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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,**

versus

Respondent,

Sam English Grading, Inc.,

Appellant.

Final Appellant's Brief

Charles E. Carpenter, Jr.
Carpenter Appeals & Trial Support, LLC
4825 Portobello Road
Columbia, SC 29206
(803) 758-2886

James C. (Trey) Cox, III
Danielle F. Payne
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, SC 29202
(803) 731-0030
Attorneys for Appellants
Sam English Grading, Inc.

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

- a. Deciding not to stop but instead to use his rear brake to skid his rear tire to draw attention to himself, instead of using both brakes to stop.
- b. Having committed to his decision not to try to stop, but to skid his rear tire, he made his second negligent decision when he decided to throw down the motorcycle. While he was skidding the pan driver was stopping and did not enter the road. It was not necessary to throw down the motorcycle.
- 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.

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

- a. The trial court admitted into evidence the private contract between Owens Corning and Sam English Grading about the grading work at the Owens Corning landfill 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. This was the vehicle which the Court used to justify admitting provisions about warning signs, flagmen, and all the state requirements under an encroachment permit.

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.

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

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.

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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Questions Presented

- 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.
 - b. Having committed to his decision not to try to stop the correct way, but 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.
 - 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.
- II. The Trial Court committed reversible error in the admission a series of connected evidentiary rulings from a private contract between two parties which created no additional duties to the plaintiff.
 - a. The trial court admitted into evidence the private contract between Owens Corning and Sam English Grading about the grading work at the Owens Corning landfill which created no duties between Sam English Grading and the public.
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to encroach in 1984 to become duties to the general public. This was the vehicle which the Court used to justify admitting provisions about warning signs, flagmen, and all the state requirements under an encroachment permit.

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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Prohibitions against Coerced Verdicts or Over Burdened Jury Service

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The Trial Court May Not Threaten

Verdicts produced soon after a charge suggests coercion.

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

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

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, 2012 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 notwithstanding 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].

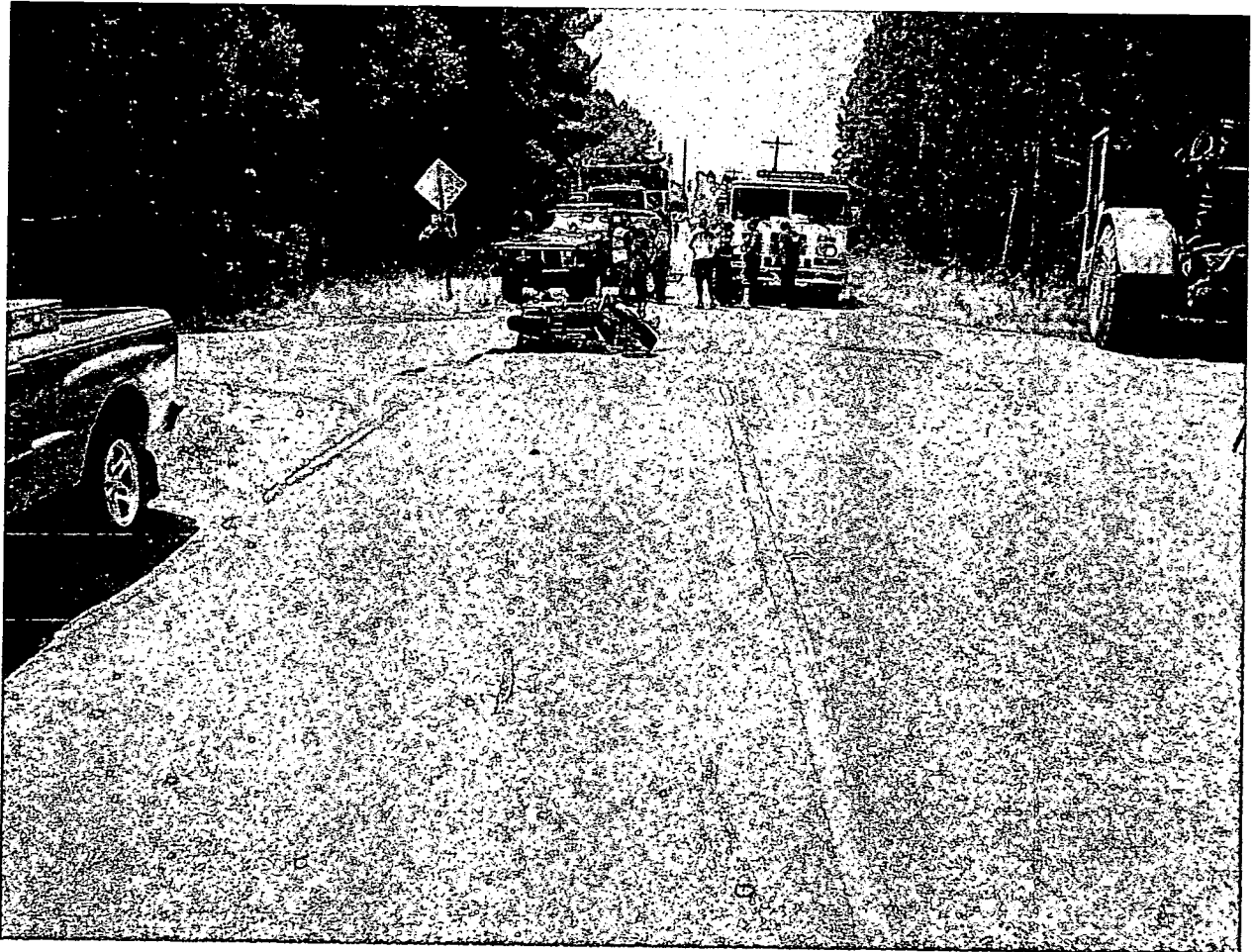
....

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]

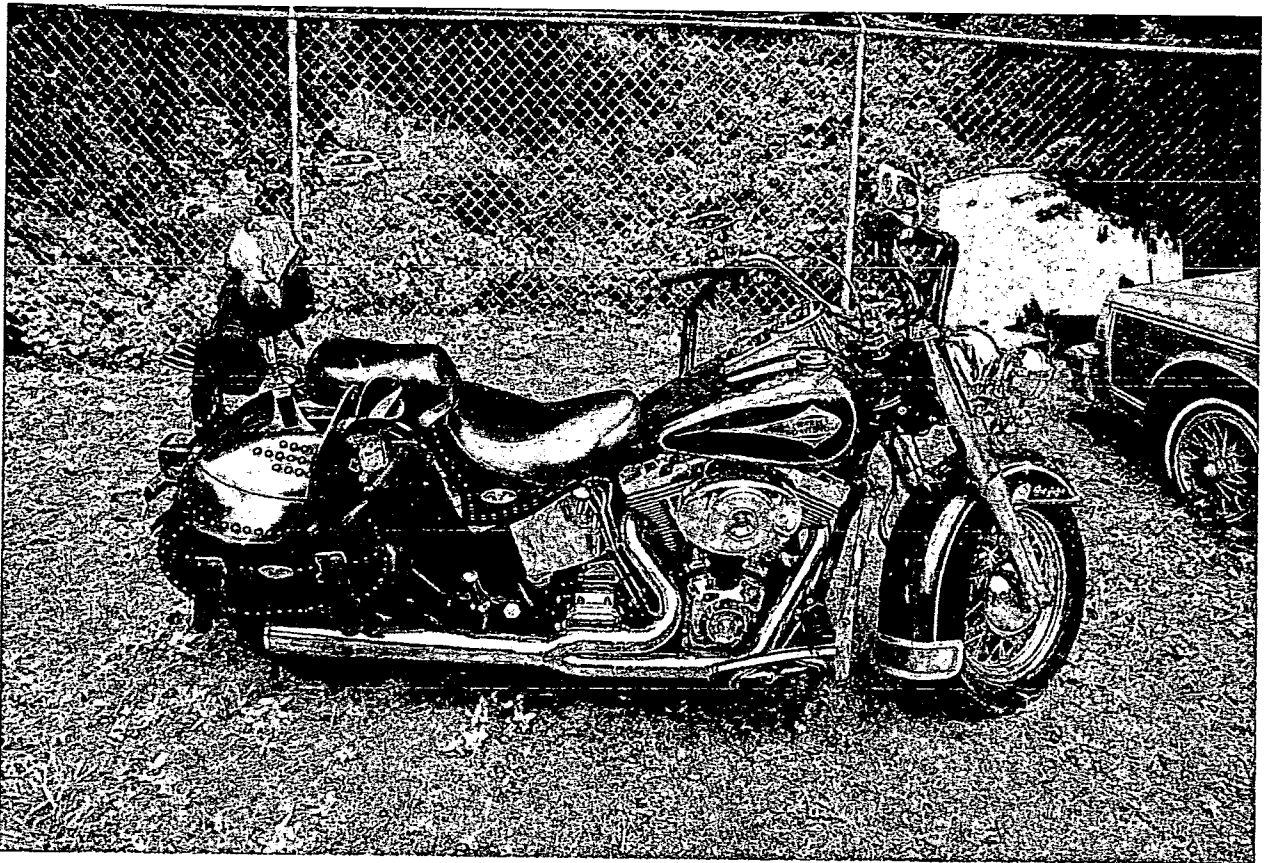
Michael Valenzuela did not try to stop using both brakes but, instead, skidded with his rear brake to draw attention. Michael Valenzuela also did not keep the motorcycle upright and threw it down on the pavement, then it "high sided" flipping over and then it tumbled. Christie was thrown over the motorcycle 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 spotter 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 to read verbatim the Allen versus United States charge that it requires to read when we have a potentially hung jury and then I am going to tell them that I'll let them continue on. I'll buy them supper. If we can't reach a verdict by nine, we'll come back tomorrow. We're going to push it until we get it concluded.” [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_](http://www.wikipedia.org/wiki/Allen_v._United_States_(1896)) (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 them 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.

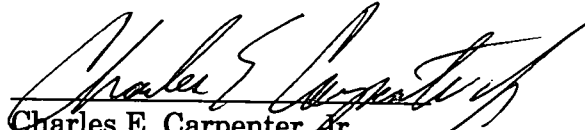
A pressured group of citizens who came to do their duty is bad.

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.


Charles E. Carpenter, Jr.
Carpenter Appeals and Trial Support, LLC
4825 Portobello Road
Columbia, SC 2926
(803) 758-2886

James C. (Trey) Cox, III
Danielle F. Payne
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, SC 29202
(803) 731-0030
Attorneys For Appellant,
Sam English Grading, Inc.

April 17, 2014.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,



Charles E. Carpenter, Jr.
Carpenter Appeals and Trial Support, LLC
4825 Portobello Road
Columbia, SC 2926
(803) 758-2886

James C. (Trey) Cox, III
Danielle F. Payne
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, SC 29202
(803) 731-0030
Attorneys For Appellant,
Sam English Grading, Inc.

Dated: April 17, 2014

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:

J. Paul Detrick
PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.
Post Office Box 457
Hampton, SC 29924

-and-

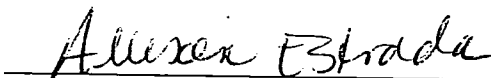
L. Lisa McPherson
MCWHIRTER, BELLINGER & ASSOCIATES
119 East Main Street
Lexington, SC 29072

-and-

Robert Hill, Esquire
Law Offices of Robert Hill
P.O. Box 51
Newberry, SC 29108

-and-

Ronald Maxwell, Esquire
Maxwell Law Firm
P.O. Box 1115
Aiken, SC 29802



Allison Estrada, Paralegal to Charles E. Carpenter Jr.

Dated: April 7, 2014.

The State of South Carolina
In the Court of Appeals

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Case No. 2011-CP-02-00868

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

v.

Sam English Grading, Inc., ... Appellant

Respondent's Brief

J. Paul Detrick
Peters Murdaugh Parker
Elzroth & Detrick
P.O. Box 457
Hampton, SC 29924-0457
803-943-2111

Robert N. Hill
Law Offices of Robert Hill
P.O. Box 51
Newberry, SC 29108
803-405-1629

Lisa McPherson
McWhirter Bellinger & Assoc.
119 East Main Street
Lexington, SC 29702
803-359-5522

Ronald A. Maxwell
Maxwell Law Firm
P.O. Box 1115
Aiken, SC 29802
803-641-6700

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Statement of the Issues

1. Is there any evidence that the Company was more at fault than Valenzuela in causing his wife Christie's death?
2. Must the Court reverse because the jury heard evidence that the Company caused Christie's death by breaching its contract to provide a flagman and maintain road crossing signs at an intersection?
3. Must the Court reverse because the jury heard evidence that the Company's failure to provide a flagman, maintain road crossing signs, or require that its drivers stop at a stop sign threatened others who were more familiar with the intersection?
4. Is the Company's argument about the opening statements preserved and, if so, did counsel say what the Company infers?
5. Does the *Allen* charge require a new trial?

Statement of Facts

On August 7, 2009, Christie Valenzuela wanted to buy a lawn-mower belt and asked her husband to take her to Lowes on her motorcycle. R. 462 ll.5-6 and ll.15-18, 465 ll.14-18. He decided to take back roads so that they could enjoy the beautiful fall day and because he thought these roads were safe. R. 462 ll.15-16, 465 ll.22-25, 467 ll.16-

18. The trip took them down Redd's Branch Road. Though well traveled by school buses and others, Valenzuela had not been down the road for 10 years and did not know that heavy equipment crossed the highway. R. 404 l.25 - 405 l.9, 466 ll.3-9, 1009 ll.23-25, 1018 ll.2-8.

Sam English Grading Inc. ran this equipment. Since 1982, the Company operated an Owens Corning landfill located on the road and at various times hauled dirt across the highway. R. 804 ll.15-24, 808 ll.8-13. To haul the dirt across, the Company used a 12 foot tall, 73,450 pound "pan scraper." R. 615 ll.9-24. The scrapers have a front cab that is hinged in a way that allows the cab to double back on itself. R. 383 ll.4-8, 617 ll.1-10; Respondent's Addendum (photographs of the scraper)

Not what 819 says
Owens Corning furnished the Company a stop sign and required it to use a flagman and other precautions when crossing the road. R. 819 ll.23-24; 1222 l.3 - 1223 l.16. The Company knew that these precautions were to protect the road's motorists, and used a flagman and warning signs during Owens Corning's preannounced safety inspections. R. 780 ll.11-21, 1223 ll.3-16, 1253 l.3 - 1254 l.24.
To fly his own men

In May 2009, the Company contracted to construct a berm which again required it to haul dirt across the highway. R. 806 ll.12-21, 807 ll.18-25, 1266. The contract required the Company to "provide a

flagman; maintain road crossing signs and other road crossing safety measures to comply with Owner's South Carolina Highway Department

Encroachment Permit." R. 1220 ll.19-24, 1221 ll.6-10, 1222 ll.3-11,

1308. Owens Corning required a flagman and signs even though the encroachment permit earlier expired, and explained that the Company knew from its previous projects where to place the flagman and signs.

R. 1217 l.17 - 1218 l.3, 1222 ll.16-24, 1241 ll.3-16, R.p. ____.

To complete the contract, the scraper crossed Redd's Branch Road 50 or more times a day, nearly every day, without the required flagman or signs. R. 417 ll.11-21, 536 l.14 - 537 l.1, 538 ll.18-24, 743 ll.12-20, 779 ll.6-19, 780 ll.3-6, 794 ll.15-24, 795 ll.2-7, 811 ll.2-12, 813 ll.17-22, 825 ll.10-17, 840 l.23 - 841 l.3, 1028 ll.17-23. To save eight to ten seconds, a spotter would also have the scraper run the stop sign. R. 400 ll.9-16, 402 ll.2-7, 819 ll.13-22, 1026 ll.6-25, 1028 ll.8-12.

Valenzuela did not know any of this as he and Christie headed down the highway at 40-45 miles per hour. R. 466 ll.6-9, 469 ll.21-24, 742 ll.2-6. He would have slowed or stopped had there been a flagman or warning sign. R. 474 l.6 - 475 l.9, 475 l.19 - 476 l.14. As it was, the spotter, who was sitting in a tractor off the road, waived the scraper across before he noticed the motorcycle and threw up his hands for the

scraper to stop. R. 408 l.10 - 409 l.19, 560 ll.20-25, 737 l.23 - 738 l.5,
1021 l.20 - 1022 l.8.

When the spotter waived him across, the scraper driver sped up to
17 miles per hour to run the stop sign. R. 409 ll.2-3, 436 l.22 - 437 l.19,
620 ll.7-12. When the spotter then motioned to stop, the driver
slammed on brakes about 20 feet from the intersection and ran over the
stop sign as he jerked the scraper's hinged, front cab 90 degrees. R. 412
l.22 - 413 l.10, 440 ll.17-20, 563 ll.22-23; Respondent's Addendum
(photographs of the scraper). If the machine had not been able to double
back on itself, the scraper would have crossed over Valenzuela's lane. R.

628 ll.18-25, 630 l.20 - 631 l.7.

7 But he is talking about full stop! He can see
Trees blocked Valenzuela's view of the approaching scraper until he
was 58 feet away from the intersection. R. 406 ll.12-16, 634 l.24 - 635
Through the trees much further back

1.24, 640 ll.9-15, 962 ll.20-22. When he saw it, it "just like if you shot
two bullets at each other." R. 468 ll.4-12. With only one or two seconds
Doesn't say that
to react, Valenzuela first hit his back brakes. R. 468 ll.4-12, 470 ll.14-

17, 471 l.19. As the scraper kept coming, he then laid the motorcycle
down because he was convinced that there was no other way to avoid a
crash into him and his wife. R. 468 ll.13-19, 469 ll.12-13, 470 ll.17-22.
Valenzuela laid the motorcycle down before the scraper began braking.

R. 471 ll.24-25, 634 ll.14-18.

Christie died from the wreck. She was only 35 years old. R. 478 ll.17-

18, 1124 l.25 - 1125 l.8.

He needs to know what he can do. He knows but he didn't do it,
Valenzuela could not understand how the scraper could stop. R. 469

ll.8-11. There was no way for him to know that the scraper could or

would stop in time, or that it could double back on itself. R. 469 ll.12-17,

650 ll.3-13. A truck driver, in the opposite lane waiting to make a left

turn, also thought that the scraper would completely cross over

Valenzuela's lane. R. 562 ll.18-23, 564 ll.12-14. The scraper driver

agreed that Valenzuela had to react in seconds and could not know that

the scraper was going to brake or could avoid the road by jerking the

hinged cab back on itself. R. 411 ll.17-22, 412 ll.17-21, 437 ll.20-25.

The Company's expert described this as "an emergency situation"

that required "panic stopping," and testified that Valenzuela did not

cause the position that he found himself in. R. 948 ll.12-24, 966 ll.16-21.

Valenzuela's expert opined that Valenzuela reacted reasonably to an

"imminent hazard." R. 649 ll.5-7, 659 ll.6-20. The MAIT investigator

added that rear-wheel braking "is common" for motorcycles in

emergencies because front-wheel braking causes you to spill right away.

R. 720 ll.19-23, 742 ll.7-16. And the scraper's driver testified that he

He is no expert

would have laid the motorcycle down too. R. 413 ll.18-22.

Prior to the wreck, the scraper almost hit three other motorists who live near the intersection and travel by it frequently. R. 338 l.21 - 339

l.8, 340 ll.4-14, 341 l.12 - 342 l.12, 352 ll.8-10, 353 ll.9-15, 357 l.1 - 358

l.22, 366 ll.2-12, 367 l.4 - 368 l.7. They and others who live near the

intersection confirmed that nothing warned those less familiar with the

road about the scraper crossing without stopping. R. 342 l.22 - 343 l.12,

344 l.23 - 345 l.4, 358 l.23 - 359 l.8, 361 ll.8-22, 368 ll.8-12, 1009 ll.8-16,

1010 ll.8-9, 1018 l.16 - 1019 l.1.

Argument

The Company asks the Court to reweigh evidence, throw out evidence of its wilfulness, rely on an unpreserved misdescription of counsel's opening statements, and eliminate *Allen* charges. None of this justifies a reversal. The Court should affirm.

1. Evidence supports the jury's allocation of fault.

The Company's appeal rests largely on its failed jury argument that none of this is its fault. The jury eyeballed the witnesses, however, and found that the Company was ^{*Inadmissible evidence*} 65% at fault. R. 7. This allocation is a question of fact for the jury; to reverse, this Court must conclude that

the only inference from the evidence is that the Company was less than 50% at fault. *Hurd v. Williamsburg County*, 353 S.C. 596, 615-616, 579 S.E.2d 136, 146 (Ct.App. 2003). The Company cannot satisfy this narrow standard of review.

The jury, for example, could have based its verdict on the scraper driver's failure to keep a proper lookout and the Company's decision to save eight to ten seconds by having him run the stop sign. R. 400 ll.9-16, 402 ll.2-7, 408 l.10 - 409 l.3, 819 ll.13-24, 1026 ll.6-23, 1028 ll.8-12, 1114 l.23 - 1115 l.19, 1117 l.2 - 1118 l.5. The scraper driver left it up to a spotter to look for traffic and did not stop at the stop sign. He knocked it down. R. 409 ll.2-3, 412 l.22 - 413 l.10, 563 ll.11-23; Respondent's Addendum (photographs of the scraper).

The Company's expert also admitted that this put Valenzuela in "an emergency situation" that required "panic stopping," and that *But he did not do it.* Valenzuela did not cause the position that he found himself in. R. 948 ll.12-24, 966 ll.16-21. The jury was charged that it could consider this as a sudden emergency, and that persons forced to act in the face of sudden and imminent perils are not to be judged in light of hindsight or later events. R. 1120 l.13 - 1122 l.10.

On appeal, the Company does not challenge the charges on keeping

a look out, stop signs, or sudden emergencies. It instead wants the

Court to ignore its role in Christie's death and Monday-morning

quarterback her husband's ^{yes but not his} decision to hit the rear brakes and lay the ^{misperception}

motorcycle down. Even so, the MAIT investigator explained that

motorcyclists who face emergencies commonly hit their rear brakes

because front-wheel braking causes immediate spills. R. 742 ll.7-16.

And the Company's scraper driver admitted that he would have laid

the motorcycle down too. R. 413 ll.18-22.

2. The Owens Corning contract was properly admitted to show the Company's awareness of the danger and need for precautions.

The Company's broken promise to have a flagman and crossing signs

also supports the jury's allocation of fault. R. 1220 ll.19-24, 1221 ll.6-10,

1222 ll.3-11, 1308. Had the Company kept its promise, Christie would

have never died. R. 474 l.6 - 475 l.9, 475 l.19 - 476 l.14. With a

flagman, "this becomes a minor inconvenience instead of a fatality." R.

653 ll.9-24.

The trial court enjoyed "wide discretion" in ruling that this evidence

was relevant and was not unduly prejudicial. *Busillo v. City of North*

Charleston, 404 S.C. 604, 610, 745 S.E.2d 142, 145 (Ct.App. 2013). The

trial court did not abuse this discretion because tortfeasors may be

liable for injuries to third parties that arise out of the tortfeasor's contract with others. *Dorrell v. South Carolina Dep't of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 14-15 (2004). In that case, the Supreme Court held that a contract to pave a highway obligated the contractor to protect the highway's motorists.

The Company likewise obligated itself to protect Valenzuela and other motorists when it took on a contract that required it to cross the highway. The Company earlier disagreed, arguing that *Dorrell* does not apply because its contract does not say that the purpose of having a flagman and crossing signs is to protect the public. R. 1394-1397. The distinction was destroyed with testimony that the Company knew that the precautions it promised were necessary to protect the highway's motorists. R. 780 ll.11-21, ~~1223 ll.3-16~~. by flagging his vehicles The Company does not cite *Dorrell* on appeal or repeat the discredited distinction.

Other testimony similarly rebuts the Company's related argument about the encroachment permit. Owens Corning explained that the May 2009 contract required the Company to use a flagman and crossing signs even though the permit earlier expired. R. 1217 l.17 - 1218 l.3, 1241 ll.3-16. The Company knew about the requirements' further details, Owens Corning added, from the Company's prior construction

projects. R. 1222 ll.16-24. And the Company knew enough to have a flagman and properly-placed warning signs during Owens Corning's pre-announced inspections. R. 1253 l.3 - 1254 l.24.

Still other testimony shows that admitting the contract is not reversible error. The Company's expert testified that you should have at least two warning signs in construction situations. R. 981 ll.11 - 983 l.5. Valenzuela's expert testified that a flagman is necessary from a purely engineering perspective. R. 653 ll.9-24, 654 l.15 - 656 l.19. The Trooper who investigated the scene testified that construction zones typically have crossing signs, and that one would expect the Company to have a flagman. R. 539 l.15 - 540 l.24, 542 ll.3-12. And the scraper driver admitted that these precautions are just "common sense." R. 402 l.18 - 403 l.12.

So the contract was not the only evidence on the need for signs and a flagman. Even if improper, admitting cumulative evidence is not reversible error. *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 35, 491 S.E.2d 571, 576 (1997).

3. The course-of-conduct evidence was properly admitted to show a sudden emergency and the Company's wilfulness.

The trial court likewise did not abuse its discretion by admitting evidence of the Company's prior course of conduct at the intersection. The Company argues that this is inadmissible because past acts do not prove that the actor later did the same thing the same way. But that is not why the testimony was admitted.

The challenged testimony is from three witnesses who live near the wreck scene and pass it frequently. R. 338 l.21 - 339 l.8, 352 ll.8-10, 353 ll.9-15, 366 ll.2-12. They testified that prior to the wreck the intersection never had any warning signs, flagman signs, or flagman — and that the scraper had on different occasions almost hit them after running the stop sign. R. 340 ll.4-11, 341 l.12 - 342 l.12, 342 l.22 - 343 l.12, 357 l.1 - 359 l.8, 367 l.4 - 369 l.3. Two of the witnesses added that there was nothing to warn those less familiar with the road about the scraper crossing without stopping at the stop sign. R. 344 l.23 - 345 l.4, 361 ll.8-22.

The trial court ruled that the evidence was admissible for three reasons, none of which involve using the Company's past acts to prove its future conduct.

Excuses not reasons

[The evidence first rebutted the claim that Valenzuela did not keep a proper lookout. R. 332 ll.16-17, 1095 ll.20-21. Unlike those living near the intersection, Valenzuela had not traveled the road in years and had no idea about the crossings. R. 466 ll.3-9. The court reasoned that the alleged danger from the intersection is more unexpected by someone who has never been there than by those who live nearby. R. 298 ll.16-19. [The evidence thus goes to show that Valenzuela faced a sudden, unexpected peril.]

[The Company's decision to blame Valenzuela also put in issue its willfulness. *Then that kind of testimony would be allowed in every comparative negligence case.* Comparative negligence is not a defense to willfulness. S.C. Code § 15-38-15(F). So the jury was asked in the liability phase to

decide whether the Company was willful, and found that it was. R. 8,

1109 l.11- 1110 l.2. [The trial court ruled that the course-of-conduct evidence was relevant to show this willfulness.] R. 299 ll.6-20.

[The trial court lastly ruled that the evidence was relevant on the punitive damages claim to show the Company's alleged pattern of conduct, the duration of the conduct, and the degree of culpability. R. 299 ll.10-13.]

None of these rulings is an abuse of discretion. The law governing similar act evidence is "simply a rule of relevance, logic, and common

sense.” *Reed v. Clark*, 277 S.C. 310, 314-315, 286 S.E.2d 364, 387

(1982). The testimony passes this common sense test because it shows

that the Company’s decision to continually run the stop sign — without
it did post a flag man
posting warning signs or a flagman — was not an isolated inadvertence.

It was a *modus operandi* which continued to surprise those who

traveled the road much more frequently.

This evidence is also *corroborative* cumulative. The Company called witnesses who
live near the intersection and testified — without objection — that the
Company never used a flagman or warning signs, and that someone
unfamiliar with the road wouldn’t have any idea what was going on. R.
1009 ll.8-16, 1010 ll.8-9, 1018 l.16 - 1019 l.1. So this also falls under the
rule that cumulative evidence is not reversible error. *Creech*, 328 S.C.
at 35, 491 S.E.2d at 576.

4. The issue over the opening statement is new and without merit.

The Company next argues that none of this is its fault because its
opposing counsel admitted that its employees were not negligent. This
mischaracterization was never raised below.

This Court recently declined to rule on the significance of an opening
statement because the issue was raised for the first time on appeal.

Stephens v. CSX Transp., Inc., 400 S.C. 503, 519-520, 735 S.E.2d 505,

514 (Ct.App. 2012). So too here. The Company never mentioned this issue in its motions for a directed verdict or a new trial. R. 865 l.25 - 880 l.23, 1038 l.23 - 1039 l.10, 1385-1419.

And the Company cannot resurrect the issue by mislabeling it as an additional sustaining ground. Winners raise additional sustaining grounds to affirm. To reverse, trial-court losers like the Company must raise the issue below and get a ruling or ask for one. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-422, 526 S.E.2d 716, 724 (2000)(distinguishing respondents who raise additional sustaining grounds from appellants who raise unpreserved claims).

The unpreserved point also lacks merit. To bind, such statements must be deliberate, clear, and unambiguous. *See Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 872 (7th Cir. 2010)(Posner, J.). Otherwise, “trials would be turned into minefields.” *Id.*

In this case, counsel never hinted that the employees were not negligent. Counsel said that the failure to have a flagman or warning signs was not their fault because they “were doing exactly what they were told” and “doing as we all do when you listen at 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. ” R. 313 l.22 - 314 l.10. At trial, everyone agreed that the scraper driver and spotter were only following orders. R. 403 ll.13-25, 796 ll.5-7, 1027 ll.22-24.

Following orders does not imply a lack of negligence. It means that the employees were negligent because the Company required it.

5. The *Allen* charge was not coercive.

The final attack is on the standard *Allen* charge and the trial court’s decision to tell the jury that it could decide for itself when to eat, take a break, and resume deliberations. These instructions properly fulfill the Supreme Court’s command that trial courts encourage verdicts.

a. Trial courts must encourage verdicts.

The Company first complains that the trial court told the jury that the court had to encourage a verdict. R. 1137 l.24 -1138 l.8. But this accurately states the law.

“A trial judge has a duty to urge, but not coerce, a jury to reach a verdict.” *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). This duty is over 100 years old. *See Nickles v. Seaboard Air Line R.R.*, 74 S.C. 102, 54 S.E. 255, 268 (1906)(“It is important that the trial of causes should be ended. A circuit judge is but discharging his duty to

the public, and especially to the litigants, when he urges the jury to reach a verdict, provided nothing like coercion takes place.”).

This case highlights the wisdom of requiring trial courts to encourage verdicts. After hearing testimony for over four days, the jury thought it was hung after deliberating less than six hours. R. 132 l.3, 135 l.6, 1130 l.16, 1137 ll.4-23. The Supreme Court has upheld an *Allen* charge where the jury deliberated far longer before suggesting a deadlock. *State v. Lynn*, 277 S.C. 222, 228-29, 284 S.E.2d 786, 790 (1981)(upholding an *Allen* charge where the jury suggested a deadlock after deliberating nine hours).

b. An *Allen* charge properly fulfils this duty.

The trial court next gave what the Company admits is a verbatim *Allen* charge. R. 1138 l.9 - 1140 l.5. The Company argues that the charge is itself coercive.

The Supreme Court recently disagreed. In 2010, the Court described the charge as the “typical judicial mechanism” for trial courts to encourage indecisive juries — and upheld its use in the sentencing phase of a capital case. *State v. Williams*, 386 S.C. 503, 509-510, 690 S.E.2d 62, 65 (2010). If the charge is proper when the stakes are literally life and death, it is proper here too.

c. Accommodating the jury's needs is not coercive.

The Company lastly complains about the trial court offering the jury supper and allowing it to decide when to eat; how long to work; and, if necessary, whether to resume deliberations Saturday or come back Tuesday. R. 1140 l.6 - 1142 l.3.

Letting the jury know that the court will meet the jury's needs is not coercive. Coercion is telling the jury that it will not get food or breaks until it reaches a verdict. The trial court did the opposite. *See State v. Hughes*, 336 S.C. 585, 598, 521 S.E.2d 500, 507 (1999)(asking the jury when it would like to break is not coercive); *State v. Williams*, 344 S.C. 260, 265-266, 543 S.E.2d 260, 263-264 (Ct.App. 2001)(same; telling the jury that the court would make arrangements if the jurors got tired or hungry); *State v. Ayers*, 284 S.C. 266, 269, 325 S.E.2d 579, 581 (Ct.App. 1985)(same; telling the jury that the court would make hotel arrangements if necessary).

The complaints about the additional comments also fail to grapple with the four factors that the Supreme Court held must be considered. *Williams*, 386 S.C. at 512, 690 S.E.2d at 66-67. On two of the four factors, the trial court neither spoke specifically to the minority jurors nor made any inquiry to the jury's numerical division. The comments

were instead even-handed, favoring neither party over the other.

Next, the jury deliberated three more hours, and asked several questions, after it resumed deliberations. R. 1142 l.4, 1143 l.7 - 1145 l.12, 1149 ll.8-9, 1383. This confirms a lack of coercion. *See Lynn*, 277 S.C. at 229, 284 S.E.2d at 790 (upholding a verdict where the jury asked questions two hours after the *Allen* charge); *Nelson v. Atlantic Coast Line R.R.*, 191 S.C. 345, 4 S.E.2d 273, 280 (1939)(upholding a verdict where the jury came back less than a half hour after resuming deliberations).

Lastly, the court never told the jury that it had to reach a verdict. While the Company says the judge did, the most it cites is the judge's plea that the jury "please consider each other's opinion and in the spirit of compromise or whatever let's reach a verdict in this case." R. 1141 ll.19-20.

The "let's reach a verdict" phrase came in the context of the earlier charge that the jurors "should not give up your firmly held belief merely to be in agreement with the other jurors," and instruction that the Court would indeed declare a mistrial if the jury could not agree. R. 1138 l.23 -1139 l.2, 1139 ll.10-11. In this context, "let's reach a verdict" urges a verdict without requiring one. That is how the trial court meant

it. R. 1142 ll.9-18.

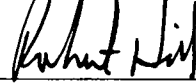
Besides, the Supreme Court has upheld verdicts where the trial judge used more forceful language. *See State v. Gebert*, 196 S.C. 306, 13 S.E.2d 451, 454 (1941) (“And it is your duty to write a final verdict in this case; you are not expected to make a mistrial, the law expects you to reach a verdict.”); *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305, 308 (1923) (“[T]his work is just analogous to a situation in time of war, when a regiment is called on to perform a certain duty and they say, ‘We can’t do it, you will have to get some one else.’”); *Terry v. Richardson*, 123 S.C. 319, 116 S.E.2d 273, 275 (1923) (“You have been assigned as citizens to do this duty. It is a public duty you owe your country. Are you going to say we are not capable or competent to do it and you must call on some one else to do it? I don’t think so.”); *State v. Drakeford*, 120 S.C. 400, 113 S.E. 307, 309-310 (1922) (“Oh, but you must agree, we wouldn’t consider a mistrial in this case.”); *Dover v. Lockhart Mills*, 86 S.C. 229, 68 S.E. 525, 528 (1910) (“It seems absurd that a jury of 12 men cannot agree upon a case like that, and find a verdict one way or the other.”).

If these statements do not warrant a new trial, the trial court’s much milder urging here does not either.

Conclusion

A wife and mother is dead. Her husband has faced his role in her death. It is now time for the Company to face its role. The judgment should be affirmed.

Respectfully submitted,



Robert N. Hill

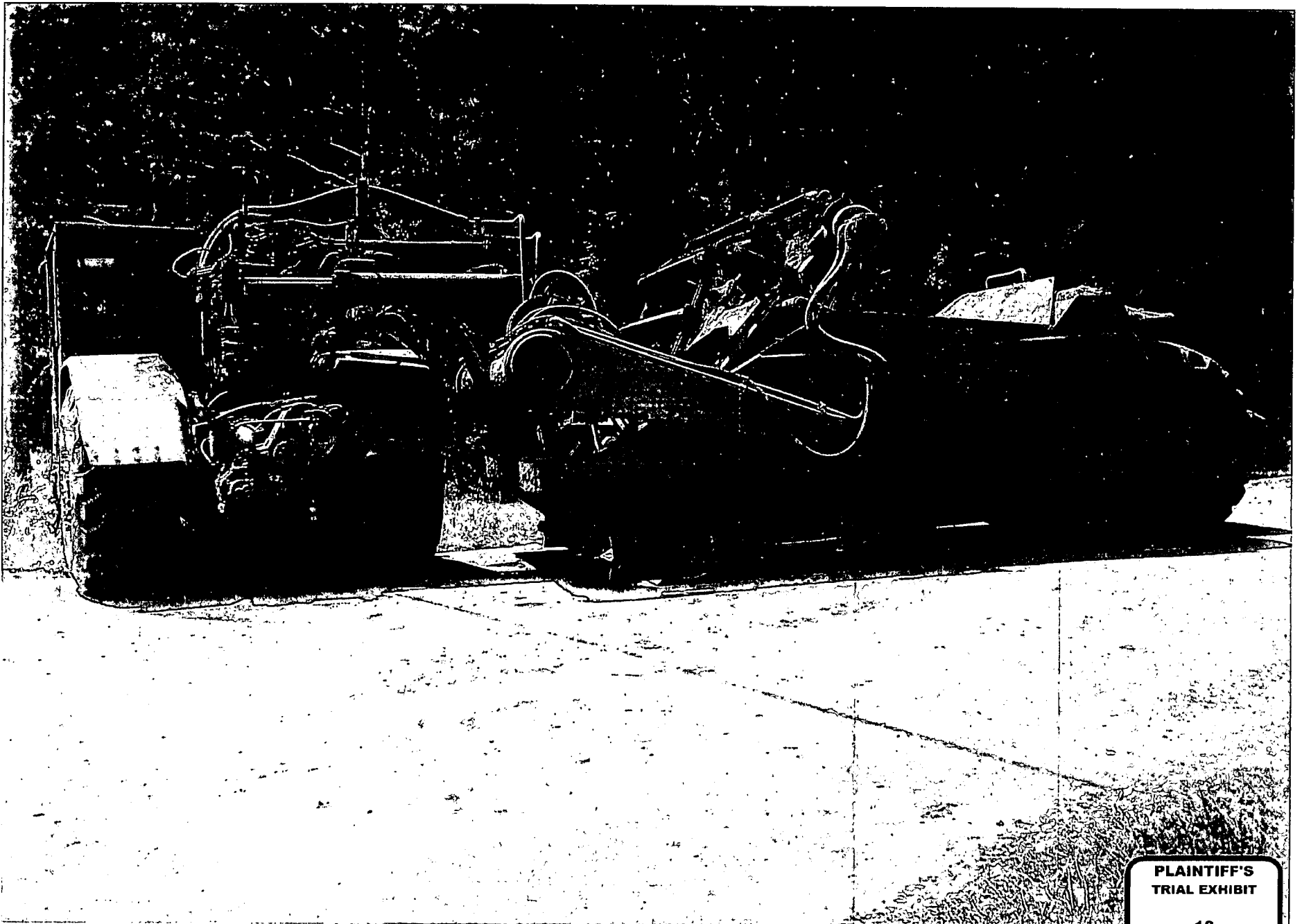
Law Offices of Robert Hill
P.O. Box 51
Newberry, SC 29108
803-405-1629

J. Paul Detrick
Peters Murdaugh Parker
Elzroth & Detrick, PA
P.O. Box 457
Hampton, SC 29924-0457
803-943-2111

Lisa McPherson
McWhirter Bellinger & Assoc., PA
119 East Main Street
Lexington, SC 29702
803-359-5522

Ronald A. Maxwell
Maxwell Law Firm
P.O. Box 1115
Aiken, SC 29802
803-641-6700

Counsel for the Respondent



**PLAINTIFF'S
TRIAL EXHIBIT**

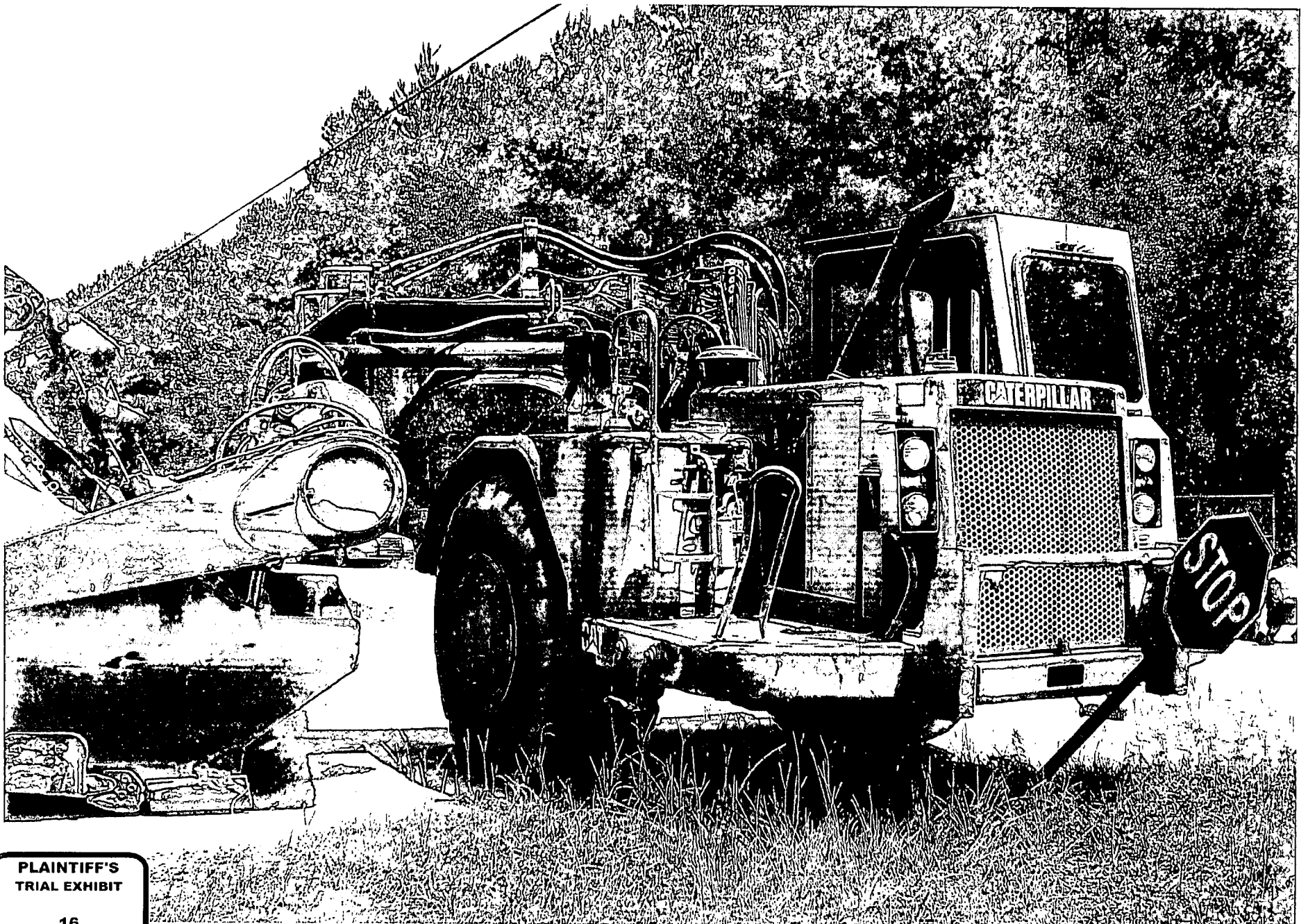


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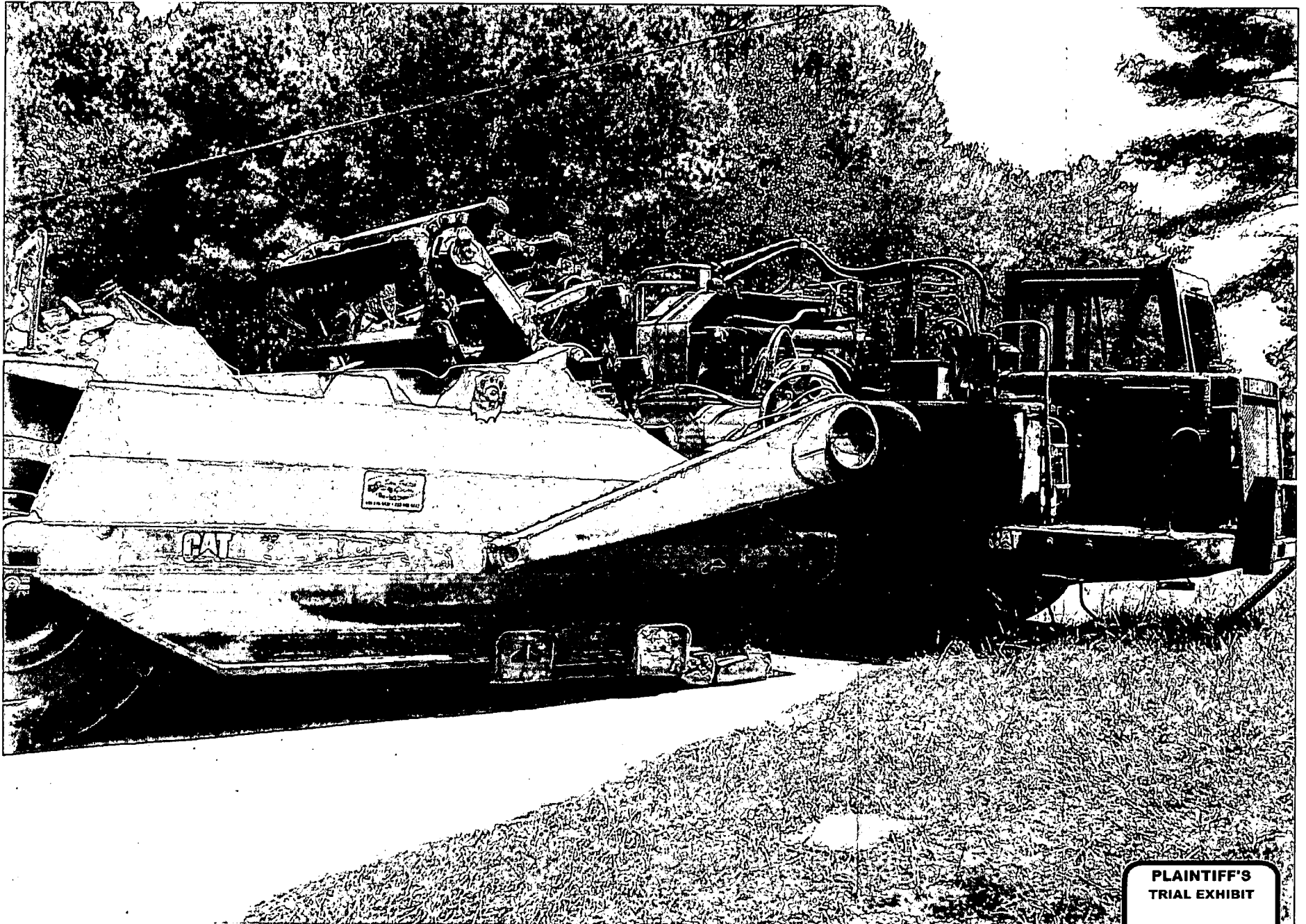
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PLAINTIFF'S
TRIAL EXHIBIT



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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.

Appellant's Final Reply Brief

**Charles E. Carpenter Jr.
Carpenter Appeals & Trial Support
4825 Portobello Rd.
Columbia, SC 29206
803-758-2886**

**James C. (Trey) Cox, III
Danielle F. Payne
Grier, Cox & Cranshaw, LLC
P.O. Box 2823
Columbia, SC 29202-2823
803-731-0030
Attorneys for the Appellant**

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

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

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

Question III (p.7) - If the erroneously admitted prejudicial evidence is removed, this defendant then is entitled to a Directed Verdict and Judgment Not Withstanding the Verdict as a matter of law.

Question IV (p.9) - If the acts of employees are not negligent, then there is no negligence to impute to the employer under the doctrine of respondeat superior.

Question V (p.15) - After the jury reported it could not reach a unanimous verdict, the Trial Court gave a coercive improper variant of an Allen charge.

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Questions Presented

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

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

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

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

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

Conclusion

Reply Brief of the Appellant

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

The Respondent argues that Sam English Grading knew what it was doing because it had been doing it since 1982. It is true that Sam English Grading had been doing its work since 1982 (actually since 1978) [R. p. 803]. That would seem to be strong evidence in opposition to the plaintiff because it shows there had been no similar accidents in 30 years. This is no indicator of a procedure that is negligent.

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

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

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

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

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

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

Reply to the particular Questions Presented.

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

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

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

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

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

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

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

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

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

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

"All I seen was a dust tornado coming off the front tire that was spinning and in my mind I was like, What in the world -- what -- I just couldn't -- I couldn't comprehend that he was not going to stop. I couldn't. Why won't he look, you know? So I laid in my back brake. I started skidding. We were coming -- we were going to hit right in the intersection. I mean, just like if you shot two bullets at each other. We're coming just like that. I'm looking at him, begging him, please acknowledge me, man. Just hit the brakes please and I'll hold upright, you know, but I couldn't. [R.p.468]."

.... [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"

After Valenzuela next concluded it was too late to stop, and too late to continue to drive through, he decided to throw the motorcycle down on the road. [R. p. 468].

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

....

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

that we would stay behind it and we would survive it. He would get caught up in the motorcycle himself. That was my plan. [R. p. 469]

As it turned out, the scraper was able to stop. The scraper did not come out of the driveway and never entered onto Redd's Branch Rd. The accident is a single vehicle motorcycle accident. The only thing in the road are the skid marks and the motorcycle. [Plaintiff's Exhibit 39 R. p. 1322].

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

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

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

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

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

Question II

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

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

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

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

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

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

Private parties may contract to do many things they are not otherwise obligated to do, but, private contracts between two parties do not create duties to third parties. If

one party wants to require the other party to perform certain actions beyond what the law requires, and the corresponding party agrees, they may do so. But, this private contracting does not modify or change the existing law. It is enforceable by the parties to the contract, but not by strangers to the contract.

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

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

Question III

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

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

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

Respondent's Table of Contents	Respondent's Statement of Issues	Respondent's Body of Brief
The course-of- conduct	Must the Court reverse because the	The course-of- conduct

evidence was properly admitted to show a sudden emergency and the company's willfulness.

p. i.

jury heard evidence that the Company's failure to provide a flagman, maintain road crossing signs, or require that its drivers stop at a stop sign threatened others who were more familiar with the intersection?

p. 1.

evidence was properly admitted to show a sudden emergency and the company's willfulness.

p. 11.

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

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

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

How many other accidents would be admissible that actually took place at that intersection of a driveway and the road? None. We should only be trying this case on these facts. And this was not even prior conduct that resulted in other accidents. It was just prior conduct where nothing happened but the neighbors didn't like it.

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

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

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

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

Question IV

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

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

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

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

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

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

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

The Respondent, in response, cites *Stephens v. CSX Transp., Inc.*, 400 S.C. 503, 519-520, 735 S.E.2d 505 (Ct.App. 2012). This citation is puzzling because *Stephens v. CSX Transp. Inc.* is a case about an accident at a railroad crossing. The plaintiff attempted to introduce a subsequent remedial measure by claiming that post accident trimming of brush was to impeach the railroads position that the crossing was reasonably safe. The Court held that “The trial court correctly saw past the “impeachment” label Stephens put on the evidence and determined that his purpose for admitting the evidence was to prove that the crossing was not safe because CSX was negligent in failing to cut the trees.” “The admission for that purpose is precisely what Rule 407 forbids.”

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

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

The Robinson opinion then goes on to say “But the plaintiff makes the further argument that in closing argument McNeil's lawyer made a "judicial admission" that the plaintiff had not

been contributorily negligent. What the lawyer said was: "We are, of course, not blaming Karen Robinson for her own injuries. We never have. We never will." She had taken a particular medication.

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

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

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

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

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

"RULE 43 CONDUCT OF TRIAL

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

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

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

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

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

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

In its brief, the Respondent makes the same kind statement of opposites. “Following orders because the Company required it.” Following orders is what

takes place in almost every case in which a corporation is sued for negligence.

Either the acts undertaken in following orders are negligent or they are not.

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

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

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

Despite the fact that each of these decisions was wrong, he would have still been safe if he had stayed with the decision. He could have stopped first instead of skidding. He could have

stopped or driven through either, because the scraper could and did stop. He could have driven through even though he wrongly thought he had gone past the point of no return, if he just had not laid the motorcycle down. The road remained open. The scraper not only did not hit the motorcycle, the scraper did not enter the roadway.

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

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

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

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

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

issues that are disputed.

Second, the jury charge in this case was not an Allen charge. It includes an Allen charge, but it also goes far beyond any previously approved charge in the cases the Respondent cites, and actually violates the principles described in all of the cases. The cases uniformly say that trial courts should encourage verdicts, **but not coerce them.**

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

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

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

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

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

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

“THE COURT: I am going to bring them out. I am going to read verbatim the Allen versus United States charge that it requires to read when we have a potentially hung jury and then I am going to tell them that I'll let them continue on. I'll buy them supper. If we can't reach a verdict by nine, we'll come back tomorrow. **We're going to push it until we get it concluded.**” [R. p. 1137]

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

He said:

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

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

The jury knew the context. The judge told them. The judge's wife was out of town and had been during the trial. The judge had been staying late each afternoon in a

situation in which the judge had an empty home to return to in Bamberg with no meal prepared. There is nothing wrong with this in and of itself, but as part of the context it was true, and he described it to the jury, so they knew what was going on.

Having a late meal was not an accommodation to the jury, it was a threat that they would not be able to go home on Friday night of the Labor Day weekend and would have to eat dinner at the courthouse and then stay even longer at the courthouse working on the case.

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

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

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

There are good reasons why South Carolina and the remaining states which still permit an Allen charge scrutinize not just the charge but also the surrounding circumstances. The parties are entitled to a unanimous verdict of each individual juror who reaches their own conclusion.

The jurors also have a right to not be put to an improperly onerous performance of their civic duties. The rights of the defendant and the rights of the jury were violated here.

Conclusion

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

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

April 7, 2014



**Charles E. Carpenter Jr.
Carpenter Appeals & Trial Support
4825 Portobello Rd.
Columbia, SC 29206
803-758-2886**

**James C. (Trey) Cox, III
Danielle F. Payne
Grier, Cox & Cranshaw, LLC
P.O. Box 2823
Columbia, SC 29202-2823
803- 731-0030
Attorneys for the Appellant**

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,



Charles E. Carpenter, Jr.
Carpenter Appeals and Trial Support, LLC
4825 Portobello Road
Columbia, SC 2926
(803) 758-2886

James C. (Trey) Cox, III
Danielle F. Payne
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, SC 29202
(803) 731-0030
Attorneys For Appellant,
Sam English Grading, Inc.

Dated: April 14, 2014

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 Reply Brief**, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

J. Paul Detrick
PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.
Post Office Box 457
Hampton, SC 29924

-and-

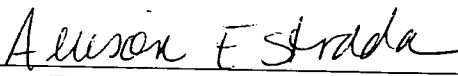
L. Lisa McPherson
MCWHIRTER, BELLINGER & ASSOCIATES
119 East Main Street
Lexington, SC 29072

-and-

Robert Hill, Esquire
Law Offices of Robert Hill
P.O. Box 51
Newberry, SC 29108

-and-

Ronald Maxwell, Esquire
Maxwell Law Firm
P.O. Box 1115
Aiken, SC 29802



Allison Estrada, Paralegal to Charles E. Carpenter, Jr.

Dated: April 17, 2014.