THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-03251
Appellate Case No. 2016-000419

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

APPELLANT'S PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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NOW COMES Winsor,[1] by and through its undersigned counsel, pursuant to Rule 221(a), SCACR, and hereby petitions this Honorable Court for rehearing of this matter, which it decided via unpublished opinion filed August 7, 2019 (the "Subject Decision"), suggesting rehearing en banc.

SUGGESTION FOR REHEARING EN BANC

"*Pursuant to Rule 220(b), SCACR*, and [various string-cited] authorities,"[2] the Subject Decision makes all too short work of Winsor's appellate arguments, summary rejecting them all with no meaningful explanation why.[3] Most respectfully, and as is more fully explained below, the Subject Decision is not only erroneous on the merits but also procedurally defective under Rule 220(b).

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[1] Shorthand references already defined in Winsor's briefs (e.g., referring to Defendant-Appellant, Winsor Custom Homes, LLC, as "Winsor") are continued in this petition.

[2] (Subject Decision p. 2 (emphasis added).)

[3] Winsor recognizes that the authorities cited in the Subject Decision are accompanied by parentheticals stating various propositions of law (*see, e.g.*, Subject Decision p. 2 ¶ 1 ("*Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007 ('The existence of a duty owed is a question of law for the courts.') (quoting *Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001))"); however, the mere recital of a legal proposition says nothing of its applicability to this (or any other) particular case. Most respectfully, it appears the Court has (mistakenly) relied on Rule 220(b), to address Winsor's appellate arguments in a manner that, were Winsor to have presented them likewise, the Court would have disregarded them as conclusory. *See Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority *or is only conclusory*.") (emphasis added).

Under Rule 220(b), the decision of this appeal must rest on more than the ipse dixit of the Court: "In *every decision* by [this Court], *every point* distinctly stated in the case which is necessary to the decision of the appeal and fairly arising on the record of the court *must be* stated in writing *and must, with the reason for the court's decision*, be preserved in the record of the case." (emphasis added). Winsor contends that this rule requires the Court to state, in reasonably substantive detail, the reasoning (i.e., some reasonable minimum level of meaningful analysis) for its decision on every material point properly raised on appeal and, most respectfully, the Subject Decision fails to do so.

Pursuant to Rule 219, SCACR, Winsor suggests that this matter be reheard en banc because this petition asks the Court to consider what exactly it is that Rule 220(b) requires, not merely what it requires with respect to the Subject Decision but, effectively, what it requires of all its Court's decisions—including the question of when, if ever, Rule 220(b) actually authorizes this Court to issue an unpublished opinion at all. Accordingly, Winsor submits (1) that consideration by the full Court is necessary to secure or maintain uniformity of its decisions and (2) that this petition involves a question of exceptional importance.

MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

I. The Subject Decision does not comply with Rule 220.

A. Under the plain language of Rule 220, it is not proper for the Subject Decision to be unpublished.

Rule 220 is the appellate court rule addressing opinions. It has three subsections—(a), (b), and (c),[4] respectively—with subsection (b) having two sub-subsections—(1) and (2), respectively.

Rule 220(a) provides as follows:

> **(a) Opinions.** *The appellate court shall make its decisions in writing by published opinions or memorandum opinions*, with any concurring or dissenting opinions attached. Published opinions shall appear in the Official Reports of the Supreme Court and the Court of Appeals; memorandum opinions shall not be published in the official reports and shall be of no precedential value. Published opinions shall be sent to the official reporter and other reporters or publishers when the time for rehearing has expired or, if a petition for rehearing has been filed, when the petition has been finally decided by the appellate court. The court may affirm, reverse, or modify the decision below or remand all or any issues for further proceedings.

(emphasis added).

Accordingly, Rule 220(a) requires appellate court decisions to be made in written opinions, of which *there are only two types*: "published opinions" and

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[4] Subsection (c) is irrelevant here and, therefore, omitted from the discussion below.

unpublished "memorandum opinions."

Rule 220(b) provides as follows:

> **(b) Decision by the Court.** In *every* decision rendered by an appellate court, *every point* distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court *must* be stated in writing and *must*, *with the reason for the court's decision*, be preserved in the record of the case. This rule does *not* apply to the following:
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> (1) The *Supreme Court* may file a *memorandum* opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears.
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> (2) The *Court of Appeals* need not address a point which is *manifestly without merit*.

(emphasis added).

Accordingly, Rule 220(b) establishes a general rule prohibiting the summary disposition of appeals and requiring the appellate court (be it this Court or the Supreme Court) to expressly rule on every distinct point (duly raised in the appeal) that is necessary to the decision of the appeal, and to set forth its reasoning in

reasonably substantive detail.

There are only two exceptions to the general rule in Rule 220(b). They are found in subsections (b)(1) and (b)(2), and of the two of them, *only (b)(2) applies to decisions of this Court*; the other, (b)(1), applies only to decisions of the Supreme Court.

Subsection (b)(1), which, again, applies only to decisions of the Supreme Court, and does not apply to decisions of this Court, expressly sets forth the circumstances under which the Supreme Court is authorized to issue an unpublished "memorandum opinion." No such authorization is granted to this Court in subsection (b)(2), which merely provides that "[it] need not address a point which is manifestly without merit."

So, again, the plain language of Rule 220(a) contemplates only two types of opinions: (1) "published opinions" and (2) "memorandum opinions," which are unpublished and have no precedential value. Nowhere in Rule 220 is this Court authorized to issue a "memorandum opinion." The only part of Rule 220 that addresses the circumstances under which a "memorandum opinion" may be issued expressly applies only to the Supreme Court, not this Court. *See* Rule 220(b)(1). The subsection that is expressly addressed to this Court, (b)(2), speaks only of the Court's authority to refrain from addressing a particular *point(s)* raised on appeal; it says nothing to the effect that this Court render an entire decision without prudential

value.

Most respectfully, issuance of the Subject Decision as an unpublished decision is improper under Rule 220.

B. Even assuming, *arguendo*, issuance of the Subject Decision as an unpublished decision is proper under Rule 220, the Subject Decision nonetheless fails to comply with Rule 220 because it does not state in reasonably substantive detail the reasoning for the Court's decision on every material point Winsor properly raised to it.

As explained above, there are only two exceptions Rule 220(b)'s general rule—which general rule, again, prohibits the summary disposition of appeals and requires the appellate court to expressly rule on every distinct point (duly raised in the appeal) that is necessary to the decision of the appeal, setting forth its reasoning in reasonably substantive detail—and only one of them, subsection (b)(2), applies to decisions of this Court; and all subsection (b)(2) says is that this Court "need not address a point which is *manifestly without merit*." (emphasis added).

The Subject Decision does in fact address (albeit insufficiently under Rule 220) Winsor's appellate arguments, necessarily implying that the Court did not find any of Winsor's arguments to be manifestly without merit. But even assuming, *arguendo*, there could be some contention that the Court found Winsor's arguments, or any of them, to be manifestly without, such a contention—along with any such finding of manifest meritlessness by the Court—is itself manifestly erroneous. In this regard, Winsor submits that the clearest proof that its arguments exceed the

"manifestly without merit" threshold are the arguments themselves, and it incorporates its appellate briefs herein by reference.

Most respectfully, even assuming, *arguendo*, issuance of the Subject Decision as an unpublished decision is proper under Rule 220, the Subject Decision nonetheless fails to comply with Rule 220 because it does not state in reasonably substantive detail the reasoning for the Court's decision on every distinct and material point Winsor properly raised to it on appeal.

II. Even assuming, *arguendo*, the Subject Decision fully complies with Rule 220, it is nonetheless erroneous because the Court overlooked or misapprehended the merit of Winsor's appellate arguments.[5]

A. The Court erred in overlooking or misapprehending the trial court's error in denying Winsor judgment as a matter of law.[6]

1. The trial court erred in determining that Winsor owed Mrs. Connelly a legal duty to maintain the silt fence and, in consequence, erred in determining that Mrs. Connelly had a viable claim against Winsor for ordinary negligence—which, defective though it was, was the only claim that Mrs. Connelly did not effectively abandon or dismiss, leaving her with no viable claim against Winsor and entitling Winsor to judgment as a matter of law, which the trial court wrongfully denied, and this Court erred in not recognizing.

In short, with Mrs. Connelly's consent, the only claim actually submitted to the jury was for ordinary negligence based on Winsor's supposed duty to maintain the silt fence; by proceeding in this way, Mrs. Connelly effectively dismissed or abandoned any/all other causes of action against Winsor; and, because Winsor did not owe Mrs. Connelly a duty to maintain the silt fence, her ordinary-negligence

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[5] PLEASE NOTE: Winsor does not intend to waive any issue/argument it has raised to the Court thus far, and, again, its appellate briefs are incorporated herein by reference. (*See generally* Final Br. of Appellant; Final Reply Br. of Appellant.) Besides the facts presented in the argument in Section II of this petition, please see the facts section of Winsor's principal brief (*see* Final Br. of Appellant pp. 9–14), which is, of course, included in what is incorporated herein by reference, and which Winsor asks the Court to reconsider along with this petition.

[6] As noted in Winsor's principal appellate brief, this issue/argument addresses and includes errors in denying Winsor's directed-verdict motions and its motion for JNOV.

claim, i.e., her only claim, necessarily fails, and Winsor was—and is—entitled to judgment as a matter of law.

"The issue of negligence is a mixed question of law and fact." *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007) (citation omitted). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff[,]"[7] and "the court must [first] determine, as a matter of law, whether the law recognizes a ***particular*** duty." *Moore*, 373 S.C. at 221, 644 S.E.2d at 746 (emphasis added). It is only if a duty does exist that the jury then determines whether there was a breach of the duty and resulting damages; otherwise, i.e., if there is no duty, the defendant is entitled to judgment as a matter of law. Id.

"Duty is generally defined as 'the obligation to conform to a particular standard of conduct toward another.'" *Huggins*, 355 S.C. at 333, 585 S.E.2d at 277 (citing *Hubbard v. Taylor*, 339 S.C. 582, 529 S.E.2d 549, 552 (2000)). "Duty arises from the ***relationship*** between the alleged tortfeasor and the injured party. In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care." *Huggins*, 355 S.C. at 333, 585 S.E.2d at 277 (emphasis added); *see also Ravan v. Greenville County*, 315 S.C. 447, 468, 434 S.E.2d 296, 308 (Ct. App. 1993) ("It is essential to liability for negligence to attach

[7] *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003).

that the parties shall have sustained a relationship recognized by law as the foundation of a duty of care."). "Where this relationship is 'too attenuated,' a duty will not arise." *Ravan*, 315 S.C. at 467, 434 S.E.2d at 308 (citing *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325-26 (1986)); *see also Huggins*, 355 S.C. at 333, 585 S.E.2d at 277 ("The concept of duty in tort liability will not be extended beyond reasonable limits.").

As a builder on Daniel Island, Winsor had to abide by the ARB's construction guidelines, which, as noted above, required Winsor to, among other things, "[i]nstall erosion control measures (silt fencing) to the perimeter of the [Premises]" and under which the ARB had the right to enforce compliance. (*See generally* R. pp. 1211-1214.) Winsor owed the ARB, not Mrs. Connelly, a duty to install and maintain the silt fence; this duty, imposed by the ARB's construction guidelines, arose solely out of Winsor's relationship to the ARB as a builder on Daniel Island, a relationship to which Mrs. Connelly was a complete stranger.

To illustrate this point, suppose the silt fence—which went around the entire Premises, not just along the sidewalk—was completely down on all sides of the Premises except the side abutting the sidewalk; or it was down on the side of the Premises abutting the sidewalk but none of it actually encroached upon the sidewalk; or, for that matter, suppose Winsor had simply never installed the silt fence to begin with. In all of these scenarios, Winsor would have been in breach of a duty owed to

the ARB, but in none of them would it have been in breach of duty to Mrs. Connelly—because Winsor did not owe Mrs. Connelly a duty to maintain the silt fence, and most respectfully, the trial court erred in determining it did and, in consequence, in failing to grant Winsor judgment as a matter of law on Mrs. Connelly's ordinary negligence claim, which was ultimately, though not viable, the only basis upon which Mrs. Connelly sought to establish Winsor's liability.

To be clear, as noted above, Winsor is distinguishing a claim of negligence under a premises-liability theory from a claim of ordinary negligence. Winsor's position is not that it had no duty at all to Mrs. Connelly with respect to its activities/the conditions on, or abutting, the Premises; it owed her a duty, as it would any other member of the public making use of the sidewalk, not to create a hazardous condition on the sidewalk. *See Lane v. Gilbert Constr. Co. Ltd.*, 383 S.C. 590, 681 S.E.2d 879 (2009) (under a premises-liability theory, a contractor, generally equates to an invitor and has the same duties that the property owner would have to invitees); *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530 (2002) (while the general rule is that an abutting landowner does not owe a duty of care with respect to the safety of the sidewalk there is an exception to this rule when the landowner creates an unsafe condition on the sidewalk). This duty, however, is not a duty to maintain the silt fence, and it arises under the law of premises liability, not ordinary negligence—and Mrs. Connelly effectively dismissed or abandoned any potential

claim against Winsor under a premises-liability theory (or, for that matter, any other theory).[8] Consequently, her entire case rests solely upon her ordinary-negligence claim, which fails as a matter of law—as, respectfully, the trial court should have found and this Court should have recognized on appeal.

2. The trial court erred in refusing to rule as a matter of law that, in light of South Carolina's adoption of the rule stated in § 343A and the only reasonable conclusion capable of being drawn from the evidence presented, Winsor was not liable to Mrs. Connelly for the Subject Accident.

Again, South Carolina has adopted § 343A,[9] and it provides as follows:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

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[8] During argument on Winsor's first directed-verdict motion, through her counsel, Mrs. Connelly agreed with the trial court that her theory of liability was ordinary negligence, based on alleged negligent maintenance of the silt fence. Indeed, Mrs. Connelly abandoned her prior requests for jury charges related to premises liability (*see* R. pp. 1274-1297 [at proposed charges VI, VII, VIII, and IX]), took no exception to the trial court's ordinary-negligence charge, and, without objection, allowed the case to be submitted to the jury on that basis alone—without any charge on premises liability, or any other potential basis of liability against Winsor. Accordingly, Mrs. Connelly effectively consented to the dismissal of, or abandoned, any claim against Winsor but for her (defective) claim of ordinary negligence. *Cf. TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."); *Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004) (a party may not "seek and receive a particular result at trial and then challenge it on appeal").

[9] *Callander*, 305 S.C. at 126, 406 S.E.2d at 362.

> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

With respect to subsection (2), comment *g* explains that, even where it is applicable,

> ***defendants***, however, ***may reasonably assume*** that members of the public will not be harmed by ***known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid.*** This is ***true particularly*** where a ***reasonable alternative way is open to the visitor, known or obvious to him, and safe.***

(emphasis added).

It cannot reasonably be denied that the hazard at issue (the Claimed Accident Condition) was known and/or obvious to Mrs. Connelly.[10] Indeed, even though, as addressed below, Winsor contends the jury could not reasonably have found (and

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[10] Comment *b* on subsection (1) provides as follows:

> *b.* The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

did not reasonably find) Mrs. Connelly to be less than 51% at fault for the Subject Accident, the fact that the jury found Mrs. Connelly 35% at fault plainly reflects that the hazard was known and/or obvious to her.

Moreover, during trial, Mrs. Connelly made much of just how bad the Claimed Accident Condition was; indeed, as shown above, her counsel highlighted the obvious disrepair of the Claimed Accident Condition in both his opening statement and closing argument and even underscored the fact that the silt-fence material was lightweight, like a garbage bag, and easily blown around. Nonetheless, as also shown above, it was admitted that, as Mrs. Connelly approached the Claimed Accident Condition, she saw that the sidewalk was partially obstructed—downed black plastic silt-fencing material fluttering in the breeze—and, recognizing this, she jogged over to the left to avoid it. (*See also* R. p. 296, line 16 ([Mrs. Connelly]: "***I saw the plastic on the ground. I ran to avoid it.***") (emphasis added).) Mrs. Connelly said herself, she knew the Claimed Accident Condition was not supposed to be like it was; the silt fence was supposed to be taut and secured to wooden stakes but, instead, was down and encroaching upon the sidewalk, unsecured, and moving on a windy day. (R. p. 168, lines 6-21.)

Mrs. Connelly was not forced to run along the sidewalk, and she approached the Claimed Accident Condition from an unobstructed vantage point on a clear (albeit windy) day. (R. p. 210, lines 8-10; R. p. 1218.) Not even Smith could have

obstructed Mrs. Connelly's view: both testified Mrs. Connelly was in front. (R. p. 166, lines 4-18; R. p. 337, lines 21-25.) And they were not running particularly fast; according to Mrs. Connelly, she ran about a 10-minute mile—in other words, 6 miles per hour. (R. p. 165, lines 9-20.)

Mrs. Connelly agreed it was important to watch for safety hazards while jogging, and she testified that she paid attention to the conditions around her[11]—and, again, it was admitted that she, in fact, observed and appreciated the Claimed Accident Condition, recognizing it as a hazard, and attempted to run around it but was tripped up, not simply because of the hazard posed by the downed silt fence, but because a sudden gust of wind (on a windy day) blew it into her foot.

Further still, Winsor notes, Mrs. Connelly's facebook post from the day after the Subject Accident makes no mention of the silt fence or being tripped at all; in fact, she herself lightheartedly blames the fall on her age:

> Hi!! an update! running yesterday I fell on the sidewalk and fractured my nose!! Thank goodness I didn't break any teeth-the moral of this story ***I guess is running is dangerous for our crowd!!*** No, not really, as soon as I can I will be back out there. In the meantime I look like I got hit with 10 uglysticks!!!!!

(R. p. 1230 (emphasis added).)

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[11] (R. p. 165, lines 9-20; R. p. 211, lines 3-12.)

Most respectfully, the trial court erred in denying Winsor judgment as a matter of law under § 343A. This is so even assuming, *arguendo*, Winsor owed Mrs. Connelly a duty to maintain the silt fence that could support an ordinary-negligence claim. By its plain language, § 343A applies to "any activity or condition . . . [,]" and maintenance of the silt fence, or lack thereof, or the Claimed Accident Condition as a result, would be covered under § 343A. Consequently, even if a duty of care did exist that could theoretically support a cause of action by Mrs. Connelly against Winsor for ordinary negligence, such a claim nonetheless fails as a matter of law under § 343A, and the trial court erred in denying Winsor judgment as a matter of law, as, respectfully, this Court should have recognized.

3. The trial court erred in refusing to rule as a matter of law that, in light of the only reasonable conclusion capable of being drawn from the evidence presented, Mrs. Connelly was at least 51% at fault for the Subject Accident and, therefore she could not recover against Winsor because of her comparative negligence.

Most respectfully, even assuming, *arguendo*, § 343A does not apply, for the same reasons set forth above, Mrs. Connelly could not reasonably be found to be less than 51% at fault for the Subject Accident (and, indeed, the jury's finding to the contrary was unreasonable); consequently, in any event, the trial court should have found—and, respectfully, this Court should have recognized—that, as a matter of law, recovery by Mrs. Connelly against Winsor was barred by her comparative negligence, entitling Winsor to judgment as a matter of law. *Roddy v. Wal-Mart*

Stores E., LP, U.S., 415 S.C. 580, 588, 784 S.E.2d 670, 675 (2016) ("In a comparative negligence case, the trial court ***should*** grant a directed verdict motion if the sole reasonable inference from the evidence is the nonmoving party's negligence exceeded fifty percent.") (emphasis added); *see, e.g., Humphrey v. Day & Zimmerman Inc.*, 997 F. Supp. 2d 388 (D.S.C. 2014) (finding, as a matter of law, on summary judgment, the plaintiff's negligence greater than the negligence attributable to the defendant and, accordingly, the plaintiff's claims barred under the doctrine of comparative negligence).

B. Assuming, *arguendo*, Winsor is not entitled to judgment as a matter of law, the Court erred in overlooking or misapprehending the reasons why this case should be remanded for a new trial on account of prejudicial errors in the proceedings below.

1. The trial court erred in denying Winsor's motion for a mistrial when Mrs. Connelly raised the subject of insurance to the jury.[12]

The day after the Subject Accident, Mr. Connelly, again, a lawyer, wrote Winsor a letter, on his law firm's letterhead, advising,

> ***My client*** fell on the sidewalk on 6/6/2011 in front of this construction site due to the dangerous conditions which as of this morning still exists [sic]. Your company still has dangerous debris on the pedestrian walk. She may have a broken nose. She has multiply [sic] cuts and abrasions to

[12] As noted in Winsor's principal brief, in addition to the initial error in denying Winsor's motion for a mistrial because of Mrs. Connelly's testimony (which, to be clear, warrants reversal standing alone), this issue/argument addresses and includes other and/or further errors and prejudice to Winsor on account of the subject of insurance being raised to the jury.

> her face, arms, and shoulder and is currently under a doctor's care.
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> Please ***have your attorney call me . . . . Should I not hear from you, I will assume you prefer the more formal route of filing a complaint at law.*** . . .
>
> Also, please advise Karen Nelson, John Edelen, Clark Design Group and Daniel Island Realty of my ***accusation*** against the owners and agents of this property. . . .

(R. pp. 1231-1233.) Notably, the letter referred only to Mr. Connelly's "client," not mentioning that the fall involved his wife. (R. pp. 1231-1233.)

During cross-examination of Mrs. Connelly at trial, the following exchange occurred in the presence of the jury:

> [DEFENDANT'S COUNSEL]: And on the day after the accident, your husband contacted some folks to threaten legal action about this fall; right?
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> [MRS. CONNELLY]: I don't think he was threatening legal action about this fall. I think he was just telling them what happened. I think it was like, this is what happened and do you guys have insurance and whatever --

(R. p. 243, lines 4-10.)

Winsor promptly moved for a mistrial, which the trial court denied,[13] reasoning as follows:

> All right. Before we broke for lunch, there was a motion for a mistrial that the court denied the motion. And the court was referring -- relying on [Brazeale] vs. Piedmont Manufacturing Company, 193 S.E. 39; and

[13] (R. p. 243, line 11 – p. 252, line 21.)

> Benjamin Keller vs. Pierce, Young, Angel 171 S.E. 2nd 352.
>
> The court finds that the -- the [Mrs. Winsor] was being asked about a letter that her husband wrote about -- about her fall to Winsor [], and made the comment that her husband asked them "do you have insurance". Number one, I don't think that places the insurance issue before the Court. She was just quoting what her husband asked [Winsor]. If, in fact, it does, the court finds that it was inadvertent -- it was inadvertently stated, it's not grounds for a mistrial.

(R. p. 249, lines 7-22 (underline added).)

First off, the trial court's view of Mrs. Connelly's testimony—that it did not place the insurance issue before the court because "[s]he was just quoting what her husband asked [Winsor]"—is plainly contradicted by the record. Mr. Connelly's letter says nothing at all about insurance. (R. pp. 1231-1233.) At that, immediately following her above-quoted answer, which raised the subject of insurance to the jury, Mrs. Connelly said, "I don't know. I haven't read -- I wasn't -- I didn't write the letter, so I don't know what he meant." (R. p. 243, lines 12-13.) In other words, to put it bluntly, she conceded she did not really know what she was talking about to begin with—yet she somehow knew to raise the issue of insurance.

With regard to the trial court's view of her reference to insurance as inadvertent, this is also belied by the record. Mrs. Connelly, again, the spouse of an attorney and, as the record shows, a sophisticated person in her own right, had been present in the courtroom only the day before when, during pre-trial proceedings, *her*

counsel had argued that Winsor should not be allowed to present evidence that it was a small company—a "mom and pop shop," in counsel's words—or else Mrs. Connelly should be able to introduce evidence of Winsor's liability insurance policy. (R. p. 76, line 12 – p. 81, line 10.) Mrs. Connelly had also been present when Winsor's counsel clarified that references to insurance in Winsor's contract with the owners of the Premises would be redacted. (R. p. 193, lines 6-7.) Again, to put it bluntly, she knew—or certainly should have known—that her reference to insurance was out of bounds, and her answer cannot reasonably be viewed as inadvertent. It would be fundamentally unjust for Mrs. Connelly to be allowed to introduce the subject matter of insurance into the trial of the case in this way, while Winsor, now facing a $325,000 judgment, is left without any meaningful recourse for her having done so—which, of course, only rewards Mrs. Connelly for her own impropriety and, more broadly, shows other litigants they, too, may engage in this tactic with impunity.

Moreover, the trial court's reliance upon *Brazeale v. Piedmont Manufacturing Co.*, 184 S.C. 471, 193 S.E. 39 (1933), and *Keller v. Pearce-Young-Angel Co.*, 253 S.C. 395, 171 S.E.2d 352 (1969), was misplaced. *Brazeale* was a case where a ***witness***, not a ***party*** to the action, "volunteered" a statement about insurance. 184 S.C. 471, 193 S.E. at 44 (wherein the Brazeale Court noted that the fact that the subject of insurance was injected into the proceedings by a ***witness***, ***"for which the***

plaintiff is not responsible*," *as opposed to a party: "Of course, in cases of this kind, ***if plaintiff should bring out*** on examination of the witnesses that the defendant carried indemnity insurance, ***our decisions are to the effect that a mistrial should be ordered***. These decisions, however, several of which are cited by the appellant, are not controlling under the facts of this case. Where improper reference is made to insurance, or an insurance agent, by the ***witness***, as was here done, ***and for which the plaintiff is not responsible***, it seems that the only remedy that the court can give is to grant a motion to strike out the objectionable testimony and to instruct the jury to disregard it."). Likewise, *Keller* was a case where a ***witness*** for the plaintiff, not the ***plaintiff, i.e., party***, himself, inadvertently raised the subject of insurance, and in determining a mistrial was not required, the *Keller* Court focused on the plaintiff's lack of responsibility for the "inadvertent slip." *See* 253 S.C. at 398-99, 171 S.E.2d at 354.

Most respectfully, the trial court's denial of a mistrial here was erroneous and prejudicial and itself requires a new trial, as, respectfully, this Court should have recognized. So, too, should this Court have recognized that this error, along with prejudice to Winsor, was then repeated and compounded by the trial court's subsequent denial of a mistrial upon the second mention of insurance in the presence of the jury, i.e., during Dr. Funcik's testimony,[14] its *sua sponte* "curative" instruction

[14] (R. p. 320, line 3 – p. 322, line 20.)

regarding insurance thereafter,[15] and its jury charge in the form of a "curative" instruction about insurance. (R. p. 619, line 10 – p. 620, line 4; R. p. 631, lines 8-11.)[16]

2. The trial court erred in partially directing a verdict against Winsor as to liability (i.e., as to the issues of duty and breach).

The trial court granted Mrs. Connelly a partial directed verdict as to duty and breach. (R. p. 556, line 8 – p. 566, line 17.) As explained above, the trial court erred in determining Winsor owed a duty to Mrs. Connelly under ordinary-negligence law to maintain the silt fence, and Winsor incorporates that argument herein. Moreover, even assuming, *arguendo*, Winsor had such a duty of silt-fence maintenance under ordinary-negligence principles—indeed, regardless of whether the theory of negligence asserted against Winsor was founded on premises liability or ordinary negligence—the trial court nonetheless erred in determining there was no issue of fact for the jury to determine as to Winsor's alleged breach of duty.

In granting this partial directed verdict, the trial court explained,

> [A]s far as the duty to maintain the fence, and the breach of that duty, I've heard no testimony that would contradict what was said by the plaintiff and her witness, and the

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[15] (R. p. 322, line 25 – p. 325, line 3.)

[16] Winsor's position is, and has been, that it was simply not possible to cure the prejudice, and further mention of insurance to the jury via "curative" efforts only further infected the trial with prejudice against Winsor—in reality, each attempt at un-ringing the bell only serving to clang it once more before the jury. (R. p. 249, line 23 – p. 250, line 19.) Respectfully, it strays beyond legal fiction into the realm of farce to view the situation otherwise.

> pictures show. So I'm going to direct a partial directed verdict as to duty and breach of duty. And I will amend the charge to say that and amend the verdict form to say that. The issue of causation as to damages is still an issue. That's my ruling based upon the plaintiff's argument for directed verdict.

(R. p. 566, lines 8-17.)

First off, the trial court's ruling fails both to consider the evidence in favor of Winsor that had been presented and to view the evidence in the requisite light favorable to Winsor. The standard for a directed verdict mirrors the summary-judgment standard. *See Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 281, 578 S.E.2d 329, 334 n. 4 (2003); *cf. Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009) (addressing the summary-judgment standard: "[W]e hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). "When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury." *Roddy*, 415 S.C. at 588, 784 S.E.2d at 675.

Winsor's owner, Thomas, testified at trial. (R. p. 387, line 23 – p. 388, line 8.) He testified that, generally, with certain exceptions, he was on the job site on a daily basis, and he never saw the silt fence in the Claimed Accident Condition. (R.

p. 392, lines 10-12; R. p. 392, line 21, R. p. 430, line 11 – p. 433, line 15.)[17] He further testified that, while he was aware that silt fences could be damaged during the course of construction, his practice was to have them fixed as soon as possible and, at that, the ARB was vigilant with respect to silt-fence repair and would fine him if he did not act promptly. (R. p. 394, lines 13-17; R. p. 410, lines 5-9; R. p. 461, line 7 – p. 464, line 15.) At that, the only evidence that the silt fence was in the Claimed Accident Condition came from Mrs. Connelly and Smith—and, notably, Smith, who testified at trial that she had seen the fence down the week before the Subject Accident, was impeached on this point with her prior deposition testimony to the contrary. (R. p. 345, line 11 – p. 348, line 10; R. p. 350, line 2 – p. 351, line 16.)

Moreover, in effect, the trial court relied on *res ipsa loquitor* and/or a standard of absolute liability (as opposed the reasonableness-based standard of negligence law) and/or improperly shifted the burden to Winsor to prove that it was not negligent. "South Carolina does not recognize *res ipsa loquitur*." *Tucker v. Doe*, 413 S.C. 389, 406, 776 S.E.2d 121 (Ct. App. 2015); *see also Watson v. Ford Motor Co.*, 389 S.C. 434, 453 n. 7, 699 S.E.2d 169, 179 n. 7 (2010) ("*Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one

[17] To be clear, the Subject Accident happened fairly early on a Monday morning. (R. p. 161, line 19 – p. 162, line 3; R. pp. 10-11, ¶ 23.)

which ordinarily does not occur in the absence of negligence."); *Snow v. City of Columbia*, 305 S.C. 544, 555 n. 7, 409 S.E.2d 797, 803 n. 7 (Ct. App. 1991) (noting that because South Carolina does not recognize *res ipsa loquitur*, a plaintiff is required to prove affirmatively each element of his cause of action).

Notwithstanding the evidence referenced above, the trial court found that Winsor had breached its duty to Mrs. Connelly as a matter of law because Mrs. Connelly and Smith said the silt fence was down on that Monday morning[18] and, having not been there at the time, Thomas could not directly refute their claim—although, as noted above, he did testify that he had no knowledge of the fence being in the Claimed Accident Condition and about his practice, which was, as a practical matter, reinforced by the ARB's monitoring efforts, of being both regularly present on the job site and of promptly attending to silt fences in need of repair—Winsor was necessarily negligent. Most respectfully, the trial court erred in granting a partial directed verdict against Winsor, and this Court erred in failing to recognize the same.

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[18] And in so doing, the trial court wrongfully took the questions of credibility and evidentiary weight away from the jury. *S.C. Fed. Credit Union v. Higgins*, 394 S.C. 189, 194, 714 S.E.2d 550, 552 (2011) (when considering a motion for directed verdict, "The trial court should be 'concerned only with the existence or nonexistence of evidence,' not its credibility or weight.'") (citation omitted).

3. The trial court erred in refusing to give Winsor's requested jury charge regarding § 343A.

"'Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence.'" *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012) (citation omitted). "'Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error.'" *Id.* "'Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.'" *Id.*; *see also Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011) ("'A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial.'") (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

Most respectfully, assuming, *arguendo*, the case should have been submitted to the jury at all, for the reasons set forth above, § 343A was applicable, and the trial court's refusal of Winsor's requested jury charge thereon was prejudicial error, and this Court should have recognized the same.

4. The trial court erred in denying Winsor's challenge to the reliability and admissibility of Mrs. Connelly's medical expert testimony with respect to the alleged causal connection between the Subject Accident and the Smell/Taste Problem.

Although it was, again, by far the most substantial aspect of Mrs. Connelly's claimed damages, there is no record of her having made any complaint about the Smell/Taste Problem to any healthcare professional until her April 4, 2013, visit to Charleston ENT Associates, approaching ***two years after*** the Subject Accident on June 6, 2011. (R. pp. 1180-1181.) And Winsor challenged the medical expert testimony Mrs. Connelly intended to offer—via Drs. Funcik and Ghegan—as to the alleged causal connection between the Subject Accident and the Smell/Taste Problem.

Dr. Funcik never treated Mrs. Connelly for the Smell/Taste Problem at all; in fact, Mrs. Connelly had not even reported the problem to him until May 28, 2013, after she had already seen Charleston ENT on her own the month before. (R. p. 997, line 22 – p. 998, line 1; *see generally* R. pp. 1120-1176; R. pp. 1177-1197.) Dr. Funcik conceded that he did not see patients complaining of loss of smell as a regular part of his practice and that he "probably would not be the first doctor in Charleston they would see for that concern"[19]—when discussing the possibility of him treating a member of his office staff were they to come to him with such a complaint, he even

[19] (R. p. 853, lines 22-24; *see also* id. at p. 908, line 2 – p. 910, line 12.)

mentioned that he "would probably sit down and Google it to make sure I wasn't missing anything . . . ." (R. p. 982, lines 4-24.) Dr. Funcik even admitted that, when he was first deposed he had trouble making the timing of the Subject Accident and Mrs. Connelly's recognition of the Smell/Tate Problem add up; at that, he testified that the reason he felt comfortable offering his opinion on causation in his second (i.e., the video deposition, which was used at trial) was because ***Mrs. Connelly's counsel*** had related certain information to him about recent deposition testimony by Mrs. Connelly's daughter Christina, and on account of his recollection of a certain incident where he experienced some sort of nerve-related—but completely unrelated to Mrs. Connelly's medical condition at issue in this case—lessening of strength in one of his own hands. (*See generally* R. p. 918, line 10 – p. 919, line 18; R. p. 935, line 4 – p. 937, line 22; R. p. 1011 line 17 – p. 1032, line 6.)

Although he did treat Mrs. Connelly for the Smell/Taste Problem, Dr. Ghegan confirmed that his treatment involved a single office visit on April 4, 2013; the total visit lasted about 30 minutes, with Dr. Ghegan's interaction with Mrs. Connelly being 10-15 minutes. (R. p. 1078, line 8 – p. 1086, line 23.) He further testified that, even though he was offering the opinion that the Subject Accident was the cause of the Smell/Taste Problem, he did not have—and therefore, of course, had not

reviewed—***any*** of Dr. Funcik's records of Mrs. Connelly for the Subject Accident,[20] and, although he answered, "not necessarily," when asked if his review of those records would be important in understanding the relationship between the Subject Accident the Smell/Taste Problem, he conceded the possibility that review of these records could change his opinion. (R. p. 1087, line 7 – p. 1088, line 23; *see also* id. at R. p. 1100, line 14 – p. 1102, line 11 (where Dr. Ghegan agrees there is information potentially material to his opinion that he does not have).)

Most respectfully, the trial court erred in denying Winsor's challenge to Mrs. Connelly's experts' testimony with respect to the alleged causal connection between the Subject Accident and the Smell/Taste Problem because their testimony on this issue could not reasonably be found to be substantively reliable. *See* Watson, 389 S.C. at 446-47, 699 S.E.2d at 175 ("[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 [SCRE] before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary

[20] Primarily a fascial plastic surgeon, and someone with whom Mrs. Connelly had an ongoing doctor-patient relationship on account of past cosmetic procedures, Dr. Funcik was the first doctor Mrs. Connelly saw after the Subject Accident—indeed, she drove herself straight to his office. (R. p. 166, line 20 – p. 167, line 12; *see generally* R. pp. 1120-1176.) Though, again, he did not treat Mrs. Connelly for the Smell/Taste Problem, it was Dr. Funcik that treated Mrs. Connelly for the Subject Accident. (R. p. 997, line 22 – p. 998, line 1; *see generally* R. pp. 1120-1176.)

knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate.") (internal citations omitted); *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) (observing that the "familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence"). Even if Winsor is not granted judgment as a matter of law, this case should have been remanded for a new trial—a new trial in which Mrs. Connelly should not be able to present evidence of or claim damages relating to the Smell/Taste Problem—and, respectfully, this Court erred in not recognizing the same.

5. The trial court erred in denying Winsor's motion for a new trial absolute because the jury's damages determination was grossly excessive, indicating that the jury was motivated by some improper influence.

The jury's finding that Mrs. Connelly suffered damages in the amount of $500,000 was grossly excessive, indicating the jury was motivated by some improper influence.[21]

To begin, in addition to the error, argued above, with respect to the trial court's refusal to grant a mistrial on account of Mrs. Connelly raising the subject of insurance to the jury (along with the other insurance references), this incident (and the prejudice done to Winsor) should also be noted in this context. Additionally, a great deal of evidence cuts sharply against such a large damages determination. Again, the Smell/Taste Problem is, by far, the most significant damage Mrs. Connelly claimed in this suit. The only reasonable inference to be drawn from the evidence is that, while she claimed to have had the Smell/Taste Problem ever since the date of the Subject Accident, she did not actually notice this loss for at least a year thereafter. Not to mention being inconsistent with the only medical evidence in the record regarding the mechanism of injury in cases of traumatic loss of smell,

[21] Again, as noted above, Mrs. Connelly's total claimed pecuniary loss was less than $13,500. (R. pp. 1198-1209.) Accordingly, the jury found more than $485,000 in nonpecuniary damages.

i.e., a sudden and permanent shearing of the olfactory nerve filaments,[22] the very idea that such a loss was capable of going unnoticed by Mrs. Connelly for a year or more is wholly inconsistent with such a large value being given to it.

In other words, it is simply illogical for Mrs. Connelly to have it both ways; she cannot, on the one hand, attempt to explain away the year-plus lapse in time between the Subject Accident and her noticing the Smell/Taste Problem because she simply did not notice it, but, then, on the other hand, claim tremendous damage on account of the Smell/Taste Problem, i.e., the same problem that she lived with for at least a year without realizing it. Compare this with a loss of the senses of sight, hearing, or touch; it is simply inconceivable that a person could lose any of those senses without noticing their absence for any significant period of time. This is not to say that the Smell/Taste Problem is trivial, but the interests of justice require maintaining a reasonable perspective about Mrs. Connelly's claimed loss, and not just generally, but under Mrs. Connelly's particular circumstances, which, again, involve her not even recognizing the loss for a year or more.

The lack of such perspective is well illustrated, in fact, by considering Mrs. Connelly's counsel's closing argument about valuing the Smell/Taste Problem in terms of a job Mrs. Connelly would be working every waking hour for the rest of

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[22] (*See, e.g.,* R. p. 143, line 11 – p. 148, line 3 and R. p. 580, line 21 – p. 586, line 9 (wherein Mrs. Connelly's counsel explains the plaintiff's theory of traumatic smell loss).)

her life. (R. p. 590, lines 2-22.) Common sense tells us that she is not, in fact, "suffering" from the Smell/Taste Problem every waking hour of her life because common sense tells us that there a many times—if not, in fact, the vast majority of our waking hours—when a person simply does not notice any particular smell at all—and, of course, not all smells are pleasant. Similarly, common sense tells us that a person does not spend the entirety of their waking hours eating; consequently, a person does not spend the entirety of their waking hours "suffering" from a deficit in their ability to taste.

Moreover, beyond the mere fact that it took Ms. Connelly at least a year before she even noticed the Smell/Taste Problem, the evidence in this case about Mrs. Connelly's life with the Smell/Taste Problem is inconsistent with the jury's large damages determination. Mrs. Connelly's daughter Christina testified that she has a close relationship with her mother and communicates with her on, essentially, a daily basis. According to Christina, Mrs. Connelly is a happy person and still goes out to

eat regularly. (R. p. 486, line 22 – p. 488, line 24.)[23] In this same vein, there is Mrs. Connelly's facebook account activity that was admitted into evidence. (R. pp. 1219-1230.) And Smith, Mrs. Connell's friend, even testified that she playfully teased Mrs. Connelly about the Smell/Taste Problem. (R. p. 342, line 22 – p. 343, line 23; R. p. 344, line 12-15; R. p. 371, line 19 – p. 374, line 9.)

Most respectfully, the trial court erred in refusing to grant a new trial absolute on account of the jury's shockingly excessive damages determination. *See O'Neal*

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[23] Curiously, Christina also referenced her mother having a "decreased" sense of smell, which cuts against Mrs. Connelly's claim that she has not smelled at all the Subject Accident. (*Compare* R. p. 169, lines 17-19 with R. p. 488, line 25 – p. 489, line 17.) On this point, Winsor notes that when Mrs. Connelly first sought medical treatment for the Smell/Taste issue (on April 4, 2013, with Dr. Ghegan at Charleston ENT), although Dr. Ghegan used the word "anosmia" in his impression, Dr. Ghegan's note reflects that Mrs. Connelly "present[ed] with [a] chief complaint of ***decreased*** sense of smell and taste." (R. p. 1181 ("We discussed that I think most likely her ***decreased*** sense of smell, and subsequent decreased taste, are result of the trauma a couple of years ago.") (emphasis added)].) Similarly, on her second visit to Charleston ENT, when she saw Dr. Hester on April 26, 2013, although Dr. Hester's impression uses the word "anosmia," Dr. Hester's note indicates the history Mrs. Connelly gave was "regarding ***decreased*** smell and taste." (R. p. 1182 (emphasis added)].) This theme is continued in Dr. Funcik's note from May 28, 2013, wherein he reflects Mrs. Connelly "mentioned that she has had ***hyposmia*** since her injury." (R. p. 1152 (emphasis added)].) Dr. Funcik testified that "hyposmia" is the medical term for decreased sense of smell; whereas, "anosmia" is the medical term for total absence of the sense of smell. (R. p. 899, line 5 – p. 900, line 3.) Even the record of Mrs. Connelly's initial visit with Dr. Dozier at Charleston ENT, i.e., her third visit to the practice overall, on June 26, 2014, reflects Dr. Dozier saw Mrs. Connelly "regarding [her] chief complaint of ***decreased*** smell and taste." (R. p. 1188 (emphasis added)].) It was not until Mrs. Connelly presented for her second visit with Dr. Dozier, on January 16, 2015, about a year and a half after this lawsuit was filed, that her complaint was actually described as "anosmia." (R. p. 1194.)

v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) ("If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.")

CONCLUSION

For the reasons set forth herein, along with any other or further reason(s) which may be contained in Winsor's appellate briefs already on file, the entirety of which Winsor hereby incorporates herein by reference and requests this Honorable Court to reconsider, Winsor asks the Court to grant the instant petition; to rehear this matter; and to withdraw the Subject Decision and decide this appeal anew via an opinion that fully complies with Rule 220 and addresses all of its appellate arguments on the merits in reasonably substantive detail, filing in place of the Subject Decision a new or materially revised opinion that reverses the trial court's judgment below and grants judgment in favor of Winsor as a matter of law or, as a lesser alternative, remands this case for a new trial.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Charleston, South Carolina

Dated: 9/20/19

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-000419
Trial Court Case No. 2013-CP-10-03251

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

PROOF OF SERVICE

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellant Winsor Custom Homes, LLC, hereby certify that the **APPELLANT'S PETITION FOR REHEARING** ***WITH SUGGESTION FOR REHEARING EN BANC*** was served on Respondent Rosemary Connelly on September 20, 2019, by depositing a copy of the same in the U.S. Mail, with sufficient postage, addressed as follows to her counsel of record:

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Respectfully submitted,

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September 20, 2019

VIA FED EX OVERNIGHT AND FASCIMILE
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Rosemary Connelly v. Winsor Custom Homes, LLC
Appellate Case No.: 2016-000419
Case No.: 2013-cp-10-03251
Claim No.: CPP001009129
YCR File: 10857-20130494

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of our Petition for Rehearing on Behalf of Appellant, the original and one (1) copy of the Proof of Service of same and our firm's check in the amount of $50.00 representing the filing fee. Please file the originals and return court-stamped copies of each to me in the enclosed envelope.

With best wishes and kindest regards, I am

Sincerely,

YCRLAW, LLP

Kathleen B. Barnes
Secretary

Enclosures
Cc: Christy Ford Allen, Esquire, Wills Massalon & Allen, LLC (via US Mail and email)
John A. Massalon, Esquire, Wills Massalon & Allen, LLC (via US Mail and email)