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May 29, 2012

The Honorable Daniel E. Shearhouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: RFT Management Co., LLC v. Tinsley & Adams, LLP and Welborn D. Adams,
Case No. 2010155606

Dear Mr. Shearhouse:

Pursuant to SCACR 208(b)(7), Appellant hereby advises you that the following significant authorities have come to counsel's attention following oral argument in the above case on Wednesday, May 23, 2012:

In re Silberkraus, 336 F.3d 864, 871 (9th Cir. 2003).

Cleveland v. Viacom, Inc., 73 Fed. Appx. 736, 741 n. 8, 2003 WL 22014776 at *3 & n. 8 (5th Cir. 2003).

Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950, 988 (10th Cir. 2003) ("speculative and self-serving expert testimony" insufficient to support verdict.)

Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000).

Seabury Management, Inc. v. PGA of America, Inc., 52 F.3d 322 (Table), 1995 WL 241379 at *4 (4th Cir. 1995).

Sullivan v. Nat. Football League, 34 F.3d 1091, 1105 (1st Cir. 1994).

Abarca v. Franklin Cty. Water Dist., 812 F.Supp.2d 1199, 1204 (E.D.Cal. 2011).

Lynn v. Amoco Oil Co., 459 F.Supp.2d 1175, 1191 (M.D.Ala. 2006).

City of Keller v. Watson, 168 S.W.3d 802, 812 (Tex. 2005).

Each of these cases are consistent with the position of the United States Supreme Court that even properly admitted expert testimony will not support a verdict "when indisputable record facts contradict or otherwise render the opinion unreasonable . . . ." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993).

These cases are also consistent with South Carolina law. As the Supreme Court explained in *Young v. Tide Craft, Inc.*, 270 S.C. 453, 470, 242 S.E.2d 671, 679, 1 A.L.R. 4th (1978):

> Having failed to establish an underlying factual basis taking into consideration the material facts necessary to the formation of an intelligent opinion, Fowler's testimony . . . is devoid of probative value and cannot support a verdict. Otherwise, the verdict "would be allowed to rest on speculation and conjecture, which is prohibited." (Citation omitted).

See, also, Watson v. Ford Motor Company, 389 S.C. 434, 455, 699 S.E.2d 169, 150 (2010) (finding expert testimony insufficient to support a verdict where the only *reasonable* inference from all of the evidence was that plaintiff failed to prove an essential element of its case). And, as recently explained by the Court, unless there is "evidence", direct or circumstantial, which reasonably tends to prove the gilt of the accused or from which guilt may be fairly and logically deduced . . .", it would be improper for an appellate court to find that the case was properly submitted to the jury. *State v. Senter*, 396 S.C. 547, 552, 722 S.E.2d 233, 236 (2011).

I am submitting this authority because Justice Hearn asked me at the hearing whether I had objected at trial to the admission of Respondents' expert's testimony.[1] This question took me completely by surprise because Appellant's appeal does not raise any rulings by the trial judge regarding the *admissibility* of any of the expert's testimony. Rather, Appellant's argument was that the expert's testimony was devoid of probative value, did not "fairly and logically" support the verdict, incorrectly stated the law, and, therefore, could not reasonably support the jury's verdict. *See* Reply Brief of Appellant at 2-3, 6-7, 11-12. Because the issue on a motion for JNOV is only as to the *sufficiency* of all of the evidence (to include the expert testimony) to

[1] I answered that I did not recall but believed that I had objected to portions of it. After the hearing, I reviewed the transcript and found one instance during which I did object. Tr. at p. 866, lines 6-25. I objected to the expert testifying that Adams did not deviate from standard of care in any respect, resulting in injury to Appellant.

support the verdict and not to the *admissibility* of the evidence, the presence or absence of a trial objection would not appear to be relevant.

Yours truly,

Harry A. Swagart, III

HASIII:ssm

cc: Matthew H. Henrikson, Esquire (via U.S. Mail & Email)