to the states.

The original Allen charge has been whittled and refined many times in subsequent opinions of the federal courts.

Almost half of the states do not allow an Allen charge. There is an increasing critical trend in the literature.

A closer examination of the Allen case shows a less than illustrious lineage from a unique Old West U.S. District Court with jurisdiction over the Indian Territories for non-Indian US residents.

This ancestor of the modern "Allen" charge was born in a time of rough justice that may have been unavoidable in its day but, appropriately, to a large degree, has faded into the romanticized pages of popular historical fiction.

U.S. v Allen was a murder case that was actually tried three times, resulting in a conviction each time, and appealed to the U.S. Supreme Court three

times. The defendant was tried and convicted in 1893, which was set aside by the Supreme Court, 150 U.S. 551, and, was again tried and convicted in 1894. The case was again reversed, 157 U.S. 675. Allen was tried for the third time and was convicted, and appealed for the third time which resulted in the Allen charge.

The trial judge in each of the three trials was Isaac Charles Parker. Parker was appointed by President Ulysses S. Grant as U.S. District Judge presiding over the U.S. District Court for the Western District of Arkansas. The jurisdiction of the Western District of Arkansas included the Indian Territory, which included much of present day Oklahoma. While the legal systems and governments of the Five Civilized Tribes and other Native American tribes in the Indian Territory covered their own citizens, federal law applied to non-Native American, United States citizens in the territory. www.wikipedia.org/wiki/Allen_v._United States_ (1896). The jurisdiction of the Court was unique in several ways. From 1875 until 1889, federal law did not provide for appeals of Indian Territory cases from this court to any court of appeal. In 1883, Congress changed the statutory authority of the Court and provided for direct appeal to the U.S. Supreme Court.

Parker is remembered as the "Hanging Judge" of the American Old West. Parker had no successor before whom the case could be tried for the fourth time because the specific position was abolished. Parker died on November 17, 1896. The decision of the U.S. Supreme Court was not issued until December 7, 1896, after Parker's death. www.wikipedia.org/wiki/Allen_v._United. It is not known to whom the case could have been remanded or how the case may have been tried for the fourth time had it been reversed on its third trip for a fourth trial.

Finally, it may be worth mentioning, that in the third appeal in the Allen trilogy, the one involving the jury charge, the appellant did not even file a brief. The opinion of the Supreme Court states:

> "We are somewhat embarrassed in the consideration of this case by the voluminousness of the charge and of the exceptions taken thereto, **as well as by the absence of a brief on the part of the plaintiff in error**, but the principal assignments of error set forth in the record will be noticed in this opinion.

South Carolina Public Policy Concerning Forced Verdicts

Years before the Allen decision rode in from the Indian territories and was imposed on the federal courts, South Carolina had enacted statutory law to protect against the negative potential of an Allen charge. South Carolina has shown its public policy does not favor forced verdicts. The clearest example of this long standing disapproval of forced verdict is in § 14-7-1330. This statute and its predecessors have been in existence since at least 1871. 1871 Act No. 419, § 27.

The purpose of § 14-7-1330 is "to prevent forced verdicts, and to prevent undue severity of jury service." *State v. Freely,* 105 S.C. 243, 247, 89 S.E. 643, 644 (1916). An example of a charge that passed muster is found in *Edwards v. Edwards,* 239 S.C. 85, 121 S.E.2d 432, 436 (1961). In returning the jury to the jury room to deliberate a third time, the trial judge stated:

> I'm going to ask you in all seriousness, Gentlemen, to make one more attempt at this case. When you tell me you can't do it, that's going to be the end of it, because I'm not going to send you back again.

The Valenzuela jury did not get anything close to this considered encouragement of a deadlocked jury.

A verdict was reversed in *Rowland v. Harris*, 218 S.C. 42, 61 S.E.2d 397 (1950). The trial court left the jury with the bailiff and went home. The jury was

deadlocked and asked for the clerk of court to report that and be discharged. The clerk was not there so they went back and produced a verdict. The Supreme Court reversed.

The Trial Court May Not Require a Verdict

When the trial court instructs the jury that they have to reach a verdict, that alone is reversible error. *Jenkins* v. *United States,* 380 U. S. 445, 446 (1965) *(per curiam).* In Jenkins, the jury had sent a note to the judge to the effect that it was unable to agree upon a verdict; the judge then gave additional instructions to the jury, in the course of which he said: "You have got to reach a decision in this case." The Court concluded that "in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." See also, *United States* v. *United States Gypsum Co.,* 438 U. S. 422, 459 (1978).

The Trial Court May Not Threaten

The trial judge may not indicate to or threaten the jury that they must agree or, failing to agree, they will remain in the jury room for a specified length of time. *State v. Williams*, 344 S.C. 260, 543 S.E.2d 260 (Ct. App. 2001). In this case it is worse than State v. Williams because here the threat is not even for a specified length of time; it was a threat to stay for an indefinite period until they reached a verdict.

Verdicts produced soon after a charge suggests coercion.

"We are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility of coercion." *United States Gypsum Co., supra,* at 462.

Minority View Jurors Will Naturally Feel Pressure After an Allen Charge.

Some of the courts that have reversed because of the jury charge have noted that when there is a small minority view, it can create coercive pressure on the jury members who hold that view. When the judge gives this charge it not only creates pressure from the bench, it also gives the majority jurors an additional tool with which to pressure the minority view members. The majority can use the judge's instructions as pressure, and, that pressure is unrelated to any evidence or any rationale argument that is a proper basis for consideration.

Pressure on All the Jurors, Majority and Minority Was Imposed in this Case

As soon as Judge Early read the note from the jury he announced to the lawyers that he was going to bring the jury out and push and get this done. He did exactly that. Only after being challenged by an objection precisely on that basis did Judge Early tacitly recognized that would be improper by saying he didn't think his charge conveyed that to the jury. Well he had just said that was what he was going to do: [R.p.1137].

> THE COURT: ... I am going to bring them out. I am going the 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."

When the jury was brought in, the Trial Court not only wrongfully applied the coercive effect of conveying to a jury that they must reach a verdict, the Trial Court also gave a threat of a penalty to the jurors if they didn't reach a verdict. The jurors had been empaneled on this case for the entire week leading to Labor Day weekend. They had deliberated most of the day on Friday. They had obviously been active in their deliberations because they showed a willingness to submit questions about the law to the judge. They were not able to reach unanimity and reported that to the judge.

The judge did more than convey to the jury that they had to reach a verdict. He let them know his wife was out of town and he had been eating his meals ordered into the Court. He told the jurors he would order in dinner and they would have to keep going and if they did not reach a verdict by 9:00 pm that Friday evening, he would require then to return on Saturday or on Tuesday after Labor Day Monday and continue.

> "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.
>
> I ask, you know, please, on behalf of these parties and all my court personnel have been here all week. We've all put in a lot of time.

Nobody has put in any harder time than y'all have. Y'all have the hardest decision. I am going to ask that you respect each other and try to work it out.

Now, do you want me to order you supper or do you want to wait a little while and let me know? Why don't you send me a note 6:30 or a quarter 'til 7 and let me know how we are.

THE FOREPERSON: Okay.

THE COURT: Y'all don't go back there and fuss at me now, please. That's what the law requires me to do when we reach this situation. That was -- what I was citing y'all was an 1898 case of the US Supreme Court; so y'all aren't the first jury or the first trial that couldn't come to an agreement. You won't be the last, but every one of them that's faced with this situation I urge you, please, consider each other's opinion and in the spirit of compromise or whatever let's reach a verdict in this case. Thank you.

Madam forelady, I'll just wait to hear from you about whether you want me to order you something or whether you want to come back tomorrow.

THE FOREPERSON: You want me to find out?

THE COURT: Well, just keep going a little while. We're not going to quit yet.

THE FOREPERSON: Oh, yeah, I know. Okay.

[R.p.1140-1142].

If a jury returns its verdict soon after receiving supplemental instructions it suggests the possibility of coercion. *United States Gypsum Co., supra,* at 462. In this case the jury did return a verdict soon after receiving the supplemental instructions.

But here there are even more telling circumstances. Not only did the jury come back soon after the instructions; this jury never accepted dinner, and, this jury came back with a "verdict" just before the last possible time of the night before they would have been required to adjourn and return on Saturday morning or Tuesday morning.

The combination of these instructions did not just put coercive pressure on those jurors holding the minority view, if there was a minority view; these

instructions put pressure on everybody to come up with something or forfeit a major part of Labor Day weekend and perhaps more.

The trial court said to the jury that it was telling them what the United States Supreme Court had imposed over a hundred years ago and that the South Carolina Supreme Court required the trial court to do. Not only was this not accurate, but the trial court went far beyond anything in *U.S. v Allen* or South Carolina case law on coerced verdicts.

After the jury reported it was deadlocked, the trial court told the jury it would be required to stay until 9 o'clock and a meal would be provided if they wished and they would be required to return on Saturday morning or Tuesday morning of Labor Day weekend to continue deliberating if they still had not reached a unanimous verdict.

The parties in a law suit in South Carolina deserve and are entitled to a true verdict that is not forced. There are many worse outcomes of the judicial system than a new trial.

A pressured group of citizens who came to do their duty is bad.

A verdict that is not a true verdict is worse. If a new trial is granted, another jury, free of coercion, can reach a true verdict.

Conclusion

1. **Because there is no evidence of any negligence by this defendant that was the cause of Ms. Valenzuela's death, this Court should reverse, vacate the judgment, enter judgment for the defendant and dismiss the case.**

2. Because the trial judge allow into evidence the contract and the encroachment permit and none of that should be taken into account, the Court should reverse, vacate the judgment, enter judgment for the defendant and dismiss the case. In the alternative, the Court should grant the defendant a new trial with instructions upon remand that the contract, the encroachment permit, and prior acts testimony is to be excluded.
3. Because the plaintiff stated in his opening statement that neither the driver of the pan nor the spotter had done anything wrong, there is no negligence to impute to the employer Sam English Grading and this Court should reverse, vacate the judgment, enter judgment for the defendant and dismiss the case.
4. If this Court determines not to enter judgment for the defendant, then the Court should reverse because of the coercive jury charge and grant a new trial to proceed without the inadmissible evidence that was allowed in the first trial.

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April 17, 2014.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Appellants' Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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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 , **Final Appellant's 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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