

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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Appeal from Charleston County
Court of Common Pleas

S.C. SUPREME COURT

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

Unpublished Opinion No. 2019-UP-287 (S.C. Ct. App. filed August 7, 2019)

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Petitioner.

**APPENDIX
VOLUME 4 OF 4**

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**THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

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

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

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FEB 17 2017

SC Court of Appeals

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

FINAL BRIEF OF APPELLANT

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INTRODUCTION

This is a personal-injury lawsuit arising out of an alleged trip-and-fall accident (the “Subject Accident”) while Mrs. Connelly¹ was jogging on the sidewalk in front of the property—at the time, a construction site where Winsor,² a general contractor, was building a new home—located at 1376 Smythe Street on Daniel Island (the “Premises”). In conjunction with the ongoing project, Winsor had installed a silt fence around the perimeter of the Premises, and according to Mrs. Connelly, the Subject Accident happened because the sidewalk was partially obstructed by detached black plastic silt-fence material, and even though, admittedly, *she recognized the obstacle beforehand and tried to run around it*, the wind blew it into contact with her foot.

As it now stands, in the wake of a jury trial and unsuccessful post-trial motions, Winsor has a \$325,000 judgment against it, and most respectfully, this appeal is about why it should not. In broadest terms, Winsor intends to show, first and foremost, that the trial court erred in denying it judgment as a matter of law, but at a minimum, that this case should be remanded for a new trial on account of a number of prejudicial errors in the proceedings below.

¹ “Mrs. Connelly” is Plaintiff-Respondent Rosemary Connelly.

² “Winsor” is Defendant-Appellant Winsor Custom Homes, LLC.

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in denying Winsor judgment as a matter of law?³
- A. Did the trial court err in determining that Winsor owed Mrs. Connelly a legal duty to maintain the silt fence and, in consequence, err in determining that Mrs. Connelly had a viable claim against Winsor for ordinary negligence?
 - B. Did the trial court err in refusing to rule as a matter of law that, in light of South Carolina's adoption of the rule stated in Restatement (Second) of Torts § 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?
 - C. Did the trial court err 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?
- II. Assuming, *arguendo*, Winsor is not entitled to judgment as a matter of law, should this case be remanded for a new trial on account of prejudicial errors in the proceedings below?
- A. Did the trial court err in denying Winsor's motion for a mistrial when Mrs. Connelly raised the subject of insurance to the jury?⁴
 - B. Did the trial court err in partially directing a verdict against Winsor as to liability (i.e., as to the issues of duty and breach)?

³ This issue, and the corresponding argument below, addresses and includes errors in denying Winsor's directed-verdict motions and its motion for JNOV.

⁴ 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, and the corresponding argument below, addresses and includes other and/or further errors and prejudice to Winsor on account of the subject of insurance being raised to the jury.

- C. Did the trial court err in refusing to give Winsor's requested jury charge regarding § 343A?
- D. Did the trial court err 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 Mrs. Connelly's claimed loss of her sense of smell and decreased sense of taste?
- E. Did the trial court err 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?

STATEMENT OF THE CASE

The Subject Accident happened on June 6, 2011, and Mrs. Connelly commenced this suit on June 4, 2013, in the Charleston County Court of Common Pleas. (*See generally* R. pp. 7-14.)⁵ Referring to herself as "an invitee of the sidewalk or right of way at the sidewalk located directly in front of the Premises"⁶ and alleging that "Winsor, as builders and agents of the owners of the Premises, owed [her] a duty to exercise reasonable and ordinary care for the safety and well-being of persons passing by on the [sidewalk] at the Premises,"⁷ Mrs. Connelly averred that at the time of the Subject Accident the silt fence "was in disrepair and

⁵ As reflected in the caption of her summons and complaint, Mrs. Connelly sued four other defendants besides Winsor. By the time of trial, however, Winsor was the only defendant remaining in the case, and the trial court amended the case caption to its present form. (R. p. 1.)

⁶ (R. p. 11, ¶ 24.)

⁷ (R. p. 12, ¶ 39.)

was encroaching on the sidewalk or right of way at various places along, within, and/or abutting the property line of the Premises and the sidewalk or right of way[;]”⁸ that as she approached it she did not know the silt fence “was inadequately secured to the ground[;]”⁹ and that, “through no fault of her own,” she was caused to trip and fall when, “[w]hile [she] was jogging on the sidewalk located on the Premises, a gust of wind caused the [silt fence] to suddenly and unexpectedly encroach into the sidewalk or right of way.” (R. p. 11, ¶¶ 26-29.) She asserted a single cause of action styled “Negligence/Negligence Per Se/Gross Negligence.” (R. pp. 5-7, ¶¶ 37-45 (original emphasis and capital lettering omitted).)

Winsor timely answered, denying Mrs. Connelly’s material allegations and pleading a number of affirmative defenses,¹⁰ and following a period of discovery, the case came on for a jury trial; it lasted four days, from August 25-28, 2015, the Honorable J.C. Nicholson, Jr., presiding. (R. pp. 27-638.)¹¹

In pre-trial proceedings on August 24, 2015, the trial court denied Winsor’s challenge to the medical expert testimony Mrs. Connelly intended to offer to prove

⁸ (R. p. 10, ¶ 22.)

⁹ (R. p. 11, ¶ 25; *see also* R. p. 11, ¶27.)

¹⁰ (R. pp. 15-26.)

¹¹ Jury selection—which is not relevant to this appeal—was actually conducted by the Honorable Roger M. Young, Sr. Judge Nicholson presided over all proceedings relevant to this appeal.

the requisite causal connection between the Subject Accident and her claimed loss of the sense of smell and diminished sense of taste (the “Smell/Taste Problem”),¹² rejecting Winsor’s argument that Mrs. Connelly’s experts’ opinions were unreliable in this regard and therefore inadmissible. (R. p. 54, line 10 – p. 76, line 11; R. p. 81, line 13 – p. 83, line 22; R. p. 108, line 1 – p. 109, line 7; R. p. 111, line 4 – p. 119, line 7; R. pp. 712-1119.)¹³

When trial began the next day, Mrs. Connelly was the first witness to testify. During cross-examination, Mrs. Connelly raised the subject of insurance to the jury, and Winsor promptly moved for a mistrial, which the trial court denied. (R. p. 243, line 4 – p. 252, line 21.)

At the close of Mrs. Connelly’s case, and again at the close of all evidence, Winsor moved for a directed verdict. Distinguishing a claim of negligence under a premises-liability theory from a claim of ordinary (non-premises-liability) negligence, Winsor argued that Mrs. Connelly did not have a viable claim for

¹² Mrs. Connelly intended, and ultimately was allowed, to present medical expert testimony on the alleged causal connection via Drs. Thomas Funcik and Mark Ghegan, both of whom had been deposed the week before on video. (R. pp. 838-1034; R. pp. 1035-1119.)

¹³ Far and away, the most substantial damage claimed in this case relates to the Smell/Taste Problem. (See, e.g., R. p. 140, lines 10-16.) Mrs. Connelly’s other claimed damages are comparatively modest—chief among them a nondisplaced-to-minimally-displaced nasal fracture and related surgical procedure, the same time as which she elected to have unrelated cosmetic enhancements. (R. pp. 1135, 1134, 1123, 1137-1138.) Her only claimed pecuniary loss consists of medical expenses totaling less than \$13,500. (R. pp. 1198-1209.)

ordinary negligence because Winsor did not owe Mrs. Connelly a duty to maintain the silt fence—the supposed legal duty upon which her ordinary-negligence theory rested. Winsor further argued that, while it did have a duty under the law of premises liability not to create an unsafe condition on the sidewalk, the evidence was such that, as a matter of law, Mrs. Connelly could not prevail on a premises-liability claim in light of South Carolina’s adoption of the rule stated in § 343A, regarding “Known or Obvious Dangers.”¹⁴ For that matter, Winsor argued that even were Mrs. Connelly to have a potentially viable ordinary negligence claim against it based on negligent maintenance of the silt fence such a claim would nonetheless fail as a matter of law under § 343A because the rule stated therein applies to “any activity or condition,” which would cover silt-fence maintenance. Further still, Winsor argued even assuming, *arguendo*, § 343A did not apply, no

¹⁴ Section 343A states 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.

(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.

South Carolina adopted the rule stated in § 343A in Callander v. Charleston Doughnut Corporation, 305 S.C. 123, 126, 406 S.E.2d 361, 362-63 (1991).

reasonable jury could find Mrs. Connelly to be less than 51% at fault for the Subject Accident; thus, in any event, Winsor was entitled to judgment as a matter of law on account of Mrs. Connelly's comparative negligence. Except for in two respects not relevant to this appeal, the trial court denied Winsor's motions. (R. p. 491, line 21 – p. 503, line 7; R. p. 563, line 15 – p. 564, line 8; R. pp. 1234-1237.)¹⁵

In arguing against Winsor's first directed-verdict motion, Mrs. Connelly, through her counsel, made clear that she was not pursuing a premises-liability claim against Winsor; rather, her claim was for "simple," i.e., ordinary, negligence, premised on Winsor's alleged breach of a legal duty that it owed her to maintain the silt fence. (R. p. 495, line 18 – p. 496, line 20.) Then, at the close of all evidence, Mrs. Connelly moved for a directed verdict on the issue of negligence, arguing Winsor owed her a legal duty to maintain the silt fence and that the evidence was such that the trial court should find Winsor breached that duty as a matter of law. (R. p. 556, line 8 – p. 557, line 7.) Notwithstanding Winsor's objection and argument to the contrary, the trial court determined that this was not a premises-liability case, but an ordinary-negligence case, founded on the duty, which it determined Winsor owed to Mrs. Connelly, to maintain the silt fence.

¹⁵ Though irrelevant to this appeal, the trial court did grant Winsor a directed verdict on Mrs. Connelly's claim of negligence *per se* (R. p. 498, lines 12-13) and also struck punitive damages from the case. (R. p. 563, lines 20-21.)

Moreover, the trial court ruled that the evidence left no jury question as to whether Winsor had breached this duty and, thus, determined the issue of breach as a matter of law, granting a partial directed verdict in favor of Mrs. Connelly. (R. p. 557, line 8 – p. 563, line 15; R. p. 565, line 22 – p. 566, line 17.)

Instructed that, “[a]s a matter of law, [the trial court] ha[d] found that [Mrs. Connelly] has met the burden of proving [Winsor’s] duty and breach,”¹⁶ the jury was then given the case to determine issues of proximate cause, comparative negligence, and damages with respect to Mrs. Connelly’s ordinary-negligence claim—the trial court having refused Winsor’s proposed jury charge on § 343A and, also, over Winsor’s objection, given a “curative” instruction regarding insurance. (R. p. 613, line 13 – p. 633, line 1; R. pp. 3-5; R. pp. 1238-1241.) The jury returned a verdict finding Winsor had proximately caused Mrs. Connelly damages that it valued at \$500,000 but also finding Mrs. Connelly to have been 35% comparatively negligent. (R. p. 634, line 5 – p. 610, line 10; R. pp. 3-5.) The trial court then entered judgment in favor of Mrs. Connelly, against Winsor, in the amount of \$325,000, i.e., \$500,000 reduced by 35%. (R. p. 2.)

This appeal, notice of which was served February 26, 2016, timely follows the trial court’s hearing and denial of Winsor’s timely post-trial motions, which

¹⁶ (R. p. 620, line 4-7.)

had sought JNOV or, alternatively, a new trial. (R. pp. 1243-1305; R. pp. 639-711; R. p. 6; Notice of Appeal.)

STATEMENT OF FACTS¹⁷

Though she herself lived on Sullivan's Island, Mrs. Connelly had been regularly jogging on Daniel Island for several years before the Subject Accident. Her friend Cori Smith ("Smith"), a fitness trainer by trade, lived on Daniel Island, and three days a week on average, Mrs. Connelly would drive over, and she and Smith would run together. (R. p. 158, lines 3-5; R. pp. 161, line 17 – p. 163, line 9; R. p. 209, line 20 – p. 210, lines 5-7; R. p. 328, line 14 – p. 329, line 4; R. p. 329, line 16 – p. 331, line 8.)

At the time of the Subject Accident, a new home was under construction on the Premises, and as required by the Daniel Island Architectural Review Board ("ARB"), general contractor Winsor had installed a silt fence—made of black plastic material attached to wooden support stakes—around the perimeter of the Premises for erosion control. (R. p. 402, line 4 – p. 404, line 20; R. p. 1215; R. p. 1210; R. pp. 1211-1214; R. pp. 1215-1216.)

The Subject Accident happened on a windy, but otherwise pleasant, Monday morning when, while out jogging with Smith, about halfway through their run,¹⁸

¹⁷ Please note that this factual statement is not intended to be exhaustive; additional facts will be presented in support of the arguments that follow.

Mrs. Connelly tripped and fell on the sidewalk in front of the Premises. Mrs. Connelly claims it happened because the silt fence was in disrepair; indeed, she claims it was in obvious disrepair and that it looked, for all intents and purposes, just as depicted in the photo Bates Labeled RMC 96 (the "Claimed Accident Condition"). (R. p. 164, lines 4-10; R. p. 337, lines 1-11; R. p. 378, line 18 – p. 379, line 9; R. p. 576, lines 11-15; R. pp. 1217-1218.)¹⁹ Mrs. Connelly says—literally, her own words are quoted below, as are those of Smith and Mrs. Connelly's counsel—the Subject Accident happened because detached black plastic fencing material was partially obstructing the sidewalk, and even though, admittedly, *she recognized the obstacle beforehand and tried to jog around it*, the wind blew it into contact with her foot, causing her to trip and fall:

From Mrs. Connelly's Testimony

[PLAINTIFF'S COUNSEL]: All right. Let me show you the photo of -- that we have of [the Premises (i.e., the Claimed Accident Condition)], and let me ask you, [Mrs. Connelly], take a look at it. And the jury can all see it.

¹⁸ At the time of the Subject Accident, Mrs. Connelly was running roughly four miles at a time, for a total of about 12 miles per week. (R. p. 162, line 17 – p. 163, line 9; R. p. 330, lines 14-18; R. p. 332, lines 16-21.)

¹⁹ Smith took this picture the day after the Subject Accident at the request of Mrs. Connelly's husband, Bill Connelly ("Mr. Connelly"), an attorney. (R. p. 241, line 23 – p. 242, line 23; R. p. 336, lines 7-16; R. p. 362, line 19 – p. 364, line 25.) The accident location is in the foreground, and the sidewalk along which the ladies were running as they approached it is in the background; in other words, they were running toward the place where Smith was standing when she took the photo, with the Premises to their right. (R. p. 336, lines 3-20.)

Does that accurately depict what [the Premises] looked like that day?

[MRS. CONNELLY]: I would say yes. Maybe, you know, an inch here or an inch there, but I would say overall, yes.

(R. p. 164, lines 4-10.)

[PLAINTIFF'S COUNSEL]: Okay. *Did you see that when you came upon it* that day?

[MRS. CONNELLY]: Well, when I run, I look forward. I look down. And, *yes, I saw there was plastic. I mean, I avoided it. I tried to avoid it, to not go -- you know, you adjust your running* when you go -- and I run a 10 minute mile. I'm not saying I'm running any great distance here. Okay. And -- but I adjust to see what kind of conditions are -- you know, if there's a stop sign, I'm going to stop at the stop sign and look both ways crossing the street. *So, yeah, I saw that there was something black, yes.*

(R. p. 165, lines 9-20 (emphasis added).)

[PLAINTIFF'S COUNSEL]: Okay. Tell the jury *as you came upon this fence*, to the best of your recollection, what happened?

[MRS. CONNELLY]: Okay. I'm running down here. [Smith] is running -- I'm on the right hand -- I'm on the right hand side, and she's on the left hand side. And so she's -- I'm running a little bit faster than she is to get through there. You know, I put my foot down -- I put my left foot down, you're running, you're running you're running, you're running.

It was a windy day. I saw a fluttering motion of this black plastic. The plastic is like garbage can plastic, you know, that sort of -- you know, it's thin. *I ran to*

avoid it -- excuse me -- when I put my left foot down, I had my right foot up, and it caught on the plastic, and I fell forward, I -- toward my body. . . .

(R. p. 166, lines 4-18 (emphasis added).)

From Smith's Testimony

[PLAINTIFF'S COUNSEL]: Is this picture [(i.e., the Claimed Accident Condition)] -- does it accurately represent your memory of what the tarp looked like on June 6, 2011?

[SMITH]: Uh-huh, yes, sir.

[PLAINTIFF'S COUNSEL]: How was the weather that day?

[SMITH]: It was nice. It was windy, but nice.

(R. p. 337, lines 1-6.)

[PLAINTIFF'S COUNSEL]: Tell the ladies and gentlemen of the jury what happened as you and [Mrs. Connelly] ran past [the Premises] and *came upon this black plastic barrier?*

[SMITH]: *We were running past it*, and it was fine, and just going at a normal stride. And she stepped down and the tarp kind of flew up a little bit and got her foot, and she tripped and fell on her head.

[PLAINTIFF'S COUNSEL]: A couple things I want to go over on that. First of all, did you see any movement in the tarp from the wind as you were approaching it?

[SMITH]: I mean it was moving just a little bit, like a - *- you could tell it was windy*, but not crazy movement.

[PLAINTIFF'S COUNSEL]: Well, was it flopping up and down like a garbage bag or something like that?

[SMITH]: No. No. *It was like just fluttering like wind would do to something.*

(R. p. 337, line 12 – p. 338, line 2 (emphasis added).)

From Mrs. Connelly's Counsel's Opening Statement

On . . . June 6, 2011, as [Mrs. Connelly and Smith] *approached that black plastic barrier fence . . . as they were jogging . . . they saw that the fence was partially in the sidewalk*, they did what many of us may have done. And that's *they just sort of jogged over to the left a little bit, because there was plenty of sidewalk there still.*

. . . *And [Mrs. Connelly] sort of jogged a little bit to the left to avoid it.* It was a little bit of a windy day, and that black plastic barrier -- it's kind of *made of a light, almost like hefty bag material* -- all right. . . .

And what happened was when it moved a little bit in the wind, . . . it caught [Mrs. Connelly's] right foot and she went forward. . . .

(R. p. 137, line 10 – p. 138, line 9 (emphasis added).)

From Mrs. Connelly's Counsel's Closing Argument

You folks have seen that photo [(referring to the Claimed Accident Condition)] over and over and over again in this trial. And *the fence was laying in the sidewalk, partially in the sidewalk.* All right. *That's what it looked like on June 6, 2011. The photo was taken on the next day, June 7, 2011.* . . .

(R. p. 576, lines 11-14 (emphasis added).)

[W]hen [Mrs. Connelly and Smith] saw the fence was down a little bit, they did what most of us would do. If it's over here, just sort of jog over to the left a little bit. And, unfortunately, the wind caught it a little bit, and it caught [Mrs. Connelly's] foot. And the accident happened. You all heard that. . . .

(R. p. 577, line 21 – p. 578, line 1 (emphasis added).)

ARGUMENT

I. The trial court erred in denying Winsor judgment as a matter of law.

- A. 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.**

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 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[.]”²⁰ 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 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

²⁰ Huggins v. Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003).

(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).²¹ 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.

B. 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,²² 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.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact

²¹ As noted above, 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”).

²² *Callander*, 305 S.C. at 126, 406 S.E.2d at 362.

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.²³ Indeed, even though, as addressed below, Winsor contends the jury could not reasonably have found (and did not reasonably find) Mrs. Connelly to be less than 51% at fault for

²³ 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.

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 her²⁴—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).)

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

²⁴ (R. p. 165, lines 9-20; R. p. 211, lines 3-12.)

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.

C. 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, as a matter of law, that 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).

II. Assuming, *arguendo*, Winsor is not entitled to judgment as a matter of law, this case should be remanded for a new trial on account of prejudicial errors in the proceedings below.

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

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 her face, arms, and shoulder and is currently under a doctor's care.

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?

[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,²⁵ 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 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.

²⁵ (R. p. 243, line 11 -- p. 252, line 21.)

(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. 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,²⁶ its *sua sponte* “curative” instruction regarding insurance thereafter,²⁷ 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.)²⁸

²⁶ (R. p. 320, line 3 – p. 322, line 20.)

²⁷ (R. p. 322, line 25 – p. 325, line 3.)

²⁸ 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 fantasy to view the situation otherwise.

B. 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 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, Jeff Thomas (“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.)²⁹ 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;

²⁹ 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.)

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 loquitur* 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 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 morning³⁰ 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.

C. 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

³⁰ Wrongfully taking 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).

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.

D. 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”³¹—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 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

³¹ (R. p. 853, lines 22-24; *see also id.* at p. 908, line 2 – p. 910, line 12.)

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,³² 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

³² 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:)

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 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”). If Winsor is not granted judgment as a matter of law, this case should be remanded for a new trial, and Mrs. Connelly should not be able to present evidence of or claim damages relating to the Smell/Taste Problem.

E. 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.³³

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

³³ 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.

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, i.e., a sudden and permanent shearing of the olfactory nerve filaments,³⁴ 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

³⁴ (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).)

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 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 are 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.)³⁵ 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.

³⁵ 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.)

(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 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

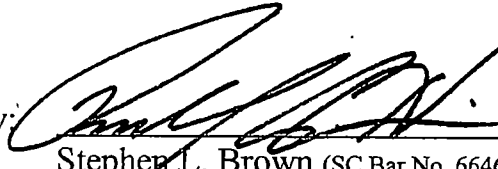
For the reasons set forth herein, Winsor asks the Court to reverse the judgment below and grant judgment in its favor as a matter of law or, as a lesser alternative, to reverse the judgment below and remand this matter for a new trial.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated:

2/16/17

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Judge

Appellate Case No.: 2016-000419

RECEIVED

FEB 16 2017

SC Court of Appeals

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

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I. STATEMENT OF THE CASE

This case arises out of Connelly's fall on Monday, June 6, 2011, on the public sidewalk adjacent to [REDACTED] Street on Daniel Island (hereinafter "Premises"). Winsor was serving as the general contractor for the purposes of constructing a home located on the Premises on behalf of Karen Nelson and John Edelen. Winsor had constructed a black plastic construction barrier fence on the Premises. The fence was in a state of disrepair on the day of the accident, became partially detached from its stakes, and blew into the sidewalk causing Connelly to fall face-first onto the sidewalk. Connelly suffered a broken nose, concussion, and head trauma which severed the olfactory nerves in the nasal and brain cavity (the cribriform plate) resulting in the loss of her sense of smell (anosmia) and reduction or distortion in her sense of taste (dysgeusia).

The case was tried against Winsor only; all other defendants had settled or were dismissed. The trial court heard pre-trial motions by Winsor regarding the expert qualifications of Dr. Thomas Funcik and Dr. Mark Ghegan, both Otolaryngologists (hereinafter "ENT") and Connelly's treating physicians, and a challenge to their ability to testify as to the cause of Connelly's anosmia and dysgeusia. (R. pp. 111-18). The trial court ruled in favor of Connelly, and held that both doctors were qualified to testify as to the cause of Connelly's anosmia and dysgeusia. (R. p. 118). Both doctors were unavailable to testify at trial, and as such their trial depositions were videotaped the week prior to trial. The parties exchanged edits to the video, no objections were lodged, and both edited depositions were played to the jury at trial.

During the course of the trial, Winsor made two motions for mistrial regarding the word "insurance" being raised in the presence of the jury. The first motion was made in response to

Connelly's testimony on cross examination regarding written correspondence that was sent by her husband to Winsor immediately following the June 6, 2011 incident. (Ct's Ex. 3, R. pp. 1231-33).

The exchange at trial was as follows:

Q: And on the day after the accident, your husband contacted some folks to threaten legal action about this fall, right?

A: 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 -- 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.

MR. BROWN: Your Honor --

A: 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.

MR. HINES: Your Honor, I think we've got a matter of law to address. . .

(R. p. 243). Winsor's counsel did not show the correspondence he was asking about to the witness; the correspondence, however, was made a court exhibit. (R. pp. 250-51). In response to this testimony, Winsor immediately moved for a mistrial. The Court denied Winsor's motion and ruled that the mention of insurance was merely inadvertent. The court asked if Winsor wanted a curative instruction, and Winsor declined. (R. pp. 249-50).

The second motion for mistrial was in the midst of Dr. Funcik's video testimony, wherein he mentioned the process of pre-certifying health insurance coverage: "So when [sic] initially saw her, I handled it on a routine basis, which is to say that she needs some reduction at some later time. But we weren't ready to schedule the operating room and start pre-certifying her insurance company." (R. pp. 320-21). The court excused the jury, and denied the motion for mistrial finding that Winsor had made no objection prior to the video being played or during the video and that the reference was only to health insurance. (R. pp. 321-22). Thereafter the judge gave the jury a

curative charge to disregard any statement regarding the doctor getting prior authorization as to insurance, and struck reference from the record. (R. p. 323).

At the close of the evidence, Winsor moved for a directed verdict. The court denied the motion. Connelly moved for a directed verdict on the subject of negligence. The trial court granted *partial* directed verdict, finding that Winsor had a duty to maintain the Fence and that Winsor had breached that duty, allowing only the questions of causation, damages, and comparative negligence to go to the jury. (R. p. 566). The Court elected to apply general negligence principles and instructed the jury accordingly. The jury's verdict resulted in judgment for Connelly in the amount of Three-Hundred Twenty-Five Thousand Dollars (\$325,000.00) (damages in the amount of Five-Hundred Thousand Dollars (\$500,000.00), reduced by a Thirty-Five Percent (35%) allocation to Connelly for comparative negligence. (R. pp. 3-5).

II. STATEMENT OF THE FACTS

This case arises out of an incident that occurred on Monday, June 6, 2011, on the public sidewalk adjacent to [REDACTED] Street on Daniel Island (hereinafter "Premises"). On that date, Winsor was serving as the general contractor for the purposes of constructing a home located on the Premises on behalf of Karen Nelson and John Edelen (hereinafter "Owners"). In the due course of conducting its construction activities on the Premises, Winsor erected a black plastic barrier fence (hereinafter "the Fence"), also known as a silt fence, around the perimeter of the construction site. The purpose of the Fence was, at least in part, to keep construction debris from encroaching onto the public sidewalk and the property of others. (R. p. 428). On June 6, 2011, the Fence was not properly secured to its wooden stakes, and was in a state of disrepair. (R. pp. 383-84, 1218).

On the morning of June 6, 2011, Rosemary Connelly was jogging down the sidewalk on Daniel Island with her friend, Cori Smith (hereinafter "Smith"). Connelly and Smith's route took them past the Premises, and, while passing the construction site, a gust of wind caught the Fence and caused it to suddenly and unexpectedly traverse the sidewalk. The Fence entangled Connelly's leg, causing her to fall head first onto the ground. (R. pp. 166-67). Connelly suffered a broken nose, concussion, and head trauma which severed the olfactory nerves in the nasal and brain cavity (the cribriform plate) resulting in the loss of her sense of smell (anosmia) and reduction or distortion in her sense of taste (dysgeusia). Connelly, her running buddy and witness to the accident, and her daughter all testified to the timeline of Connelly's gradual awareness that her sense of smell was absent and taste were diminished. (R. pp. 183, 373, 471-73).

Winsor's only corporate witness and the owner of Winsor Homes, Jeffrey Thomas (hereinafter "Thomas"), admitted: (1) the Fence was erected by Winsor, (2) Winsor was responsible for supervising and reviewing the subcontractor's work, (R. p. 399), (3) it was Winsor's sole duty to maintain the Fence, (R. p. 402), (4) he was aware that his own workers or subcontractors often walked across the Fence causing it to come down, (R. pp. 406-07); (5) it was foreseeable that the fence could become airborne in the wind if allowed to become detached from its stakes (R. p. 410); (6) he had received warning three months prior to the accident that the fence at this site was in disrepair (R. p. 461), and (7) that the Fence was in a state of severe disrepair on the date of June 6, 2011 (R. pp. 409-10). Winsor brought no other witnesses to rebut any of these admissions. A photograph taken in March 2011 showed the fence intact, albeit drooping. (R. p. 1215). The Daniel Island ARB sent Appellant a Notice to Repair the Fence dated March 17, 2011 stating "the majority of the site fence is down, and there is no construction entrance on the job site. Please repair or fix as soon as possible." (R. p. 461). The accident happened on June 6, 2011.

Both witnesses to the accident testified that the Fence looked approximately the same as the photo one of those witnesses took the day after the accident, June 7, 2011. (R. p. 1218). Thomas testified he had no memory of repairing the Fence between March and June 2011, and instead speculated “I had to have fixed the fence” or I would have been fined. (R. pp. 462-464). Winsor presented no other evidence regarding any repair of the fence between March 17, 2011 and the date of the accident, nor did it present any evidence from the ARB to corroborate Thomas’ testimony.

Two of Connelly’s treating physicians testified by video. (R. pp. 838-1119). Dr. Funcik had seen Connelly the day after the accident, and performed surgery to repair her broken nose some months later. Dr. Funcik is a board certified physician in Head and Neck Surgery and Facial Plastic and Reconstructive Surgery. He testified that he had over 2000 hours of experience as attending physician in emergency rooms and trauma centers. (R. p. 8). Dr. Ghegan, also an ENT, later diagnosed Connelly with anosmia (loss of sense of taste due to severing of the olfactory nerves in the nasal and brain cavity), and dysgeusia (reduction or distortion in sense of taste). Their professional qualifications are not in question.

Both doctors testified that it was their opinion, to a reasonable degree of medical certainty, that the fall was the cause of Connelly’s decreased sense of smell and decreased sense of taste, and that these conditions are permanent. (R. pp. 916-18, 927-28, 1070-71, 1073) And, the results of Connelly’s University of Pennsylvania Smell Identification Test, administered by another physician in Dr. Ghegan’s office, confirmed that she had anosmia. (R. pp. 1068-69). Dr. Ghegan’s treatment records indicated that Connelly reported she had been experiencing loss of smell and reduced taste since June 2011, but began noticing it in the 6 months prior to that appointment date of 4/4/2013. (R. pp. 1178, 1180). Ghegan was informed by Connelly that she had a fall about two years prior, suffered a concussion and broken nose, and understood that she had hit her head in the

approximate location where the olfactory nerves come through the cribriform plate. (R. pp. 1057-1058). He testified he did not feel it was unusual for someone to wait months after an accident before consulting with an ENT about loss of smell. (R. p. 1096). Dr. Funcik treated Connelly related to her broken nose, and performed the nose surgery some months later as he recommended she wait until the swelling subsided. He also explained in detail the physiology of how a person loses his sense of smell, how the olfactory nerves work, and how blunt head trauma can cause those nerves to be severed from the cranial bone they attach to resulting in anosmia. (R., pp. 901-905, 1242 Demonstrative).

III. ARGUMENT

a. Standard of Review

Winsor has raised several different grounds for appeal, several of which involve different standards of review. Respondent will address the respective standard of review during the corresponding argument.

b. The trial court did not err in denying Winsor judgment as a matter of law

Only when there is no evidence to support the ruling or when the ruling is governed by an error of law can a directed verdict be overturned on appeal. Austin v. Stokes-Craven, 387 S.C. 22, 691 S.E.2d 135, 145 (2010) (citing Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997)). As set forth above, the Court denied Winsor judgment as a matter of law. The court directed a verdict in favor of Connelly on the first two elements of negligence, and held, as a matter of law, that Winsor owed Connelly a duty to use due care in its maintenance of the Fence, and that the evidence mandated a finding that Winsor breached that duty. The elements of causation, damages, and comparative negligence were decided by the jury.

Winsor claims that the trial court erred in relying on a general negligence duty to use due care in lieu of considering the "premises liability" negligence duty a property owner owes to invitees on his own property. "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." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The duty of care is that standard of conduct the law requires of an actor to protect others against the risk of harm from his actions. Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 444, 365 S.E.2d 324, 329 (Ct.App.1988), rev'd on other grounds, 299 S.C. 439, 385 S.E.2d 820 (1989). This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiff. Darrell v. South Carolina Dept. of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) (citing Terlinde v. J.F. Neely, Sr., 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (stating that the "key inquiry" in determining whether to impose liability is "foreseeability, not privity"). "The tortfeasor's liability . . . rests upon the tortfeasor's duty to exercise due care." Darrell 361 S.C. at 318, 605 S.E.2d at 15 (2004) (citing Barker v. Sauls, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986)).

Winsor suggests that the law of premises liability is distinct from the law of negligence, and that premises liability principles had exclusive application to this case. This suggestion, however, fails to recognize that the rules applicable to premises liability fall within the general law of negligence, not outside of it. "South Carolina uses a status or category system for determining the duty [a landowner or occupier] owed to *persons on the premises*." Hubbard, F. Patrick and Felix, Robert L., THE SOUTH CAROLINA LAW OF TORTS, p. 121 (4thed. SC Bar 2011) (emphasis added). The law of negligence has developed to apply differing levels of duties owed by a landowner to persons on their property regarding dangerous conditions, depending on the classification of the injured person: licensee, invitee, adult trespasser, or child. Id. at 124-25.

Foreseeability remains a key underpinning to the limitations on the general duty to use due care imposed by these rules. Even further within the limitations on the duty of care in the premises liability context is the “open and obvious” doctrine. Connelly agrees that South Carolina adopted the Restatement Second of Torts version of this doctrine in 1991, which modified the common law rule wherein a landowner owed no duty to warn anyone of open and obvious conditions. See Callander v. Charleston Doughnut Corp., 205 S.C. 123, 126, 406 S.E.2d, 361, 362 (1991) (business owner had a duty to warn its elderly customers of broken stool, even though open and obvious, because owner should have anticipated the harm and had knowledge the customers often backed into the stools to sit down). Prior to Callander, an owner owed no duty to warn of open and obvious conditions. After Callander, the law recognized an exception to that rule where the owner should have anticipated the harm despite its obviousness. Id. Notwithstanding this modification, the open and obvious rule should be considered one of the most, if not the most, narrow of the “on the premises” duties because as long as the facts do not warrant a finding pursuant to the exception, the owner has no duty at all.

Contrary to Winsor’s argument, neither the tort duties owed invitees nor the open and obvious rule applies in this case because Connelly was not “on the premises” nor was the dangerous condition “on the premises” when Connelly encountered it. With regard to persons “off the premises” and on a public right of way adjacent to the owner/occupier’s land, the “landowner owes those on a public right of way adjacent to his land a duty of due care in the conduct of activities on his land.” SC LAW OF TORTS, at p. 60, note 82, 123-24. In Epps v. United States, 862 F.Supp.2d 1460 (D.S.C 1994), the court thoroughly analyzed the nature of the duty owed when one controls property abutting a public sidewalk explaining that, in South Carolina

the general rule appears to be that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk *unless* such a duty is imposed by legislation, *the abutter created an unsafe condition on the sidewalk*, or the abutter has a special property interest in the sidewalk. . . . See 39 Am.Jur.2d Highways, Streets, and Bridges § 365 (1968) ("An owner or occupant of land abutting on a highway, street, or sidewalk, who does not enjoy a private servitude in the way, does not, in the absence of statute or ordinance to the contrary, owe to the public a duty to keep the way in a safe condition, and is generally held not liable for injuries sustained by travelers thereon as a result of conditions which he has not *been instrumental in creating or maintaining*") . . . This is also the English common law rule

Id. at 1464. (emphasis added). Whether a duty arises in a given case may depend on the existence of particular facts. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997). Where a landowner or occupier has "created or maintained a hazard on the sidewalk, or the hazard is otherwise legally traceable to it," a duty of care is imposed. Epps, 862 F.Supp.2d at 1467.

In this case, the injury occurred off the owner's property, and was caused by a fence in disrepair, the disrepair of which allowed it to blow into and about the public sidewalk. Winsor installed the Fence, admitted that it was responsible for the Fence, was in control of the fence, and undertook to maintain the Fence as part of its construction job duties. (R. pp. 399, 402-04). Winsor testified that the purpose of the Fence was, at least in part, to keep construction debris from encroaching onto the public sidewalk and the property of others. (R. pp. 427-29). Connelly did not enter the owner's property for any purpose. Instead, Connelly asserted that the actions undertaken by Winsor with regard to its activities concerning the fence were not done with due care. In issuing the directed verdict, the trial court determined that it was foreseeable that Connelly could suffer injury if the Fence were not properly maintained.

In light of the undisputed facts in this case, some of which are somewhat unusual, the trial court properly found that Winsor owed Connelly, a person on a public right of way adjacent to the land it occupied and controlled, a duty of due care in the conduct of those activities. Those

activities in this case related only to the maintenance and inspection of the construction fence Winsor had installed. Regardless of the label placed on the duty, the result – finding a duty of due care with regard to the condition of the fence – was not an error of law.¹

With regard to the trial court directing a verdict that Winsor breached the duty to use due care, only one reasonable inference can be drawn from the evidence. Connelly presented evidence that the Fence was in a significant state of disrepair on June 6, 2011. (R. pp. 335, 337, Photo 1218, 378-79, 409). Connelly also provided evidence that Winsor knew or reasonably should have known that the Fence was down and in a significant state of disrepair. (R. pp. 392-93, 405-06, Photo 1215, 432). Winsor admitted that it was aware that the Fence material could become airborne if it was detached from its stakes. (R. p. 410). Winsor testified that its workers would improperly climb over the similar fences as a shortcut to enter the site, instead of using the construction entrance, and that it had encountered that problem before. (R. pp. 406-07). Finally, Winsor had received a written warning less than three (3) months prior to the accident from the Daniel Island Architectural Review Board regarding the state of disrepair of this particular Fence and Winsor's failure to provide a proper construction entrance onto the site. (R. pp. 460-61).

The record contains no evidence to support Winsor's apparent argument that the Fence only came into a state of disrepair just prior to Connelly's accident, and nothing in the law of negligence requires Connelly to prove exactly the moment the dangerous condition came to exist. The testimony of Thomas that he had no memory of fixing the Fence between receiving that ARB

¹ Winsor states in its brief that Connelly abandoned its premises liability claim by the acceptance of the trial court's decision to charge causation and damages under a general negligence theory. Considering that the court had already directed verdict on the duty and breach of the duty, it is unclear how Connelly's handling of the jury charges could have waived any claim. As stated herein, the trial court reached the correct conclusion regarding the duty, as a matter of law.

notice and the accident date, but that he supposed he must have because he always does, does not require reversal. (R. pp. 462-64). Thomas was Winsor's only witness, other than a medical expert. Thomas was called to testify by Connelly in the case in chief. Winsor did not recall Thomas in its case in chief, nor did it call any other witness related to that issue. (R. p. 529)

Even when the question of notice of the condition of the Fence prior to the accident was raised, the trial court properly concluded that Connelly had presented uncontroverted evidence that the Fence was in disrepair, (R. pp. 559-60), that Winsor received notice of said condition, but had presented no evidence it had addressed the condition.²

There was evidence supporting the court's ruling, and no error of law was committed.

- c. *The court's failure to charge the open and obvious rule does not warrant reversal, nor was Winsor entitled to judgment as a matter of law on the basis of the open and obvious rule.*

Winsor claims that it was entitled to judgment as a matter of law that it was not liable to Connelly because the dangerous condition was "open and obvious", and in the alternative, that it was reversible error for the trial judge not to charge the proposed "Known or Obvious Dangers" charge to the jury.

With regard to the jury charge and considering that the trial court granted directed verdict as to the duty and the breach of said duty, the charge actually given to the jury as whole was sufficient. "To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well. Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and

²There is nothing to indicate that the trial judge's ruling relied on res ipsa loquitur. Res ipsa goes to the issue of causation – that because some unsafe condition existed, it must have caused the alleged damages. The court did not direct a verdict on causation, and the jury was charged with the definition and prohibition of res ipsa as a basis for finding proximate cause. (R. pp. 601-02).

the issues involved.” Larimore v. Carolina Power & Light, 531 S.E.2d 535, 540–41 (S.C. App. 2000) (citations omitted). When instructing the jury, the trial judge is required to charge only the current and correct law of South Carolina. See Jones v. Cannerella, 297 S.C. 212, 215, 375 S.E.2d 352, 354 (Ct.App.1988) (“A trial charge must be considered as a whole and claims of error in a portion of the charge must be viewed in light of and in context with the rest of the charge.”).

In this case, the open and obvious rule affects the scope of the duty—and generally, the duty to warn, or lack of duty to warn of dangers *on* one’s property. The open and obvious rule originates from the “traditional ‘no duty to warn of the obvious.’” Callander v. Charleston Doughnut Corp., 305 S.E.2d 123, 125, 406 S.E.2d 362 (1991). The court eventually modified that the traditional rule in Callander by adopting the Restatement (Second) of Torts, §343(A) which added an exception. While the Restatement phrases the rule as “a possessor of land is not liable to,” such is equivalent to modification of the scope of the duty itself, rendering it: a possessor of land does not owe a duty to invitees for harm caused by a condition whose danger is known or obvious. Then, the rule provides an exception to the lack of duty in that circumstance: there is duty owed (to warn) if the possessor of land should anticipate the harm, despite its being open and obvious.

In this case, the court found that there was a duty to use due care in the maintenance of the Fence by Winsor, *see infra* pp. 8-11. The injury did not take place on the owner’s property, and there was no claim that Winsor should have warned Connelly; instead Winsor’s alleged negligence was its failure to maintain the Fence, in light of its knowledge that it was in disrepair and that if airborne it could traverse the public sidewalk. This was not an error in law.

Further, Winsor presents only the fact of the verdict to establish prejudice. The absence of the known or obvious charge did not prejudice the jury.

d. Connelly's comparative negligence was not established to be more than 50% as a matter of law

Winsor claims that the condition of the Fence was open and obvious, and as such Connelly was more than 50% responsible for jogging near the Fence, as a matter of law. A pedestrian has the legal right to assume the absence of the defect that caused the fall. Bryant v. City of North Charleston, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991) (cert denied, June 14, 1991) citing Kimbrell v. Bi-Lo Inc., 248 S.C. 365, 150 S.E.2d 79 (1966) (the fact that the plaintiff saw the ramp she fell on and was conscious of its existence was not determinative of contributory negligence), Harrison v. Gallivan Const. Co., 188 S.C. 304, 304, 199 S.E. 307, 309 (1938) (sufficient question of fact existed to submit defendant contractor's actionable negligence to the jury after boards were placed across a public sidewalk to aid the passage of construction trucks). No duty is imposed on a member of the general public to examine a public street or sidewalk to see if there is a defect or obstruction therein. See Id. However, should a member of the general public fail to observe ordinary care in avoiding a known danger, they may be held to be comparatively negligent. See Id. (while the principles are virtually identical, this case discusses the obsolete standard of contributory negligence that South Carolina courts have phased out in favor of comparative negligence).

It is well settled in South Carolina law that comparison of Connelly's negligence with that of Winsor is a question of fact for the jury to decide, and only in rare circumstances is the issue a question for law for the court. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); accord Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997). In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference that may be drawn from the evidence is that plaintiff's negligence exceeded fifty percent. Creech, 328 S.C. at 33, 491 S.E.2d at 575 (discussing

directed verdict standard); see also Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) ("If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created" and a directed verdict motion is properly granted). Therefore, granting a motion for JNOV/judgment as a matter of law is generally not appropriate in a comparative negligence case. See Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (stating that summary judgment is normally inappropriate in a comparative negligence case).

In the instant case and viewing the evidence set forth at trial in a light most favorable to Connelly, it cannot be said that the only inference to draw from the evidence is that Connelly was more than 50% at fault for the June 6, 2011 incident. Although Connelly had seen the Fence on occasion prior to the incident (R. p. 139), she could not specifically recall what condition she observed it in. (R. pp. 166-68) Connelly was not familiar with silt fences, their construction, or the fact that an unsecured silt fence could catch the wind and become airborne. Connelly and Smith said they were not distracted at the time of the accident, were watching where they were running, and ran to the outer side of the sidewalk as they passed the partially downed Fence. (R. pp. 165-66). They both described the movement of the Fence in the wind as they approached as minimal and that the Fence moved suddenly and abruptly, ensnaring Connelly's foot just as they were passing. (R. pp. 140, 337-38, 355) While Connelly testified that she saw the Fence in disrepair and slightly fluttering in the breeze before jogging past it, she lacked the necessary knowledge to understand just how serious a hazard the Fence posed to pedestrians on the sidewalk — specifically that it could become airborne and ensnare her foot as she passed by.

Comparatively, Winsor admitted that it had knowledge that the Fence could become airborne, was aware of silt fences coming down, was aware that his workers were responsible for

bringing down the Fence, and the Fence was down prior to the accident — all of which is information that Connelly did not have.

The trial court properly allowed the question of comparative negligence to go to the jury.

- e. *The court did not abuse its discretion regarding the admission of the treating doctors' opinions on causation.*

Winsor next argues that the trial court improperly admitted Connelly's treating physicians', Dr. Funcik and Dr. Ghegan, opinion that the accident was the cause of Connelly's loss of her sense of smell and reduction in sense taste. The qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party. Payton v. Kears, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998); Mizell v. Glover, 339 S.C. 567, 577, 529 S.E.2d 301, 306 (Ct. App. 2000). An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

In determining whether or not a witness may be qualified to testify as an expert, South Carolina courts utilize a three-pronged inquiry. First, the trial court must find that the subject matter is beyond the ordinary knowledge or ken of the jury, thus requiring an expert to explain the matter to the jury. Id. (citing State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim)). 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. Id. (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-

53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony)). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *Id.* (citing *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements)).

Respondent argues that the opinions by Funcik and Ghegan, both treating physicians, that Connelly's fall most likely caused her loss of smell and taste were not sufficiently "reliable." In the instant case, Dr. Funcik and Dr. Ghegan both are treating physicians of Connelly and are also board certified ENT medical doctors. Dr. Funcik is the board certified ENT who Connelly saw immediately after the accident, with whom she had a previous relationship, and who repaired Connelly's broken nose. Dr. Ghegan is the board certified ENT who eventually diagnosed Connelly with loss of taste and reduction in smell. In that capacity, both physicians physically examined Connelly, listened to her subjective complaints, and were able to utilize their medical knowledge and experience to diagnose her permanent condition, and opine as to the cause for that condition. Connelly's doctors also relied on the University of Pennsylvania Smell Identification Test ("SIT"), generally recognized as a proven diagnostic tool for anosmia (R. pp. 894-96). Not even Winsor's medical expert, Dr. Schlosser, testified that Funcik or Ghegan's methodology was wrong. Schlosser agreed that both Funcik and Ghegan were qualified to diagnose anosmia. (R. pp. 527). Instead, his opinion was limited to the conclusion that the loss of sense of smell/taste Connelly describes was not consistent with head trauma from a fall and a broken nose, and that such an injury is generally caused by a much more severe and acute injury. (R. pp. 516, 519-20). Further,

Schlosser agreed that Connelly's treating physicians had more information than him and that they were qualified to render opinions *as to the cause* of Connelly's injuries. (R. p. 527):

Winsor presents no authority for the proposition that a treating physician who is qualified in the medical field in which his opinions lie is not permitted to opine as to causation based on a clinical diagnosis. Cf. Nelson v. Taylor, 347 S.C. 210, 217 (2001) (medical expert testimony has been generally limited to "medical doctors," and instances where witnesses other than "medical doctors" may testify as medical experts are rare). In Nelson, the court rejected a physical therapist's opinion on causation of injury due to medical diagnosis and treatment exceeding the scope of his expertise. Id. See also Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978) (in a personal injury action, chiropractor was competent to testify as a medical expert to the extent of his knowledge and experience); Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) (consulting psychologist permitted to give expert opinion concerning diagnosis, prognosis, and causation of plaintiff's mental and emotional condition).

Both physicians clearly stated that they were qualified to diagnose the cause of anosmia and associated dysgeusia, and there was undisputed testimony that the underlying methodology used to make such a diagnosis was within their expertise. Dr. Funcik testified that the science for diagnosing the cause of anosmia is reliable and that there have been no significant advances in the field in decades. (R. p. 854). Simply put, there is no specialty other than a board certified ENT better qualified to make a reliable determination of the cause of Connelly's injuries.

Respondent complains that Dr. Funcik never actually treated Connelly for the loss of smell/taste, yet he testified that once he had concluded she suffered from that condition, there is no treatment to perform. (R. pp. 854, 939) Funcik testified that if the absence of smell/taste does not return after such a traumatic injury, especially over some time, it would be common to conclude

it will not return because the nerve endings which were damaged and detached from the cranial bone have no way to reattach. There is no medical treatment to reattach the nerve endings to the cranial bone. It is simply untreatable. (R. p. 854). Questions about the lapse of time between the injury and when Funcik reached his conclusion on causation do not go to reliability of the treating physician's diagnostic methods, but to weight. Winsor selects excerpts from Funcik's testimony that he would not be the first doctor people would see for this particular condition, because he mostly practices ENT as a facial and plastic surgeon. This is not persuasive, and a complete reading of that portion of the testimony reflects that Dr. Funcik was speaking to the fact of his specialization within the field of ENT surgery is facial/plastic surgery. (R. pp. 853-54). He and Dr. Ghegan both testified that there is no specialty other than ENT to address this condition, it is simply rare, and because there is no ameliorative treatment, there are not a large volume of case studies or patients. The diagnosis is the extent of the available treatment.

Lastly, Winsor complains that Dr. Funcik relied partially on information received from others in forming his opinion, specifically information about the testimony of Connelly's daughter and Connelly about Connelly not noticing a bad smell in the refrigerator. (R. pp. 918—919, 922-923). South Carolina allows expert opinion testimony to be based partially on information received from others, even though the information itself may not be admissible, if such facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Howle, 288 S.C. at 594, 344 S.E.2d at 162 (citations omitted).

Any flaws in Drs. Funcik and Ghegan's analysis go to the weight and credibility of their testimony, not its admissibility, and this expert testimony would supply specialized knowledge that would aid the jury in determining a fact in issue. See Rule 702, SCRE (providing a qualified expert may testify when "scientific, technical, or specialized knowledge will assist the trier of fact

... to determine a fact in issue"). Further, even if the jury had rejected the expert's testimony, the circumstantial evidence was sufficient to support the verdict. It is clear that expert medical testimony is not required in every case to establish a causal connection between an accident and subsequent injury or treatment. See Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 40 S.E.2d 681 (1946). If the facts and circumstances proved give rise to a reasonable inference of a causal connection between plaintiff's present condition and the earlier accident, the absence of medical testimony need not be conclusive. See Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969); Grice v. Dickerson, Inc., 241 S.C. 225, 127 S.E.2d 722 (1962).

f. There was no prejudice resulting from the mention of insurance at the trial.

Winsor further contends that the Court erred in denying both its motions for mistrial based on the mention of the word insurance by Connelly during her testimony and the mention of health insurance by Dr. Funcik during his videotaped trial testimony. The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and Winsor must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.'" State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (quoting Gilliam v. Foster, 75 F.3d 881, 895 (4th Cir. 1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

Rule 411 of the South Carolina Rules of Evidence states "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." SCRE 411. "By weight of authority, if counsel propounds a question which calls for proper evidence, the fact that an irresponsible or inadvertent answer includes a reference to insurance will not be ground for declaring a mistrial." Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 398, 171 S.E.2d 352, 354 (1969). " . . . A motion for a mistrial, because of anything occurring during the trial, is one addressed to the sound discretion of the trial judge, whose ruling thereabout will not be disturbed in the absence of an abuse of discretion amounting to an error of law." Id.

Winsor asserts that Connelly's use of the word "insurance" during her testimony at trial is more than inadvertent, and therefore the Court committed reversible error in denying its motion for a mistrial. In so arguing, Winsor gives significant weight to the distinction between a party to a proceeding making an inadvertent reference to liability insurance and a third party witness doing the same, and argues that Connelly bears more responsibility for her slip of the tongue than a third party witness. In support of this distinction, Winsor relies upon Brazeale v. Piedmont MFG. Co., which was cited by the trial judge in denying Winsor's motion. 184 S.C. 471, 193 S.E. 39 (1937).

The trial court also relied upon Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 398, 171 S.E.2d 352, 354 (1969). In Keller, a case where two brothers' personal injury claims were consolidated for trial -- Benjamin Keller the plaintiff was a passenger in a truck driven by his brother Raymond Keller and both were injured in a collision with another vehicle being driven by the defendant. Id. at 396, 171 S.E.2d at 353. When testifying about the Benjamin's inability to

work as a result of the collision, Raymond testified that his brother had lost tools that were necessary for him to work, Id. at 397. "I called this insurance adjuster, I imagine it was, for [defendant] and he was supposed to come over." Id. The trial judge denied the motion for mistrial, ruling that the mention of insurance was merely an inadvertent "slip of the tongue" and noted "nearly everybody knows that nearly everybody has got insurance." Id. On appeal, the Supreme Court found that there was no abuse of discretion by the trial judge in denying the appellant's motion for mistrial and that appellant failed to establish that the inadvertent mention of insurance by the plaintiff resulted in any prejudice to the appellant. Citing Keller, the court affirmed the denial of a mistrial for plaintiff's mention of the word "insurance" in Tucker v. Reynolds, 268 S.C. 330, 334-34 (1977). The standard does not differ based on the role of the speaker. The burden is on Winsor to show not only error but also resulting prejudice to him. Id.

Winsor writes at length about Connelly's counsel's responsibility to advise Connelly not to mention insurance at trial and Connelly's level of sophistication — all apparently in an attempt to suggest that Connelly's mention of insurance was somehow not inadvertent. In this case, it was Winsor's question on cross examination that resulted in the mention of the word insurance. Winsor's counsel asked Connelly about a series of communications between her husband, a lawyer, and Thomas shortly after the accident. The correspondence specifically mentions a question as to Winsor's insurance. (R. pp. 1233). The specific question asked was if Connelly's husband contacted the defendant to threaten legal action -- to which the Connelly replied — I don't think he was threatening legal action; I think he was telling them what had happening and he is asking whether there is insurance. (R. p. 243).

Here we are faced with a situation very similar to the one presented in Keller. Connelly was asked a direct question during cross-examination regarding correspondence sent by her

husband, an attorney, to Winsor within days of the June 6, 2011 incident. When pressed to comment on the content of this correspondence via a direct question, she made the statement that it was her belief that her husband was inquiring as to whether or not Winsor had insurance. No further testimony was elicited as her cross-examination was immediately stopped for Winsor's motion for mistrial. Winsor refused the court's offer to give a curative instruction with regard to Connelly's mention of insurance in her characterization of the letter. (R. p. 250). The court did not give one at that time.

The correspondence Winsor asked Connelly about included a letter and four emails between Mr. Connelly and Winsor two days after the accident. (R. pp. 1231-33). These documents had been produced in discovery, and Mr. Connelly (the author) was present in the courtroom throughout the trial. The day following the accident, Mr. Connelly wrote Winsor and informed it of Connelly's fall and the dangerous condition of construction debris on the sidewalk. The entire text of the letter and emails are part of the record. Winsor responded later the same day by email and said that the sidewalk "is and has been clean" and that he would pass it on to the owners. The following day Mr. Connelly replied, and within his reply he said "Please have owners contact me with insurance information or their attorney may contact me." (R. p. 1233). Winsor's counsel had the correspondence, which plainly included the "please have owners contact me with insurance information" line. Winsor was free to file a Motion in limine prior to trial or to seek a limiting instruction to the witness, outside of the presence of the jury, prior to questioning her about the meaning correspondence, but did not. Winsor opened the door to the answer, and the testimony was immediately halted. The court ruled that the statement did not put the issue of liability insurance before the court, and if it did, it was inadvertent.

Furthermore, Winsor's contention that Connelly should be held more accountable for her response due to her level of education or her husband's profession is completely irrelevant. Connelly herself is not an attorney, nor has she received any specialized legal education. Based on the foregoing, the Court did not abuse its discretion in denying Winsor's first motion for mistrial.

Winsor also contends that the court abused its discretion in denying its second motion for mistrial, which was made in response to Dr. Funcik's mention of health insurance during his videotaped deposition. Rule 411 of the South Carolina Rules of Evidence applies only to evidence of liability insurance, and there is no rule of evidence barring the mention of health insurance at trial. Additionally, the edited version of the video had been agreed upon prior to trial. Winsor did not raise the utterance of the word "insurance" prior to the testimony, nor did it seek to further edit the video. The suggestion that any utterance of the word "insurance" demands a mistrial is simply not supported by even the text of Rule 411, which expressly lists instances where such a mention is not prohibited. Based on the foregoing, the Court did not abuse its discretion in denying Winsor's second motion for mistrial.

Lastly, any possible prejudice was lessened by the curative charge not to consider the mention of the word insurance in Dr. Funcik's testimony. See State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005) (regarding the admission of evidence or allowance of testimony, a curative instruction is generally deemed to have cured any alleged error.)

g. The jury's verdict was not grossly excessive.

Winsor alleges that the trial court should have granted it a new trial because the jury's verdict was excessive and the result of prejudice. When considering a motion for a new trial based

on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004); "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." Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted) (quoting O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)).

"The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal." Elam, 361 S.C. at 27, 602 S.E.2d at 781; see Crawford v. Charleston-Isle of Palms Traction Co., 126 S.C. 447, 120 S.E. 381 (1923) (observing the refusal to grant a new trial on the ground that the verdict was excessive was addressed to the sound discretion of the trial judge). "In deciding whether to assess error when a new trial motion is denied, the appellate court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635-36, 529 S.E.2d 758, 761-62 (Ct.App.2000) (footnote omitted). A jury's damages award is entitled to substantial deference. Harrison, 354 S.C. at 140, 580 S.E.2d at 115.

In the instant case, the resulting judgment in the amount of Three Hundred Twenty-Five Thousand & 00/100 Us Dollars (\$325,000.00), after the reduction by the court of the 35% allocation of fault to Connelly, was neither excessive nor unduly liberal. Connelly's damages are not merely aches and pains that will heal with time. Connelly presented evidence at trial that she sustained a concussion, broken nose, permanently lost her sense of smell and suffers from a

permanent impairment to her sense of taste. While the senses of smell and taste are not as outwardly noticeable when lost as the senses of sight or hearing, they are no less important to one's enjoyment of life. Connelly must endure this permanent impairment for the rest of her life, which, as set forth by the life expectancy table in S.C. Code Ann. § 19-1-150, is another Twenty-Four and Eight Hundredths (24.08) Years.

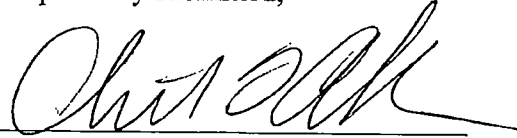
In its brief, Winsor asks this court to weigh the evidence differently and in its favor by arguing that Connelly was unaware of her loss of sense of smell (or did not understand such a loss was not part of a long healing process) until six months to one year after the accident. However, both treating physicians agreed that it would take some time to be sure the loss of sense of smell did not return, especially in conjunction with the healing of a broken nose.

While a different jury may have come to a determination that Connelly's activities after the accident did not warrant the amount of nonpecuniary damages awarded, the jury's determination is entitled to substantial deference. The comparison of the evidence presented to the amount of the verdict, especially once reduced by comparative negligence does not warrant reversal.

IV. CONCLUSION

Based on the foregoing, the trial court's findings as a matter of law, and verdict of the jury should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Christy Ford Allen', written over a horizontal line.

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ATTORNEYS FOR RESPONDENT

CHARLESTON, SOUTH CAROLINA

February 15, 2017

**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

RECEIVED

FEB 17 2017

SC Court of Appeals

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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6.	Respectfully, Mrs. Connelly’s argument that she “was not familiar with silt fences” and “lacked the necessary knowledge to understand just how serious a hazard the Fence posed to pedestrians on the sidewalk,” including her contention regarding Winsor’s supposedly superior knowledge, cannot be given any credence.	8
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Winsor makes the following points in reply to Mrs. Connelly's brief.

ARGUMENT IN REPLY

1. Winsor does not, as Mrs. Connelly asserts, "suggest[] that the law of premises liability is distinct from the law of negligence . . . ;"¹ rather, Winsor contends that there is a distinction between a claim of negligence under a premises-liability theory and a claim of negligence under a theory of ordinary negligence.

Winsor is distinguishing between theories of negligence liability: one, premises liability, which Mrs. Connelly discarded, the other, ordinary negligence, on which she staked her case. Given that, as Mrs. Connelly acknowledges, "[a]n 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[,]"² Winsor argues that this distinction is material with respect to analyzing whether Mrs. Connelly had a viable claim for ordinary negligence, i.e., the only theory of negligence she ultimately pursued, based on Winsor's supposed duty to *maintain the silt fence*, i.e., the "particular"³ duty on which Mrs. Connelly rested her ordinary-negligence claim.

¹ (Respondent's Br. p. 8.)

² (Respondent's Br. p. 7 (quoting Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).)

³ Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007) ("The issue of negligence is a mixed question of law and fact.' *First, the court must determine, as a matter of law, whether the law recognizes a particular*

“Premises liability is a negligence action in which the owner or occupier of land is held liable for violating a duty to protect the [plaintiff] *from a defect in the premises.*” Michael G. Sullivan & Douglas S. MacGregor, Elements of Civil Causes of Action 314 (3d ed. 2006) (emphasis added).⁴ As explained in Winsor’s principal brief, Winsor acknowledges that it owed Mrs. Connelly 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. In her responsive brief, Mrs. Connelly has agreed with the expression of Winsor’s duty in these terms. (See Respondent’s Br. p. 9 (“[T]he general rule appears to be that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk unless such a duty is imposed by legislation, *the abutter created an unsafe condition on the sidewalk*, or the abutter has a special property interest in the sidewalk.”) (emphasis in original) (citing Epps v. United States, 862 F. Supp. 2d 1460, 1464 (D.S.C. 1994).)

As explained in Winsor’s principal brief, Winsor contends that a duty to maintain the silt fence is not the same as a duty not to create a hazardous condition on the sidewalk; that the latter duty (i.e., the duty not to create a hazardous

duty. If there is no duty, the defendant is entitled to a judgment as a matter of law.”) (emphasis added) (citations omitted).

condition on the sidewalk), which Winsor owed to Mrs. Connelly, derives from and is cognizable under the theory of premises liability, not ordinary negligence; that the trial court erred in determining Mrs. Connelly had a viable claim against Winsor for ordinary negligence premised on Winsor's supposed duty to Mrs. Connelly to maintain the silt fence; and that, because Winsor did not owe Mrs. Connelly a duty to maintain the silt fence, her ordinary-negligence claim, i.e., her only claim, necessarily fails, and Winsor was—and is—entitled to judgment as a matter of law.

2. **Mrs. Connelly is incorrect in contending that § 343A does not apply because she was not on the Premises, nor was the dangerous condition on the Premises, when she encountered it.**

As noted above, the “general rule,” with which Mrs. Connelly agreed in her brief, is “that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk” (Respondent’s Br. p. 9 (quoting Epps, 862 F. Supp. 2d at 1464).) In other words, the abutting occupier’s (in this case Winsor’s) duty stops at the property line; however, the exception to this rule, applicable here, providing that the abutting occupier (Winsor) has a duty not to create a hazardous condition on the sidewalk, extends the abutting

⁴ With regard to the bracketed word in this quotation (i.e., “[plaintiff]”), the original source text reads “defendant,” but the context shows this to have been a scrivener’s error.

occupier's (Winsor's) duty to the sidewalk and, naturally, the applicability of § 343A follows suit—it would make no sense for the rule to be otherwise.

Elsewhere in Restatement (Second) of Torts, at § 496C, a rule of implied assumption of risk is stated. There, the Restatement explains as follows, by way of official commentary:

b. This Section deals with what may properly be called implied assumption of risk. The plaintiff does not . . . expressly consent to accept the risk of harm arising from the defendant's conduct; *but by voluntarily electing to proceed, with knowledge of the risk, in a manner which will expose him to it, he manifests his willingness to accept it, and to take his chances as to harm which may result from it. He is therefore barred from recovery as if he had expressly consented.* As in the case of express consent, the basis of the rule is the policy of the law which refuses to permit one who manifests willingness that another shall continue in a course of conduct to complain of it later if he is hurt as a result of it.

c. Such implied acceptance of the risk is commonly found in three types of situations. . . .

d. In the second type of situation the plaintiff enters the land or uses the chattels of the defendant, or enters into some other relation with him, without any right or privilege to do so other than that derived from the defendant's consent to the relation itself. . . . *[I]n the case of invitees, the defendant is under an initial duty of reasonable care in all respects to make the land or chattel safe, or otherwise to protect the plaintiff, but is relieved of this responsibility when the plaintiff, knowing of the danger, enters and accepts the risk (see § 343A).*

(emphasis added).

As Mrs. Connelly acknowledges, South Carolina has adopted § 343A. (Respondent's Br. p. 8.) In view of the clear aim of § 343A in eliminating liability—not just of a duty to warn, as Mrs. Connelly seems to suggest—for known or obvious dangers and further informed of the Restatement's view via its reference to § 343A in the commentary on implied assumption of risk, it would be absurd—and in furtherance of no conceivable policy objective—to conclude that the rule in § 343A does not apply to the circumstances of the Subject Accident, which occurred on the sidewalk abutting the Premises, the Claimed Accident Condition indeed overlapping the boundary line.

3. **Mrs. Connelly's view of the evidence—in arguing in support of the partial directed verdict granted to her by the trial court—is at best strongly slanted in her favor, i.e., self-serving, and, in any event, at odds with the proper directed verdict standard, which required the trial court to view the evidence and all reasonable inferences in the light most favorable to Winsor.**

For instance, Mrs. Connelly represents to the Court that “Winsor testified that its workers would improperly climb over the similar fences as a shortcut to enter the site, instead of using the construction entrance, and that it had encountered that problem before” and that “Winsor had received a written warning less than three (3) months prior to the [Subject] [A]ccident from the [ARB] regarding the state of disrepair of this particular Fence and Winsor's failure to provide a proper construction entrance onto the site.” (Appellant's Br. p. 11.)

While it is true that, when asked about subcontractors sometimes damaging a silt fence, Thomas agreed “[t]hat is *one* of the ways that the fences can come down,” Mrs. Connelly ignores his testimony that subcontractors do not do this when he is onsite, which is almost daily; that he himself carries a staple gun in his truck for silt fence repair; that he had never seen the silt fence in the Claimed Accident Condition; and, indeed, despite her insinuation that there was not a proper construction entrance *at the time of the Subject Accident*,⁵ the Claimed Accident Condition photo, and even her counsel’s questioning of Thomas, shows there was a construction entrance (driveway) at the time of the Subject Accident. (R. p. 392, lines 10-21; R. p. 394, lines 13-24; R. p. 404, lines 17-25; R. pp. 406, line 11 – p. 407, line 13 (emphasis added), R. pp. 430, line 11 – p. 436, line 4; R. pp. 1217-

⁵ In this regard, it must be remembered that the ARB *warning*—it should also be remembered that there is no record of that warning ripening into a ARB fine or other penalty—that Mrs. Connelly uses to make this insinuation pre-dates the Subject Accident by some *three months*. (R. pp. 403, line 25 – p. 404, line 9 (regarding the sequence of ARB action; first comes a warning, then a fine, “if you do not correct the situation”).) Indeed, with particular regard to the March 17, 2011, ARB warning, about which Mrs. Connelly makes much, Thomas testified as follows—without objection:

[F]or me to try to remember whether or not, if I have three or four jobs going on, that I’ve fixed the silt fence at 1376 Smythe Street between March 17, 2011, and June 6, 2011. I’m not going to remember that. ***I will tell you this though, once I got this notification on March 17th, we repaired the silt fence, or would have been fined.***

(R. pp. 462, line 21 – p. 463, line 2 (emphasis added).)

1218.) Likewise, Mrs. Connelly ignores the fact of Smith's impeachment with respect to her testimony about whether she had seen the silt fence down the week before the Subject Accident as well as the fact that the Subject Accident happened early on a Monday morning.

Lastly, on this point, Mrs. Connelly's own phrasing is rather telling. "There *was evidence* supporting the [trial] court's ruling . . . [,]" she says. (Respondent's Br. p. 12 (emphasis added).) This, of course, is not the standard. The question is not whether there "was evidence" supporting the trial court's ruling but whether, when viewing the evidence and all reasonable inferences capable of being drawn therefrom in the light most favorable to Winsor, the evidence was susceptible of more than one reasonable inference as to whether Winsor had breached the duty that the trial court had ascribed to it—and, clearly, it was.

4. Mrs. Connelly misapprehends *res ipsa loquitor*.

According to Mrs. Connelly, "[r]es ipsa goes to the issue of *causation*" (Respondent's Br. p. 12 n. 2 (emphasis added).) This is simply incorrect. Though, again, the doctrine does not apply in South Carolina, where it does apply, *res ipsa loquitor* (meaning "the thing speaks for itself") allows for an inference of negligence, i.e., negligent conduct, in certain circumstances where "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care" O'Leary-Payne v. R.R. Hilton Head, II, Inc.,

371 S.C. 340, 348, 638 S.E.2d 96, 100 (Ct. App. 2007). It does not “go[] to causation,” as Mrs. Connelly asserts.

5. **Mrs. Connelly did not merely testify that she “had seen the Fence on occasion prior to the [Subject Accident],” as she represents in her brief;⁶ rather, as explained in Winsor’s principal brief, she expressly testified that, as she approached the Claimed Accident Condition at the time of the Subject Accident, she, in fact, saw the Claimed Accident Condition, knew it was not supposed to be like it was, and, recognizing the hazard, “ran to avoid it.”**
6. **Respectfully, Mrs. Connelly’s argument that she “was not familiar with silt fences” and “lacked the necessary knowledge to understand just how serious a hazard the Fence posed to pedestrians on the sidewalk,” including her contention regarding Winsor’s supposedly superior knowledge, cannot be given any credence.**

As evidenced by the Claimed Accident Condition photo itself, not to mention Mrs. Connelly’s own counsel’s description of the silt fence material as being like a “hefty bag,” it should be plain that, in all material respects, the hazard posed by the Claimed Accident Condition was a matter of common and ordinary knowledge.

⁶ (Respondent’s Br. p. 15 (emphasis added).)

7. Contrary to Mrs. Connelly's contention that "[a]ny flaws in Drs. Funcik and Ghegan's analysis go to the weight and credibility of their testimony, not its admissibility,"⁷ our Supreme Court has instructed, "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." State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).
8. Winsor's counsel did not, as Mrs. Connelly asserts in her brief, ask Mrs. Connelly "about a series of communications between her husband, a lawyer, and Thomas shortly after the [Subject Accident]."⁸

The record is clear; Winsor's counsel asks Mrs. Connelly about her husband threatening litigation "on the day after the accident." (R. p. 243, lines 4-10.) A plain reading of the question posed to Mrs. Connelly shows that it was not "about a series of communications," as she now attempts to characterize it. Moreover, a review of Court's Exhibit 3 shows that it was not until *two* days after the Subject Accident (i.e., June 8, 2011) that Mr. Connelly first mentioned insurance. (R. pp. 1231-1233.) And she was not "pressed"⁹ for an answer in this regard; she was asked a single, proper question, calling for a "yes" or "no" answer, which did not at all call for her injection of insurance into the trial, to which she responded by knowingly injecting insurance into the proceedings. Unlike the case of Tucker v. Reynolds, 268 S.C. 330, 334 (1977), which she cites in her brief, there was no evidence of a momentary hiccup in her testimony; rather, she unequivocally

⁷ (Respondent's Br. p. 20.)

⁸ (Respondent's Br. p. 23.)

responded to the question, first, by wrongly denying that which is demonstrably true, i.e., that her husband threatened litigation the day after the Subject Accident, then, going into the matter of insurance—even though, as explained in Winsor’s principal brief, she would only moments later claim, outside the presence of the jury, that she really did not know what she was talking about to begin with.

9. The mechanism of injury that Mrs. Connelly describes in her own brief—traumatic “server[ing] [of] the olfactory nerves”¹⁰—is inconsistent with the notion, which she also describes in her brief, that her awareness of her loss of the sense of smell was “gradual.”¹¹

CONCLUSION

For the reasons set forth herein, as well as in its principal brief, Winsor asks the Court to reverse the judgment below and grant judgment in its favor as a matter of law or, as a lesser alternative, to reverse the judgment below and remand this matter for a new trial.

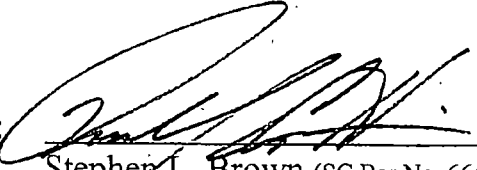
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⁹ (Respondent’s Br. p. 23.)

¹⁰ (Respondent’s Br. p. 1.)

Respectfully submitted,

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¹¹ (Respondent's Br. p. 4.)

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Rosemary Connelly, Respondent,

v.

Winsor Custom Homes, LLC, Appellant.

Appellate Case No. 2016-000419

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-287
Heard September 10, 2018 – Filed August 7, 2019

AFFIRMED

Stephen Lynwood Brown and Russell Grainger Hines,
both of Young Clement Rivers, of Charleston, for
Appellant.

John A. Massalon and Christy Ford Allen, both of Wills
Massalon & Allen, LLC, of Charleston, for Respondent.

PER CURIAM: This case arises out of injuries Rosemary Connelly sustained while running on a sidewalk in front of a home under construction on Daniel Island. Winsor Custom Homes (Winsor) was the general contractor for the home. Connelly sued Winsor for negligence, and a jury awarded Connelly \$500,000. The

jury found Connelly was thirty-five percent comparatively negligent, and the trial court reduced the award accordingly. Winsor appeals. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the trial court granting a directed verdict in favor of Connelly on the existence of a duty of care: *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))); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 858 (D.S.C. 2015) ("Premises liability is a theory of negligence that establishes the duty owed to someone injured on a landowner's property as a result of conditions or activities on the land." (citing *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008))); *Shaw v. City of Charleston*, 351 S.C. 32, 43, 567 S.E.2d 530, 536 (Ct. App. 2002) (stating one exception to the general rule "an abutting landowner or occupier . . . does not have a duty of care with respect to the safety of the sidewalk" is when "the abutter created an unsafe condition on the sidewalk" (quoting *Epps v. United States*, 862 F.Supp. 1460, 1464 (D.S.C. 1994))).

2. As to the trial court directing a verdict in favor of Connelly on the existence of a breach of duty: *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008) ("In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt."); *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 313, 743 S.E.2d 109, 112 (Ct. App. 2013) ("A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference." (citing *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002))).

3. As to the trial court's refusal to charge section 343A of the Restatement (Second) of Torts (Am. Law Inst. 1965): *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." (citing *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977))); Restatement (Second) of Torts § 343A ("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." (emphasis added)).

4. As to the trial court's failure to direct a verdict in favor of Winsor due to section 343A of the Restatement (Second) of Torts: *Chakrabarti*, 403 S.C. at 313, 743 S.E.2d at 112 ("A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference."); *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006) ("The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." (citing *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981))).
5. As to the trial court's refusal to grant Winsor a directed verdict on comparative negligence: *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) ("In a comparative negligence case, the trial court should grant the motion [for directed verdict] if the sole reasonable inference from the evidence is the non-moving party's negligence exceeded fifty percent." (citing *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000))); *id.* ("Because the term is relative and [dependent] on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury." (citing *Creech v. S.C. Wildlife and Marine Res. Dep't*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); *Mahaffey v. Ahl*, 264 S.C. 241, 247, 214 S.E.2d 119, 122 (1975))).
6. As to the trial court's denial of Winsor's motion for a mistrial due to the mentioning of insurance: *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 202, 621 S.E.2d 363, 366 (Ct. App. 2005) ("The granting or denying of a motion for mistrial is within the sound discretion of the trial judge." (citing *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 118, 512 S.E.2d 510, 521 (Ct. App. 1998))); *id.* at 202, 621 S.E.2d at 366-67 ("The granting of a motion for a mistrial is an extreme measure which should be taken only when an incident is so grievous that the prejudicial effect can be removed in no other way." (citing *State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999))); *Tucker v. Reynolds*, 268 S.C. 330, 334, 233 S.E.2d 402, 404 (1977) ("[O]n a motion for a mistrial because of the injection of liability insurance during the trial, the burden is upon the movant to show not only error but also resulting prejudice to him." (citing *Keller v. Pearce-Young-Angel Co.*, 253 S.C. 395, 398, 171 S.E.2d 352, 354 (1969))); *id.* (finding "the plaintiff's use of the word 'insurance' was inadvertent and not intentional or deliberate" and the defendant was not prejudiced).
7. As to the trial court's admission of Connelly's experts' testimony: *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997) ("The qualification of an expert witness and the admissibility of the expert's testimony

are matters within the trial court's discretion." (citing *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 344, 468 S.E.2d 633, 636 (1996); *Creed v. City of Columbia*, 310 S.C. 342, 344-45, 426 S.E.2d 785, 786 (1993)); *Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010) ("The trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge."); *McGee*, 321 S.C. at 345, 468 S.E.2d at 636 (stating even if admission of expert testimony was error, it was harmless because it was cumulative to other evidence).

8. As to the trial court's denial of Winsor's motion for a new trial absolute: *Kelley v. Wren*, 415 S.C. 379, 393, 782 S.E.2d 406, 413 (Ct. App. 2016) ("A trial court may grant a new trial absolute 'only when the verdict 'is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.'") (quoting *Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011)); *id.* ("The trial court and this court must give 'substantial deference' to the jury's determination of damages." (quoting *Burke*, 393 S.C. at 56, 710 S.E.2d at 88)); *id.* ("Whether the verdict is so excessive as to require a new trial is within the discretion of the trial court.").

AFFIRMED.

HUFF, SHORT, and WILLIAMS, JJ., concur.

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

RECEIVED

SEP 28 2019

SC Court of Appeals

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).

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 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

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:

(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.

(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

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]ninstall 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.

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

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 her¹¹—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).)

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.

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?

[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.)

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

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 loquitur* 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 morning¹⁸ 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.

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

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 are 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*

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.)

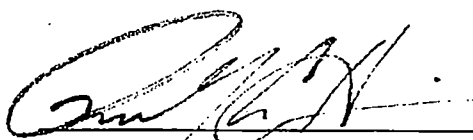
v. *Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (“If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.”)

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>

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The South Carolina Court of Appeals

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November 15, 2019

Mr. Stephen Lynwood Brown, Esquire
PO Box 993
Charleston SC 29402-0993

Mr. Russell Grainger Hines, Esquire
PO Box 993
Charleston SC 29402-0993

Re: Rosemary Connelly v. Winsor Custom Homes, LLC
Appellate Case No. 2016-000419

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in cursive script that reads "V. Claire Allen, Deputy".

CLERK

cc: Christy Ford Allen, Esquire
John A. Massalon, Esquire

The South Carolina Court of Appeals

Rosemary Connelly, Respondent,

v.

Winsor Custom Homes, LLC, Appellant.

Appellate Case No. 2016-000419

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff

J.

Paul E. Short, Jr.

J.

H. B. W.

J.

Columbia, South Carolina

cc:

Stephen Lynwood Brown, Esquire

Russell Grainger Hines, Esquire

Christy Ford Allen, Esquire

John A. Massalon, Esquire

FILED

November 15, 2019