THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2018-002095

Jeanne Knollinger,

Appellant,

v.

Ryan Noel Oliver,

Respondent.

FINAL BRIEF OF RESPONDENT

Langdon Cheves III
Turner Padget Graham & Laney, P.A.
P.O. Box 1509
Greenville, S.C. 29602
(864) 552-4606 (p)
(864) 282-5970 (f)
lcheves@turnerpadget.com

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Rules

Treatises

STATEMENT OF ISSUES ON APPEAL

I. Did the Appellant properly preserve the trial court's rulings during the pre-trial phase of the trial for Appellate Review?

II. Did the trial court properly exclude various pieces of evidence at the pre-trial phase of the trial?

III. Given the testimony, photographic evidence and verdict after only 20 minutes of deliberation, were any alleged errors in the exclusion of evidence outweighed by overwhelming evidence in Respondent's favor?

III. Did the trial court err in denying Appellant's Post-Trial Motions?

STATEMENT OF THE CASE

On April 21, 2016, Appellant Jeanne Knollinger filed this Action for negligence against Respondent Ryan Noel Oliver and Enterprise Leasing Company – Southeast LLC d/b/a Enterprise Rent-A-Car ("Enterprise Leasing") in the Court of Common Pleas for Richland County. R. at pp. 10-20. The Action arose over a vehicular accident which occurred on December 11, 2014, between Appellant and Respondent. At the time of the accident, Respondent was operating a truck leased from Enterprise Leasing. Id. Respondent and Enterprise Leasing filed a joint Answer disputing liability, with Enterprise Leasing asserting a counterclaim for the property damage to its truck caused by the accident. R. at pp. 21-25. Appellant filed a Reply to the counterclaim, denying liability. R. at pp. 26-29. After a period of discovery, on March 19, 2018, Enterprise Leasing voluntarily dismissed its counterclaim. R. at p. 70. By like token, on August 31, 2018, Appellant dismissed her claim against Enterprise Leasing, leaving Appellant and Respondent as the only two parties to the Action. R. at p. 71.

The trial on Appellant's negligence Action against Respondent commenced on September 4, 2018. In the pre-trial phase of the proceedings, the trial judge made several rulings in response to Motions in Limine. R. at pp. 107-120. Once the trial commenced, Appellant did not proffer any of the disputed evidence the trial judge had excluded pre-trial. R. at pp. 137-261. On September 5, 2018, the jury returned a verdict for Respondent after under 20 minutes of deliberation. R. at pp. 304-306. The Court subsequently denied Appellant's oral motions for a New Trial and Judgment Non Obstante Veredicto. R. at pp. 308-309. Appellant filed a written Motion to Alter and Amend, which the trial court denied. R. at pp. 7-8. On November 20, 2018, Appellant filed her Notice of Appeal.

STATEMENT OF FACTS

On December 11, 2014, Respondent operated a 26-foot box truck he had rented from Enterprise Leasing. R. at pp. 227-228. Respondent moved furniture for a living and utilized box trucks on a weekly basis. R. at p. 227. He was therefore familiar with the handling and acceleration rate (aka "pickup") of box trucks. Id. That morning, Respondent had packed up a client's belongings and filled the box of the truck to its capacity, rendering the truck heavier and slower to accelerate than it had been without cargo. R. at pp. 227-228.

Respondent ate lunch at now-defunct Eric's San Jose Restaurant on Garner's Ferry Road. R. at p. 228. Upon finishing his lunch, Respondent pulled to the exit of the restaurant, intending to take a left turn onto Garner's Ferry Road. R. at pp. 228-229. To reach the median in the center of the road, Respondent needed to cross

over three lanes of westbound traffic. R. at pp. 230; 320, 321. Respondent came to complete stop at the restaurant's exit. R. at p. 229. Respondent looked to his left, then his right and then to his left again. R. at p. 230. Seeing no cars approaching from his left, Respondent began to pull out of the parking lot. Given the weight of the truck as well as Respondent's caution concerning his cargo, it took Respondent 4-5 seconds for the cab of his truck to cross the three lanes of travel and reach the median. R. at pp. 230-231.

At the same time Respondent was leaving the restaurant parking lot, Appellant was traveling from the nearby Target store to her son's shop on Leesburg Road. R. at p. 147. She exited Target onto Pelham Drive and drove to where it merges onto Garner's Ferry Road. The merge point is guarded by a Yield sign. R. at pp. 147-148. As a photographic exhibit demonstrated (and Appellant acknowledged), the merge point from Pelham Drive onto Garner's Ferry Road is close to the Eric's San Jose Restaurant exit. R. at pp. 319; 171. As Appellant pulled out from Target onto Pelham Drive, she could see Respondent's truck in the restaurant parking lot headed towards Garner's Ferry Road. R. at p. 148. While still on Pelham Drive, Appellant diverted her eyes from looking ahead - looking both to her left and then into her left side view mirror - to not only verify no cars were approaching from behind her on Garner's Ferry Road, but also to see if she could cross over to the center lane of travel on Garner's Ferry Road. R. at pp. 149-150.

The front of Respondent's truck was already to the median (across three lanes of travel) when he first noticed that Appellant was merging onto Garner's

Ferry Road. R. at p. 230. When Respondent first saw Appellant, her head was not facing ahead but was turned over her left shoulder. R. at pp. 230-231. After a second and a half, Appellant turned her head to look straight ahead. R. at p. 232. At that time, her "eyes got big," and Appellant turned her wheel to the left in an apparent evasive action. R. at p. 233. The front of Appellant's car struck Respondent's truck approximately half-way down the box portion. R. at pp. 234; 322. At the time of contact, the front of Respondent's truck was in the median if not slightly into an opposing lane of travel. R. at p. 234. And though Appellant contends the impact occurred as she was attempting to access the center lane, photographic evidence reflects Appellant's vehicle came to rest in the median. R. at pp. 154; 320. In his testimony, Respondent was adamant that Appellant had not yet entered Garner's Ferry Road when he began to pull out of the restaurant exit onto the same road. R. at p. 235. The jury agreed, rendering a verdict for the Respondent after under 20 minutes of deliberation. R. at pp. 304-306.

ARGUMENT

I. The issue as to whether the trial court properly excluded pieces of evidence at the pre-trial phase of the trial was not properly preserved for appellate review

Prior to the commencement of the trial, Respondent moved *in limine* to exclude, *inter alia*, a) internal documentation produced by Enterprise Leasing while it was a party to this matter; b) the *de benne esse* testimony of an ex-Enterprise Leasing employee; c) an oral statement from an unidentified witness allegedly made at the scene of the accident; and d) evidence that Enterprise Leasing had asserted a

counterclaim. The trial judge granted Respondent's motions as to these issues. Appellant did not proffer any of the evidence at issue during the pre-trial phase. R. at pp. 107-122. Once the trial began, Appellant never raised any of these evidentiary issues and did not proffer any evidence she deemed improperly excluded at the pre-trial stage. After the verdict for the Respondent, Appellant asserted in a post-trial motion that the Court had improperly excluded this evidence. Respondent contested Appellant's ability to raise the issue when she had not proffered this evidence during trial, and the Court denied Appellant's post-trial motion.

On appeal, Appellant again contends the trial court erred in not admitting certain evidence which she contends would have assisted her position as to liability. However, there was no evidence in the Record to assist the trial court in making this determination. When an objection stems from the court's exclusion of evidence, trial counsel should seek to proffer the excluded testimony and make any excluded physical evidence a court exhibit. The failure to proffer excluded evidence prevents consideration of the issue. State v. Nelson, 322 S.C. 377, 471 S.E.2d 767 (Ct. App. 1996), *rev'd on other grounds*, State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998); *see also* State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984) (failure to make an offer of proof prevents the appellate court from determining whether the exclusion of testimony is prejudicial and thus precludes the appellant from raising the issue on appeal).

A fundamental tenet of evidence law in South Carolina is that a ruling on a motion *in limine* is not the ultimate disposition on the admissibility of evidence,

which is subject to change based upon developments at trial. State v. Floyd, 295 S.C. 518, 521, 369 S.E.2d 842, 843 (1988) ("trial judges must not be held, conclusively, to preliminary rulings made without benefit of all pertinent and relevant evidence"). If the court excludes the evidence in its *in limine* ruling, the proponent must proffer it during trial to preserve any error on appeal. *See* Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992) (Motions *in limine* are not final determinations of whether evidence will be admitted at trial); *See also* State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996) (a ruling *in limine* is not a final ruling on the admissibility of evidence; unless a final ruling is made, the issue is not preserved for review).

Here, all evidentiary rulings occurred pre-trial and prior to the introduction of any testimony or other forms of evidence. These rulings were preliminary, and the Appellant had ample opportunity to request the trial court redress any errors it had allegedly made once the map of the case unfolded. Appellant failed to do so; therefore, the evidence Appellant asks this Court to consider was not preserved. The failure to make an offer of proof prevents the appellate court from determining whether the exclusion of testimony is prejudicial and thus precludes the appellant from raising the issue on appeal.

It follows that this Court should not consider any other documentation which was not presented during the trial of this matter but has now been presented by Appellant in her submissions to the Record on Appeal. This documentation includes: a) emails between counsel (R. at pp. 381-382); b) Motions for Summary

Judgment and accompanying memoranda (R. at pp. 30-69); c) Court Orders not occurring during trial or otherwise preserved for appeal (R. at pp. 1-6); and d) Stipulations of Dismissal (R. at pp. 70-71). These documents have no bearing on this Court's determination of whether the trial judge committed reversible error, which should be predicated on this Court's analysis of the trial transcript and documents properly admitted into evidence.

II. The trial court properly excluded various pieces of evidence during the pre-trial phase of the trial

Strictly in the alternative, even if Appellant did properly preserve the evidentiary issues raised in the Motions *in Limine*, the trial court's exclusion of the subject evidence should be not disturbed on appeal. The admissibility of evidence lies within the sound discretion of the trial court whose decision will not be overturned on appeal absent a clear abuse of that discretion. Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996); Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994).

A. Enterprise Vehicle Accident Report

As noted above, at the time of the subject accident, Respondent was operating a vehicle owned by Enterprise Leasing. Upon the vehicle's return to Enterprise Leasing, employee Tyler Thiede spoke to Respondent and completed a company-required report noting that the vehicle had been in an accident.[1] Thiede's notations in the Report were his own. There is no evidence Respondent endorsed or even saw the subject report. As the lower court noted in the pre-trial hearing, Respondent did

[1] At the risk of overkill, at no point did Appellant proffer this Report to the lower court.

not sign the report or show any indication he adopted the report as his own statement. R. at pp. 112-113. Therefore, the portion of the Enterprise Leasing report Appellant seeks to introduce is hearsay under Rule 802, S.C.R.E. and is not, as Appellant contends, admissible as either an admission or under the business records exception to the hearsay rule.

Rule 801(d)(2), S.C.R.E., sets forth the criteria for the admissibility of a party admission, none of which apply to this matter:

> A statement is not hearsay if -
>
> (2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
>
> Rule 801(d)(2), S.C.R.E.

The Enterprise Leasing employee completed the report, and there is no evidence Respondent manifested any belief in it (which again, he never saw), and no agency relationship between Enterprise Leasing and Respondent existed. Because the Enterprise report does not constitute an admission by Respondent, the trial court properly ruled it inadmissible.

Moreover, the Enterprise Leasing report is not admissible under the "business records" exception to the hearsay rule. First, according to Rule 803(6), S.C.R.E., "subjective opinions and judgments found in business records are not

admissible." Id. Here, the Enterprise Leasing employee's conclusion that the Respondent "was involved in an accident *when his truck pulled out in front of another vehicle*" is his opinion as to how the accident occurred and is not admissible. [Emphasis added]; *See* State v. Blackwell, 420 S.C. 127, 801 S.E.2d 713 (2017) (trial court correctly excluded document as it contained inadmissible subjective opinions and judgments); Benchoff v. Morgan, 302 S.C. 116, 394 S.E.2d 19 (Ct. App. 1990).

Second, the trial judge correctly determined that since the report was not seen, endorsed or otherwise adopted by Respondent, it lacked the required level of trustworthiness to render it reliable and admissible. Rule 803(6), S.C.R.E., was patterned after S.C. Code § 19-5-10 as well as its Federal counterpart, Rule 803(6), F.R.E. State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007). Both of these authorities require the element of trustworthiness prior to admissibility. S.C. Code § 19-5-10, otherwise known as the Uniform Business Record as Evidence Act, provides:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and *if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.*
>
> S.C. Code Ann. § 19-5-510 [emphasis added].

The South Carolina appellate courts have construed this statute to grant the trial court control to exclude or require additional proof if the authenticity or trustworthiness of the business record is suspect. *See* Kershaw County Dep't of Soc.

Servs. v. McCaskill, 276 S.C. 360, 362, 278 S.E.2d 771, 773 (1981). Moreover, Rule 803(6), F.R.E. sets forth:

> . . . . A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) *the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.*
>
> Rule 803(6), F.R.E. [emphasis added].

There is no allegation the Enterprise Leasing employee witnessed the subject accident. And as the Record reflects, the trial judge ascertained during pre-trial argument that the report was at best a paraphrased version of a conversation the Enterprise Leasing employee had with Respondent when he returned the vehicle: "All right. So, it's not his statement, that's hearsay, and it is excluded. I don't see what any Enterprise witnesses have anything [sic] to do with whether this gentleman is at fault in an accident that allegedly caused injury to the Plaintiff." R. at p. 113. Clearly, the trial judge made a discretionary decision that the information in question in the report was not trustworthy and deemed it inadmissible. This Court should not disturb that decision in appeal.

Appellant's arguments as to admissibility do not pass muster. First, Appellant cites a self-serving quote from her attorney's argument before the lower

court, which is not evidence. Second, Appellant mistakenly asserts that Respondent's acknowledgement as to the authenticity of the report is akin to an admission as to the truthfulness of the report's contents. Third, the examples Appellant has taken from case law of factual observations deemed admissible (e.g., "the path of a bullet" and "the location of damage to a motor vehicle") are not analogous to a third-party providing an opinion as to how an accident which he did not witness may have occurred.

Finally, the lower court did not err in not allowing Appellant to use the inadmissible report to impeach Respondent at trial. As the trial court correctly noted (and as reiterated above), the report was not Respondent's statement. It therefore cannot be deemed an "inconsistent statement" and used to impeach Respondent. Appellant is attempting to impeach a party with a non-party's statement, which is impermissible (and again, Appellant cites in her brief to her own attorney's argument as substantive evidence).

B. Unidentified Witness

At some undefined point after the accident, an unidentified witness allegedly said that Respondent "pulled out in front of" the Appellant's vehicle. The lower court properly excluded this hearsay statement, as the reasoning behind the hearsay prohibition is that the alleged declarant is not present at trial, placed under oath and available for cross-examination. *See* Orangeburg Dept. of Social Serv. v. Schlins, 291 S.C. 477, 354 S.E.2d 388 (1987). "The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and

untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross examination." 5 J. Wigmore, Evidence in Trials at Common Law § 1362, at 3 (1974). Though Appellant never proffered through any testifying witness this alleged statement, she now contends the Court erred in not finding the statement was either the present sense impression of the unknown speaker or an excited utterance.

The "present sense impression" exception to the hearsay rule involves "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Rule 803(1), S.C.R.E.; *see* State v. Washington, 2018 WL 3748430 (S.C. Ct. App. 2018) (20 to 25 minutes after an event left too much time for reflection and deliberate misrepresentation). Here, the alleged statement did not occur while the unknown declarant perceived the accident. Instead, Appellant contends the statement occurred immediately following the accident. In support, Appellant cites *the discovery deposition* testimony of the Respondent, which a) had no bearing on the trial of this matter and b) makes no reference to immediacy. R. at pp. 116-117. There being no evidence before the trial court of how long after perceiving the accident the unidentified witness allegedly made her statement, the trial court properly did not admit the statement as a present sense impression.

Moreover, in order to qualify as an excited utterance, the alleged statement must occur while the declarant was under the stress of excitement caused by the event. S.C.R.E. Rule 803(2). Again, there is no evidence in the Record as to when

this unknown witness allegedly made this statement; therefore, there is no evidence that the declarant was under the stress of excitement caused by the accident. And while a declarant's appearance, behavior and condition may be used to establish a state of excitement, here the Record lacks any such evidence. For these reasons, the trial court properly excluded an alleged statement made by an unidentified witness at some indeterminate amount of time after the accident.

C. Counterclaim and Enterprise Leasing Testimony

In her action against Respondent, Appellant claimed as an element of her damages the stress of having to defend against Enterprise Leasing's counterclaim. The trial judge properly prevented her from introducing such evidence. R. at pp. 114-116. At the outset of this disputed liability matter, Enterprise Leasing alleged Appellant was responsible for the damage to its vehicle. Enterprise Leasing voluntarily dismissed its counterclaim on March 9, 2018. R. at p. 70. After Appellant dismissed her claims against Enterprise Leasing on August 31, 2018, Enterprise Leasing was no longer a party to this Action, and Appellant waived all claims against Enterprise Leasing. R. at p. 71. Therefore, under the auspices of Rule 403, S.C.R.E., the dismissed counterclaim bore no relevance to identifying whom was responsible for this accident between Appellant and Respondent and what damages Respondent allegedly caused Appellant. It bears repeating that Appellant never proffered any of this evidence during the trial of this matter – Appellant cites to the contents of a discovery deposition as well as her own attorney's argument below as evidence of her position. For these reasons, the trial

court properly excluded evidence that a former party had filed (and voluntarily dismissed) a counterclaim prior to trial.

The trial judge also correctly determined that the proposed testimony from Enterprise Leasing's risk manager should have no bearing on the jury's determination of liability. R. at pp. 109-113. Appellant sought to have the risk manager testify as to the company's risk analysis, including a) its internal determination concerning whether to seek damage recovery from its renter and b) its litigation strategy to dismiss its counterclaim. One of the more fundamental tenets of evidence law is that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, S.C.R.E. It is not in dispute that no Enterprise Leasing employee witnessed the subject accident. Therefore, Enterprise Leasing's risk assessment and litigation strategy would only serve to distract the jury from the primary issue in this matter – whether the Respondent was responsible for this accident. As quoted previously, the trial judge astutely noted that no Enterprise Leasing employee had anything to do with who was responsible for the subject accident. R. at p. 113. The trial court correctly determined that there was no probative value as to any testimony from the Enterprise Leasing risk manager.

III. Any errors allegedly made the trial court concerning evidentiary issues were outweighed by overwhelming evidence in favor of Respondent

To the extent this Court has any question concerning the preliminary Motion in Limine rulings made below, the evidence was overwhelming that Appellant caused this accident, and the jury made the correct determination by returning a defense verdict. There were no vehicles on Garner's Ferry Road in the near vicinity when Respondent, familiar with the acceleration rates of box trucks, began to attempt his left turn. It took 4-5 seconds for the front of Respondent's truck to pass over three lanes of traffic and the center line before the impact occurred. Appellant acknowledged looking over her left shoulder and in her left mirror (as opposed to straight ahead) as she merged onto Garner's Ferry Road from Pelham Drive. As a result, Appellant did not see that Respondent had already assumed his position on the roadway. However, the most damning evidence to Appellant's case was the photographic evidence demonstrating that Appellant struck Respondent's truck not at its cab (which could possibly lead to an assumption that the truck pulled out in front of Appellant), but instead the impact occurred approximately halfway down the 26-foot truck's box section. R. at p. 322. The jury obviously did not have much question as to how the accident occurred, as its deliberations took under 20 minutes before returning a verdict for the Respondent.

IV. The trial court did not err in denying Appellant's Post-Trial Motions

Appellant Plaintiff made oral motions for New Trial and J.N.O.V. upon the dismissal of the jury at trial. The Court denied these motions. Appellant later submitted a written Motion to Alter or Amend, which the trial court also denied as there was no basis for disturbing the jury's verdict. A jury's verdict should be

affirmed if it is possible to do so and carry into effect the jury's clear intention. Daves v. Cleary, 355 S.C. 216, 584 S.E.2d 423 (Ct. App. 2003). A judgment notwithstanding the verdict should not be granted unless only one reasonable inference can be drawn from the evidence. Creighton v. Coligny Plaza Ltd. Partnership, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). The motion must be denied where either the evidence yields more than one inference or its inference is in doubt. Buff v. South Carolina Dept. of Transp., 332 S.C. 472, 505 S.E.2d 360 (Ct. App. 1998). Finally, a motion for a new trial or a new trial nisi is directed to the trial judge's discretion and will be upheld unless the verdict is wholly unsupported by the evidence or so excessive as to be the result of caprice, passion, prejudice, or sympathy. Jenkins v. Dixie Specialty Co., 284 S.C. 425, 326 S.E.2d 658 (1984).

As set forth in detail throughout this Brief, the Record established conclusively that Respondent was not responsible for this accident. The jury was entitled to conclude that Appellant merged onto Garner's Ferry Road without keeping a proper lookout for vehicles already on Garner's Ferry Road, and the jury had every right to conclude Respondent was not negligent in his actions.

Furthermore, to the extent the testimony concerning the facts differed between the parties, the trial judge gave the standard instruction concerning assessing the credibility of the witness. R. at pp. 287-288. During her cross-examination, Appellant testified she slowed down when approaching the yield sign guarding the intersection with Garner's Ferry. Respondent impeached Appellant with her prior sworn deposition testimony in which she had admitted she never

slowed down. R. at pp. 174-176. Appellant also testified to blacking out in the accident (R. at p. 154) only to acknowledge having told EMS that she did not lose consciousness in the accident (R. at p. 182). Moreover, Appellant admitted having a chest x-ray done on the day of the accident (R. at p. 185) only to later tell another hospital that she had not yet had a chest x-ray (R. at p. 187). Finally, Appellant testified that this accident exacerbated her depression (R. at pp. 165-166), but she would also acknowledge on cross-examination that the medical records reflect she blamed her heightened depression on "family stressors," and never mentioned her accident with Respondent (R. at p. 189). Appellant gave the jury ample reason to doubt her credibility and resolve the disputed issues in favor of Respondent.

Finally, Appellant submits Respondent's "Golden Rule" violation during closing arguments rises to the level of compelling a new trial. During his closing argument, Respondent's counsel told the jury "to put [itself] in the positon of Ryan Oliver." Appellant immediately objected, and the Court sustained the objection. Defense counsel moved on with his argument. R. at p. 281.

A "Golden Rule" comment typically arises in a criminal trial setting and requests the jury place itself in the shoes of an alleged victim of a crime, for its intended effect is to arouse passion and prejudice. *See e.g.*, Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009). In the present matter, counsel's comment was certainly not geared towards appealing to the jury's sense of sympathy as if Respondent was the victim of a crime perpetrated by Appellant. Moreover, Respondent's comment to the jury could not have affected its deliberations. First, the trial court previously

instructed the jury that arguments of counsel were not evidence (Transcript p. 35), and the Court charged the jury that its verdict could not be based on sympathy or prejudice. R. at p. 299. Second, the Court sustained the objection prior to Respondent making any conclusory statements to the jury which would have aroused passion or prejudice. And finally, Appellant cannot demonstrate any impact this statement had on the jury. The jury deliberated for under 20 minutes, providing a definitive statement that it viewed the evidence as overwhelmingly in favor of the Respondent.

CONCLUSION

For the above reasons, Respondent respectfully requests the Court deny Appellant's appeal in its entirety.

December 3, 2019

Langdon Cheves III (SC Bar No. 12049)
Turner Padget Graham & Laney, P.A.
Post Office Box 1509
Greenville, South Carolina 29602
(864) 552-4606
Attorneys for Respondent
Ryan Noel Oliver

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2018-002095

Jeanne Knollinger,

Appellant,

v.

Ryan Noel Oliver,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

December 3, 2019

Langdon Cheves III
Turner Padget Graham & Laney, P.A.
P.O. Box 1509
Greenville, S.C. 29602
(864) 552-4606 (p)
(864) 282-5970 (f)
lcheves@turnerpadget.com

ATTORNEYS FOR RESPONDENT