FARNSWORTH LAW OFFICES, LLC

ATTORNEYS AND COUNSELORS AT LAW

2 WILLIAMS STREET
POST OFFICE BOX 8718
GREENVILLE, SOUTH CAROLINA 29601

DANIEL J. FARNSWORTH, JR.*
CHRISTOPHER A. GRUBBS

* ALSO A MEMBER OF THE VIRGINIA BAR

TELEPHONE: 864.250.9119
FACSIMILE 864.250.9120

FACSIMILE COVER SHEET

DATE:	10/31/2014
TO:	South Carolina Court of Appeals Attention: Tonisha
FAX #:	(803) 734-1839
FROM:	Brad Tollison Paralegal for Daniel J. Farnsworth, Jr. Farnsworth Law Offices, LLC
# OF PAGES: (INCLUDING COVER)	10
RE:	Appellate Case No. 2014-002105
COMMENTS	Tonisha, I spoke with you yesterday and believe this the information you need. Please do not hesitate to contact me with any questions or concerns at 864-250-9119. Thank you, Brad Tollison brad@farnsworthlawoffices.com

YLC 9/2/14

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2014 AUG 26 PM 4 00

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP2305261

PLAINTIFF(S)	**DEFENDANT(S)**
City Of Greer	Michael Edward Schulz
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge **Judge Code** 8/26/2014 **Date**

For Clerk of Court Office Use Only

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

ENTERED COMPUTER

This judgment was entered on **25th day of August, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **25th day of August, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Daniel Roper Hughes Duggan & Hughes, LLC P.O. Box 449 Greer, SC 29652-0449

ATTORNEY(S) FOR THE PLAINTIFF(S)

Daniel Joseph Farnsworth Jr. Farnsworth Law Offices, LLC P.O. Box 8719 Greenville, SC 29604

ATTORNEY(S) FOR THE DEFENDANT(S)

Municpl Judge Mims

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
City of Greer, Respondent, v. Michael Edward Schulz, Appellant.	DOCKET NO.: 2013-CP-23-05261 **ORDER**

This matter came before the Court on May 20, 2014 on appeal from the Greer Municipal Court. The City of Greer ("City") was represented by Daniel Hughes, Esquire, and the Appellant, Michael Schulz, was represented by Daniel Farnsworth Jr., Esquire.

BACKGROUND

Appellant was arrested and charged on April 28, 2013 with Driving Under the Influence and Open Beer in Moving Vehicle. A jury trial was held before Municipal Judge Henry J. Mims on September 27, 2013. At the trial, Daniel Farnsworth Jr., Esquire, represented the Appellant, and Daniel Hughes, Esquire, represented the City. During the trial, Appellant admitted guilt for the charge of Open Beer in Moving Vehicle; therefore, only the charge of Driving Under the Influence was submitted to the jury.

The City called Sergeant Patrick Fortenberry, the arresting officer, as the only witness for the City. Fortenberry testified that he responded to a call about an erratic driver and got behind a blue Ford Explorer inside the city limits of Greer. He observed erratic driving and activated his in-car camera. Soon thereafter, the vehicle passed outside the city limits of Greer traveling towards the town of Duncan. Fortenberry requested that the Duncan Police Department respond to initiate a traffic stop. However, a Duncan officer could not do so soon enough, so Fortenberry continued to follow the Explorer through the town limits of Duncan and back into the County of Greenville. During this time, the video continued to capture erratic driving. Fortenberry testified that he observed the Appellant's vehicle drift over the fog line at least 13 times, drift completely into the opposite lane at least three times, drift halfway over the double yellow line at least 14 times, and weave in and out of its lane of travel at least 47 times. After several miles, the vehicle returned to the city limits of Greer, and Fortenberry initiated a traffic stop.

Fortenberry testified that he approached the Explorer and immediately smelled a strong odor of alcoholic beverage and observed an open beer can located in the center console cup holder. Appellant was the driver and only occupant in the vehicle. Fortenberry testified that Appellant told him that he was coming back from a wedding and admitted he had consumed two beers while at the wedding. Fortenberry had the Appellant step out of the car to administer sobriety tests—the nine step walk and turn test and the one leg stand test. Fortenberry testified that Appellant performed poorly on the tests. Specifically, Fortenberry observed three out of four cues of intoxication on the one leg stand test and five out of eight cues on the nine step walk and turn test.

Based upon the Appellant's erratic driving, the smell of alcoholic beverage coming from inside the vehicle and from Appellant's breath, Appellant's admission of the use of alcohol, and his performance on the sobriety tests, Fortenberry arrested Appellant and transported him to the Duncan Police Department for a Datamaster test. After advising Appellant of his implied consent rights, Appellant refused the test.

During the course of direct examination, the following exhibits were admitted into evidence by the City and published to the jury: a picture of the open beer can found inside the vehicle, the in-car video (with redactions), the Datamaster video, and the SLED Breath Alcohol Analysis Test Report.

During his case in chief, Appellant testified that he was at a wedding and had an argument with his fiancé, who at the time was pregnant with his child. Appellant became very upset and left the wedding with an open can of beer, but did not consume any of the beer while driving. Appellant contended that the erratic driving resulted from texting with his fiancé while driving, rather than from any impairment by alcohol. Furthermore, he did not realize how bad his driving was until he watched the in-car video.

Appellant stated that he had a bad knee due to an injury he sustained during his career as a college football player. Appellant also testified that he suffers from anxiety, and that his condition possibly affected his performance on the sobriety tests. Appellant was under a doctor's care for anxiety. Appellant stated he refused the breath test because he did not trust the machine to produce an accurate result.

Appellant was found guilty on the charge of Driving Under the Influence, First Offense and sentenced to time served plus 30 hours of community service work. The court sentenced

Appellant to the minimum fine for the charge of Open Beer in Moving Vehicle. Appellant timely filed his appeal on September 30, 2013. A transcript of the proceeding below was filed by the municipal court. In his Notice of Appeal and oral argument before the Court, Appellant asserted three grounds for review:

1. The municipal court erred by not admitting into evidence or allowing questioning of the arresting officer on evidence of a report authored by the National Highway Transportation Safety Administration ("NHTSA") pertaining to the dangerous nature of texting while driving.
2. The municipal court erred by allowing the jury to view the City's visual aids that were not admitted into evidence after jury deliberations had begun.
3. The municipal court erred by allowing the City to argue in cross-examination and closing argument that Appellant could have produced evidence that would have proven his case, unfairly shifting the burden of proof to Appellant and causing undue prejudice to Appellant.

STANDARD OF REVIEW

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a de novo review, but instead reviews for preserved error raised to it by appropriate exception." *Rogers v. State*, 358 S.C. 266, 594 S.E.2d 278 (Ct. App. 2004) (citing *City of Landrum v. Sarratt*, 352 S.C. 139, 141, 572 S.E.2d 476, 477 (Ct. App. 2002)). Further, "the circuit court, sitting in its appellate capacity, may not engage in fact finding." *Id.*, 358 S.C. at 270. On appeals from municipal court "[t]he appeal must be heard by the Court of Common Pleas upon grounds of exceptions made and upon the papers required under this chapter, without the examination of witnesses in that court... [a]nd the court may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." S.C. Code Ann. § 18-3-70.

DISCUSSION

I. Admission of NHTSA Report

Appellant's first ground for appeal is that the municipal court erred "by not admitting into evidence or allowing specific questioning of the arresting officer from that evidence, that was in the form of a report, including specific data and findings, allowed by the National Highway Transportation Safety Administration (NHTSA), a federal agency, pertaining to the dangerous nature of texting while driving, a critical component in Appellant's case." Appellant attempted

to introduce an NHTSA report regarding the dangers of texting and driving through Fortenberry during cross examination. *See* Transcript of Record at 105-08. The City objected on the ground of hearsay. *Id.* at 105. The Court excused the jury to address the issue. *Id.* at 108. Fortenberry testified that he had no knowledge of the report that Appellant sought to introduce into evidence. *See id.* at 106, 108. The Court sustained the objection, holding the report was inadmissible hearsay evidence, and Appellant was allowed the opportunity to make a proffer of Fortenberry's testimony. *See id.* at 115-18.

"As a general rule, the admission of evidence is a matter addressed to the sound discretion of the trial court." *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 241, 616 S.E.2d 431, 436 (Ct. App. 2005). "The trial judge's decision will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision." *Id.* at 242, 616 S.E.2d at 436. Appellant argued the report was admissible because it fell within the "public records and reports" exception to hearsay evidence found in Rule 803(8), S.C. R. Evid. *See* Transcript of Record at 105, 109. The exception provides:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; *provided, however,* that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.

The municipal court found that Appellant did not offer any evidence of the report being authentic. *See* Transcript of Record at 110. Appellant then contended that the report was a self-authenticating document and did not need evidence of its authenticity pursuant to Rule 902(5) as an "official publication" issued by a "public authority." *See id.* at 110-11; Rule 902(5), S.C. R. Evid. ("Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: ...Books, pamphlets, or other publications purporting to be issued by public authority."). Appellant argued that the publication was authored by the NHTSA, which is a federal agency under the United States Department of Transportation. *See id.* at 113. The Court rejected this argument on the basis that it did not know if the NHTSA was a public agency and stated that Appellant offered no proof that it was a public agency. *See id.* at 111-13.

Appellant argued that the NHTSA is under the United States Department of Transportation and proffered testimony that the report indicated in its content that it was a publication of the NHTSA and Department of Transportation. *See* Transcript of Record at 119. The South Carolina Supreme Court has acknowledged that the NHTSA is a federal authority. *See, e.g., Priester v. Cromer*, 401 S.C. 38, 49, 736 S.E.2d 249, 255 (2012); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 47, 691 S.E.2d 135, 148 (2010). Additionally, the Fourth Circuit Court of Appeals has explicitly held that an NHTSA report "fits snuggly within the [public records] exception."[1] *Jones v. Ford Motor Co.*, 204 F. App'x 280, 284 (4th Cir. 2006). Therefore, the municipal court did abuse its discretion in prohibiting the admission of the report.

Appellant argues that his primary defense was that he was texting while driving, not driving under the influence, and the report relates to the effects of texting while driving, making its exclusion prejudicial to Appellant. However, this Court finds that the error in failing to admit the report was harmless. The proffered testimony of Fortenberry on the report was brief and provided facts from the study that texting is one of the worst driving distractions and that texting takes a driver's eyes off the road for an average of 4.6 seconds, or at 55 miles per hour, the equivalent of driving the length of a football field blind. *See* Transcript of Record at 121. Appellant had already questioned Fortenberry and asked additional questions on the record after the proffer about the possibility that Appellant was texting while driving and the dangers of texting and driving. *See id.* at 52-56, 103-04, 125. Fortenberry even admitted that texting and driving can be dangerous. *Id.* at 103-04. Therefore, omission of the report was not prejudicial because the information proffered did not provide any substantive additional information for the jury to consider. The municipal court's decision not to admit the evidence is affirmed.

II. Jury viewing visual aids

Appellant's second issue on appeal is that the municipal court erred "by allowing the jury to view the prosecutor's visual aids that were not admitted into evidence after jury deliberations had begun." During the City's opening statement, the prosecutor listed the following numbers on an easel: 13, 3, 14, 47, 3/4, and 5/8. *See* Transcript of Record at 14. During Fortenberry's direct examination, he testified that those numbers represented the number of times that he observed Appellant's vehicle travel over the fog line (13), travel into the opposite lane of travel

[1] While the Fourth Circuit was analyzing the Federal Rules of Evidence, the South Carolina Rules of Evidence are similar with regards to the public records exception, with the South Carolina rule containing two additional limitations to public records, neither of which is applicable here.

(3), travel halfway over the double yellow line (14), weave in and out of his lane of travel (47), number of cues on the one leg stand (3 out of 4), number of cues on the nine step walk and turn test (5 out of 8). *See id.* at 23-26.

The City referred to the easel during its closing argument. *See id.* at 180. After deliberations began, the jury requested that it be allowed to review the numbers and information on the easel. *See id.* at 191. While not on the record, the municipal court inquired of counsel for the City and co-counsel for Appellant whether the jury could view the easel, and both parties indicated they had no objection to the request. The jury entered the courtroom and viewed the numbers on the easel before returning to their deliberations. *See id.* The municipal court informed Appellant's lead attorney of this occurrence, and he did not object or provide any comment. *See id.*

It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *B & A Dev., Inc. v. Georgetown Cnty.*, 372 S.C. 261, 271, 641 S.E.2d 888, 894 (2007). To preserve an issue at trial for appellate review, the issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007). There is no evidence in the record of either Appellant's attorney or co-counsel objecting to the viewing of the easel. Therefore, this issue was not preserved for review.

III. City's inappropriate comments during cross examination and closing argument

Appellant's final issue on appeal is that the municipal court erred by "allowing the City to argue in cross examination and in closing argument, that Appellant could have produced evidence that would have proven his case, thus unfairly shifting the burden of proof to the Defendant, thereby causing undue prejudice to the Defendant, resulting in his conviction." Appellant testified on direct examination that his erratic driving was caused by texting and driving, rather than impaired driving. *See, e.g.*, Transcript of Record at 141-42. During cross examination, the City challenged Appellant's testimony by asking him why he did not subpoena a records custodian from his wireless provider, Verizon Wireless, to admit his phone records from the day of his arrest into evidence to support his testimony. *See id.* at 157. The City argued

in closing argument that Appellant failed to produce the phone records for the jury to consider. *See id.* at 179.

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *B & A Dev., Inc. v. Georgetown Cnty., supra.* To preserve an issue at trial for appellate review, the issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C., supra.* Appellant's counsel never objected to the City's line of questioning during cross examination. When the City argued in closing argument that Appellant failed to produce the phone records for the jury to consider, Appellant's counsel again never objected. Therefore, this issue was not preserved for review. Additionally, this Court finds that Appellant opened the door to allowing these statements by asserting that Appellant was texting while driving as a defense. Appellant's appeal is denied on this ground.

ORDER

For foregoing reasons, this Court finds that the conviction of the lower court is **AFFIRMED.**

AND IT IS SO ORDERED.

Alison Renee Lee

ALISON RENEE LEE
Presiding Judge

August 20, 2014
Columbia, South Carolina