THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LAURENS COUNTY

Donald B. Hocker, Circuit Court Judge

Appellate Case No.: 2019-001514

Martha Foster Watts .....
Appellant

v.

Ricky W. Chastain, Sheriff Laurens County, South Carolina .....
Respondent

Appellant's Initial Brief

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STATEMENT OF THE CASE

Martha Foster Watts ("Mrs. Watts" or "Plaintiff") commenced this personal injury action on August 13, 2015 against the Laurens County South Carolina Sheriff's Department ("the Sheriff" or "Defendant") in the Laurens County Court of Common Pleas, for negligently causing the chain of events that caused Mrs. Watts' August 15, 2013 motor vehicle impact with a non-party, Sherrell King ("Ms. King"). (Complaint pp. 1-3) The Sheriff denied liability under the South Carolina Tort Claims Act and asserted comparative fault and related affirmative defenses. (Answer pp. 1-4)

Mrs. Watts amended her complaint, identifying Ricky W. Chastain as the Sheriff of Laurens County ("the Sheriff") on December 17, 2015 and reasserting the Department's liability. (Am. Compl. pp 1-3) The Sheriff's January 14, 2016 Answer again denied liability and asserted the same defenses. (Answer to Am. Compl. pp 1-5) The case proceeded through discovery and was tried to a jury by Hon. Judge Donald B. Hocker on April 16, 2018 through April 19, 2018. (T. pp 1-451)[1]

At trial, the court admitted a video into evidence over Plaintiff's objections. (T. p. 258/1-4) Immediately before closing arguments, the court instructed counsel that they could argue what is

[1] There are two volumes of transcript of court proceedings in this appeal, the trial transcript "(T.)" and the post-trial motion transcript "(T.Vol. II)".

on the video, but not add to it. (T. pp. 361/1-8; 363/24 – 364/13) During closing argument, the court overruled Plaintiff's objections that defense comments on the video disregarded the court's instruction. (T. pp. 416/13-24; 417/13-19) The jury returned its verdict in Defendant's favor on April 19, 2018. (Verdict; T. p. 447/6; 19-22) On that same date the court entered a form judgment, that was never served on Plaintiff. (Judgment p. 1; Am. Notice of Appeal p. 1)

Mrs. Watts timely moved for a new trial under Rules 59(b) and 60(b)(3) SCRCP on April 27, 2018. (P's Motion for New Trial) The Sheriff responded June 21, 2018. (D's Response to P's Motion for New Trial) The motion was heard on December 19, 2018 by Judge Hocker, who denied it by order of August 6, 2019. (Order Denying P's Post-Trial Motions)

Mrs. Watts served her timely notice of appeal from the order denying new trial on September 5, 2019. (Notice of Appeal) Transcripts were ordered without jury selection-related matters on September 26, 2019 by agreement of the parties. (9/26/2019 Agreement of counsel) Plaintiff's counsel discovered the existence of the filed Judgment form on December 31, 2019 and served an amended notice of appeal as to it on that date. (Am. Notice of Appeal) In the interim, the trial transcript was delivered on December 9, 2019 (Tr. p 451), but it did not include a transcript of post-trial motions. That transcript was ordered December 31, 2019 and delivered January 8, 2020. (12/31/2019 Transcript order letter; T. Vol II, p 24) A motion to extend the time to file this brief was filed on February 4, 2020 and was granted by this Court February 10, 2020, allowing through March 9, 2020 to file same.

STATEMENT OF FACTS

Mrs. Watts was severely injured in the second of two automobile impacts that happened within seconds of each other on Highway 76 in Laurens County, South Carolina on the night of

August 15, 201. Her medical expenses were more than $218,000.00 and at trial she asked the jury to award damages of one million dollars from the Sheriff. (T. pp. 393/23; 397/2-3)

In the first impact, Deputy Sheriff Barton Holmes ("Dep. Holmes") (driving a Sheriff's Department cruiser), and non-party Ms. King (driving her vehicle), proceeded eastbound on Highway 76 in Laurens County toward Clinton. Ms. King testified that she drove in the left lane nearest the median lane and that Holmes was in the right lane, slightly ahead of her. (T. pp 86/10-18; 88/12-25) Ms. King testified that it was dark there. (T. p. Dep. Holmes made a sudden left U-turn, in front of Ms. King without lights or siren, and he hit the front of her vehicle with the left rear of the cruiser. Ms. King came to a stop in her left, eastbound lane, and Dep. Holmes came to a stop in the median lane, facing the opposite direction, westbound, towards Laurens. (T. pp 11/8-13; 90/25 – 91/2)

As this was unfolding, Mrs. Watts was also driving on Highway 76, between thirty-five and forty miles per hour, behind and in the same eastbound, left lane as Ms. King's now stopped vehicle. Mrs. Watts testified that it was so dark there that she did not see that the King vehicle was stopped in the lane ahead of her until just before impact and she did not have time to get her brakes to engage until after she hit Ms. King. (T. p. 150/4-22) She tried to apply her brakes and veered to the left, but she hit Ms. King's vehicle anyway, crossed the roadway and stopped after hitting a fence. (T. p. 151/4-24)

Dep. Holmes and witness Joe Williams confirmed that it was dark at that location and that the wrecks occurred over the crest of a hill. (T. p. 120/16-17; 131/2-12) (Holmes video dep. pp. 16/13-17 and 23; 18/3-5)

Ms. King testified that the time between impacts was two seconds. (T. pp. 91/3-4; 93/5-8; 102/11 – 103/3; 112/3-5) She was asked about her prior estimate, at deposition, of ten to fifteen

seconds and she reiterated that it was two seconds, but that the difference in her estimates was inconsequential because it was mere seconds between the two impacts. (T. pp. 106/1-23)

At trial, the Sheriff offered into evidence a fifteen and one-half minute long black and white silent video of extremely poor quality (the "Video"), over Plaintiff's motion to exclude it as unauthenticated and prejudicial. (T. p. 258/1-4) This appeal results from the unfairly prejudicial effects of that Video (D's Ex. 6) and the additional prejudicial effects of defense counsel's closing argument to the jury inviting speculation as to what is not depicted in the Video, over objection. (T. pp. 416/13-24; 417/13-19)

The parties agree on the circumstances under which the Video was made. A local business owner informed law enforcement that his scrap yard surveillance cameras had recorded images of a vehicle running off the roadway and hitting his fence. (T. pp 195/16-22) He told them that he had no way to provide a copy of the footage, so State M.A.I.T. Investigator, Trooper Al Duncan ("Tr. Duncan") used a small camcorder that he set on a tripod in front of the business owner's monitor, to record a few minutes of the surveillance footage as it played it on the monitor. (T. pp. 211/16-24; 214/1-11) Tr. Duncan testified that he made the Video as part of his investigation of the wreck involving Dep. Holmes and Ms. King – he did not testify that he was at that time concerned with the second impact involving Ms. King and Mrs. Watts. (T. p. 286/14-16) And, he testified that he only recorded a few minutes of the twenty-four-hour continuous surveillance footage to save space on the M.A.I.T. computer evidence storage hard drive, which holds such data. (T. pp. 225/14-21; 227/23 – 228/11; 281/19 – 282/4)

While recording the images playing on the monitor, Tr. Duncan's own image was reflected onto the surface of the monitor. It is included in the Video, covering a large portion of the frame throughout the Video. (T. p. 278/19-25) Tr. Duncan is seen moving back and forth, raising a phone

to his ear, and so on. (T. p. 284/1-2) It is undisputed that Tr. Duncan's image throughout the Video is a result of the process Tr. Duncan used to make the Video and that it was not on the original surveillance footage (hereafter generally, the "Original"). (T. pp 278/19-25; 284/1-2) Tr. Duncan testified:

> We were not able to keep from having the reflection in the room. We tried it without lights and with lights, but that is my reflection there. As I have the camcorder set up, you can see the outline of the frame of the monitor for Mr. Cagle's surveillance system, and I had my camcorder pointed towards it in order to capture the video.

(T. p. 278/19-25)

The Sheriff reluctantly conceded at trial that the Video did not show either of the impacts. (T. p 20/19 24/4) There the parties' agreement about the Video ends.

As to the wreck, the parties agree that the second impact occurred when Mrs. Watts rear-ended Ms. King's stationary vehicle in the road, a matter of seconds after the first impact, and that the second impact caused Mrs. Watts' vehicle to go off the roadway and into Cagle's fence. There, the parties' agreement about the wreck ends.

The Sheriff argued that the Video shows the lights on the Holmes, King and Watts vehicles at various times; that it shows sparks flying from Mrs. Watts' vehicle as she hit the fence; that it shows Dep. Holmes' lights as he made his U-turn; and that the time stamp shows the amount of time between impacts. (T. p 20/19 - 24/4)

Mrs. Watts contends that none of this is identifiable on the Video and the added image of Tr. Duncan constitutes a material alteration from the Original surveillance footage, and it obscures the already extremely poor-quality images on the Video. (D's Ex. 6.) These images are so dark and indistinct that no vehicle, nor the road, nor the fence appear at all except in flashes of white. And those white images are further obscured by the large white channel/time/date stamp running across

the top of the frame throughout the Video. (D's Ex. 6)

Mrs. Watts contends that Tr. Duncan's choice to record only a few minutes of the Original and to fast-forward even through portions of those few minutes unfairly deprived her of access to the majority of the footage. (T. p. 200/24 – 202/1; 209/15-19; 217/1-4; 274/4-21) Although the surveillance cameras recorded continuously, twenty-four hours per day, the Original was not preserved, and the business' surveillance system recorded over the Original after six months. (T pp. 206/17; 267/15-24)

The court heard Plaintiff's oral motion to exclude the Video, and, between trial witnesses, it heard *in camera* authentication testimony from Tr. Duncan (who recorded the Video); Cagle (who owned the surveillance system, the monitor and the Original); and Trooper Anderson (who made the Video copy for trial).(T. pp. 7-30; 50-73; 176-258)

The Video does not show either of the impacts, and its time stamp begins twenty minutes *after* the wreck was reported by Dep. Holmes. (P's Ex. 1: Sheriff's Incident Report, admitted in evidence (T. p. 115/20-22), showing the incident was called in at "2237" or 10:37 p.m.; and D's Ex. 6, beginning at 10:57) Cagle testified that the time stamp on his surveillance system and on the Video was correct and accurate. (T. p. 215/25 -216/5; 218/22-25) The incident was called in at 10:37 p.m. but the Video begins at 10:57 p.m. Cagle confirmed that the video begins at 10:57 on both channel 5 and channel 6. (T. pp. 196/10; 204/19; 210/12-24) This twenty-minute difference concerned the court who questioned Tr. Duncan about it, but the discrepancy was not resolved because Duncan had no personal knowledge of whether the time on Cagle's system was accurate. "*I don't know how well he functions with keeping* [objection omitted] *things up to date to make sure that the time is being kept up with to be exact.*" (T. p. 249/22 – 250/3)

Mrs. Watts contends that if Cagle's testimony and his system time stamp are taken as true,

then the Video shows images *after* the wrecks, making it irrelevant and confusing, and making its admission into evidence unfairly prejudicial. Likewise, if, as Tr. Duncan's testimony and the incident report suggest, Cagle's system does *not* accurately show the time, then the system's inaccuracy makes the Video inherently unreliable as to time, its overall accuracy is called into serious question, and admission into evidence under these circumstances would be confusing to the jury and unfairly prejudicial.

The court received Mrs. Watts' memorandum of law on the Video and heard argument. (T. pp. 15/19-25; 18/18-20; 252/15-23; 256/3 – 257/8; P's Memo in Support of her Motion *in Limine*)

Cagle testified *in camera* that his system had twelve cameras, only eight of which actually worked on the night of the wreck and only four of which worked by the time of trial. (T. p. 193/7-11; 206/25) Cagle admitted having no training relative to his surveillance system. (T. p. 213/10-12) His system's stationary cameras record continuous surveillance footage directly onto the system hard drive, and there is no removable tape or disk. (T. pp. 207/12; 258/2-16) His system retains the footage for about six months, then records over it. (T. p. 267/15-24) Cagle testified that Tr. Duncan told Cagle what time to begin playback for recording the Video; Cagle fast-forwarded through portions of the Original; and the Tr. Duncan's Video copy omitted what he fast-forwarded through, nor is all of Cagle's monitor screen visible on the Video. (T. p. 200/24 – 202/1; 209/15-19; 217/1-4; 274/4-21)

Tr. Duncan testified that the Video is the same as what he recorded that day off Cagle's monitor (T. p. 279/10) except that his camcorder recorded ambient noise in the room and that noise was edited out (T. pp. 222/22 – 223/4); the time stamp numbers visible across the top of the frame are part of Cagle's Original footage (T. p. 281/14-18); and, because M.A.I.T. stores so much video data, he chose to limit his recording to the particulars that he needed. (T. pp. 225/14-21; 227/23 –

228/11; 281/19 – 282/4)

No attempt was made to preserve the Original, despite that Cagle testified it could have been downloaded. (T. p. 214/1-11) And no attempt was made to capture any footage of the hours before or after the wreck. Of particular significance, no attempt was made to capture any daytime footage, which likely would have been brighter and clearer and relevant for comparison purposes.

Duncan and others on the M.A.I.T. team did, however, take color video of the vehicles and the roadway in daylight hours and these were combined and uploaded to the M.A.I.T. computer, maintained there, and added to the disk. (T. pp. 282/18 - 283/8) But none of these was made from the viewpoint of Cagle's surveillance cameras and they serve no comparison purpose.

Plaintiff also objected that the Video was not produced in discovery and the Sheriff did not identify a single expert witness who could interpret the Video. The Sheriff's counsel believed they provided the Video to Plaintiff's counsel in April 2016, but Plaintiff's counsel emphasized to the court that it was first received more than a year later, at mediation in June 2017. (T. p 62/16-25) Thus, by the time Plaintiff knew the Video existed, more than six months had passed, the surveillance system had already taped over the Original, there was no way to compare the two for accuracy and Plaintiff was deprived of access to the twenty-four hours of footage.

And the Video had an unfairly prejudicial effect even before trial. Five days after the wreck, Dep. Holmes told investigators that, five to ten seconds after the first impact (Holmes/King), he was still sitting in his car, about to call dispatch, when the second impact occurred (Watts/King). (P's Memo of Law Supporting her Motion *in Limine;* P's Ex. 3, Holmes 8/20/2013 interview, p 8; and T. p. 334/6-25) Two years later, he testified in a discovery deposition that, after repeatedly viewing the Video and being told by a State investigator that the time between impacts was actually forty-one seconds, he changed his estimate and testified that there had been enough time for Mrs.

Watts to avoid hitting Ms. King's vehicle:

> A: ... *I've since learned, based on the video* that was obtained, that i*t was 41 seconds between the two.*

(Holmes 8/15/2017 dep. p 38/13-14) (emphasis added)

> Q: And who showed you the video?
> A: I can't remember exactly the *first* time I saw it, but I was made aware of the video from Corporal Duncan with South Carolina Highway Patrol.

(Id p 38/25 -39/3) (emphasis added)

> Q: Okay. And you also indicated that that video assisted you with a time frame between the two accidents.
> A: I wouldn't say it assisted me but, again, *I was informed* that there were 41 seconds between the two crashes.
> Q: So, someone told you that?
> A: Yes sir."

(Id. p 39/9-14) (emphasis added)

> Q: Alright. So, when you told him 5 to 10 seconds, whether you did or didn't, that was not necessarily correct, is what you're telling me now?
> (objection omitted)
> A: Again, I would not necessarily agree with, I guess, the way you're phrasing the question, but I'll answer it. It's not that it's not truthful, or not accurate, it's just that, again, having gone through that situation, *that was what it felt like. But*, again, obviously, *I have since learned that it was a longer period of time.*
> Q: And that's based on the video you saw.
> A: *Based on*, I believe, *the findings by South Carolina Highway Patrol, yes* sir.

(Id. p 50/11-24) (emphasis added)

> Q: Okay and could you tell me again who showed you the video?
> A: I can't remember the *first* time I saw it. But, again, *in my interview with Corporal Duncan I know we made reference to it.*"

(Id. p 51/12-16) (emphasis added)

Holmes' *de bene esse* testimony, a year after his discovery deposition, included the following:

> Q. Well, would you agree with the five to 10 seconds between the two collisions?
> A. Again, I think we've already *discovered* that after I was just involved in an accident and *based on what the MAIT team determined* that it was *actually* -- (objection omitted) - it

was a considerable more of time -- more amount of time. So *obviously my perception of time was a little off*, but I don't think my facts are.

(Holmes 3/16/2018 Dep. p 57 /11-16 and 22-25)

Q. All right. But you're basing that, in fact, on what someone else has told you, then.
A. What the *published MAIT report concluded, yes*, sir.
Q. Something that somebody else prepared and had told you.
A. *Yes*, sir.

(*Id.* p 58/1-7) (emphasis added)

At trial, Plaintiff objected to this video testimony as being the result of the prejudicial effect of the Video and the hearsay M.A.I.T. report based on the Video. After viewing the Video, the court struck the objectionable testimony, and the remainder was played in evidence at trial. (T. p. 71/5-7; 75/17-18)

Dep. Holmes testified that he made the left U-turn in order to pursue a vehicle speeding in the opposite direction. (T. p. 75/17-18; Holmes video dep. pp. 16/7-13; 16/20 -17/4) Were there such a vehicle on the road that night, Mrs. Watts contends, its speeding lights should have been visible on the Video at a time prior to the time the wreck was called in, but this time does not appear on the Video.

The court ruled that the Video was admissible. (T. p 258/2-4) Prior to closing argument, Plaintiff's counsel asked that there be no commenting on the Video during closing argument, but the court ruled that counsel could comment on what was in it, but not add to it. Plaintiff objected and was overruled twice as to defense closing argument comments on the Video and these comments are a second source of unfair prejudice that resulted in the defense verdict and this appeal.

ARGUMENT

I. STANDARD OF REVIEW.

The Court of Appeals will reverse the trial court's discretionary evidentiary rulings on "abuse of discretion or the commission of legal error prejudicing the [appellant]". *Wright v. Craft*, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006). That abuse or prejudice may result from admission of relevant evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.* (citations omitted). "Prejudice in this context means there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 366, 827 S.E.2d 183, 188 (Ct. App. 2019), *reh'g denied* (May 13, 2019), *cert. granted* (Nov. 1, 2019) (citations omitted).

Likewise, the appellate standard of review of a motion for new trial "is limited to determining whether there was an abuse of discretion. *BB & T v. Taylor,* 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006).

II. MRS. WATTS IS ENTITLED TO A NEW TRIAL BECAUSE THE VIDEO WAS UNFAIRLY PREJUDICIAL TO THE VERDICT.

Mrs. Watts objected to the admission of the unauthenticated and unfairly prejudicial defense Video at trial, but she was overruled. The jury entered a defense verdict and Mrs. Watts timely moved for a new trial because the defense Video had worked unfair prejudice against her. To be clear, Mrs. Watts does *not* contend that the Video exhibit is different, in any objectionable respect, from the Video recorded by Tr. Duncan. She contends that it is materially different from the Original and that both the Video and the Original were not authenticated according to Rule 901.

She contends that the Video exhibit does not qualify as an admissible "print" or "duplicate" of the *Original*, under Rule 1001, 1002 and 1003 SCRE because Tr. Duncan's image is added, while 99.99% of the Original is omitted from the Video. The Video was made by Tr. Duncan using an unreliable method or process, which resulted in Duncan's image being reflected onto Cagle's monitor and superimposed onto the Video. The method was also unreliable because it generated a vastly incomplete copy. There are omissions resulting from fast-forwarding during copying and omissions by Duncan's determination to record only a few minutes of 24/7 surveillance footage.

Under Rule 1001(b) SCRE *"A "duplicate" is a counterpart produced by ... electronic re-recording, or ... other equivalent techniques which accurately reproduces the original."* Rule 1001(b) SCRE There is no dispute that Duncan's image appears throughout the Video but was not on the Original. (D's Ex. 6) The Video thus is not an 'accurate reproduction' of the Original surveillance footage.

"To prove the content of a ... recording, or photograph, the original ... is required, except as otherwise provided in these rules or by statute." Rule 1002, SCRE. The Original was self-destroyed six months after it was recorded in August 2013. Under Rule 1003, SCRE, "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Here, the Video exhibit is materially different from the Original, but even if the Video qualified as a "duplicate", the authenticity of the Original itself is legitimately questioned. No witness could substantiate at what time the Original was recorded. Tr. Duncan could not testify to the accuracy of the time stamp on Cagle's footage. Cagle testified that its time stamp was accurate, but the time stamp begins twenty minutes after the wrecks were called in.

If the time stamp was accurate, the Video, beginning twenty minutes after the wrecks, is

irrelevant and confusing at best. This is a "circumstance" under Rule 1003, making it "unfair to admit the duplicate" into evidence.

If the time stamp is *not* accurate, this begs the question of what is *accurate* in the Original. Cagle had no training and four of his system cameras did not work at the time of the wreck. Eight did not work by the time of trial, yet he thought his system worked well. (T. pp. 213/10-12; 214/7-8) Thus, his testimony is not adequate to authenticate the Original's accuracy in any respect. Tr. Duncan could not authenticate it because he lacked personal knowledge.

Likewise, the Video is not authenticated as an accurate reproduction, under Rule 1001(b) SCRE, because the portions Cagle fast-forwarded through are *omitted* from the Video and the whole Video is only fifteen and one-half minutes, while the Original footage was 24/7 continuous surveillance. (D's Ex. 6) There are 1440 minutes in twenty-four hours. The Video constitutes only .01% of the Original twenty-four hours of footage surrounding the time of the wrecks. While that small amount of footage may have been sufficient for Tr. Duncan's purposes, the *Plaintiff was unfairly deprived of access to 99.99% of the Original footage.*

Under Rule 901(a) SCRE authentication is a condition precedent to admissibility. It can be satisfied by evidence that the thing in question is what its proponent claims. Here, the Sheriff claimed that the Video was admissible as a copy, *print* or *duplicate* of Cagle's Original surveillance footage. (D's Response to P's Motion for New Trial, pp. 2-6) Mr. Harter argued at trial: "This is video footage of Highway 276 between the hours of 10:00 and 11:00 when this accident occurred, when these accidents occurred. There is no ifs, ands or buts about it." (T. pp. 253/23 – 254/1) At the post trial hearing he argued "it's an accurate portrayal of what happened out there on that roadway that night." (T.Vol. II p. 17/10-12) "And there's no dispute -- there's no doubt that that video was in real time, 60 seconds to a minute, and they were counted off on the counter. 60

seconds to a minute." (T.Vol. II p. 16/22-25)

This is not correct. "Real time" was not demonstrated merely because the time stamp counted off seconds. The passing seconds were not measured in the courtroom and at no time was evidence presented that the Original kept correct time. The Video is obviously not an accurate portrayal of the events on the road, because none of the vehicles could be identified from that portrayal. More to the point, the Video is not an accurate reproduction of any portion of the Original because of Duncan's superimposed image and because it is only .01% of the Original footage. Plaintiff submitted her arguments and authorities in detailed memoranda of law both *in limine* and post-trial. (T. p. 15/19-21; T.Vol. II p. 11/7-8; P's Memo in Support of her Motion *in Limine*; P's Memo in Support of Motion for New Trial)

The court admitted the Video into evidence finding that "the probative value does outweigh any unfair prejudice to the plaintiff." (T. p. 258/1-3) But, under Rule 403, SCRE relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." As shown herein, the Video is of such poor quality that its probative value is extremely low. Further, because it is silent, black and white, and does not depict either of the impacts at issue, its probative value is far outweighed by its unfair prejudice, confusion of the issues, and tendency to mislead the jury.

In denying Mrs. Watts' motion for a new trial, the court found that the "surveillance video received into evidence at trial was authentic and relevant, and it was not prejudicial to any party." (Order denying P's motion for new trial, p. 5) It found:

> The video admitted at trial complies with Rule 1001, 1002, 1003 and 1004. Rule 1001 indicates that an original of a photograph includes the negative or any print therefrom and the video recorded by Al Duncan is actually a print of the images shown on Matt Cagle's Recycling Center surveillance video. It is a duplicate of the same.
> ...

> There is no legitimate and/or genuine question raised here as to the authenticity of the original.

(Order denying P's motion for new trial, p. 4)

These findings err because the Video was *not 'authentic'* as it was not a "print" or Rule 1001 "duplicate" of <u>any part</u> of the Original surveillance. Duncan's image was not in the Original, but it appears throughout the Video. Cagle's fast-forwarding caused portions of the Original to be omitted from the Video and 99.99% of the Original footage is not on the Video. And, there was no longer an Original from which the court could determine how much of those twenty-four hours of surveillance footage is actually relevant. The Video thus does not qualify as a "*print*" or "*duplicate*" of the Original surveillance footage under Rule 1001 and it is not admissible under Rule 1003 because its authenticity is seriously challenged.

The Sheriff elicited testimony from Cagle that the run speed of the Video was accurate, "real time". And the court found: "The video played at trial was in real time and there were no breaks, interruptions or alterations." (Order denying P's motion for new trial, p. 4) But on its face, the Video did have "breaks", "interruptions" <u>and</u> "alterations" (Tr. Duncan's added image throughout; omission of 99.99% of the Original and omissions caused by fast-forwarding). By viewing the Video, this Court will see that the testimony offered was inadequate to authenticate the Video. Cagle had no *training* relevant to surveillance systems; and his *use* of surveillance did not show that he *understood* how to use it. He thought the time stamp was accurate, when its time stamp is off by twenty minutes, he did not know how to download footage from it and he did not keep it in good working order – four of its twelve cameras did not work at the time of the wreck and eight did not work at trial. (T. pp. 213/10-12; 214/7-8)

The inaccurate time stamp concerned the court, who questioned Tr. Duncan about it.

"THE COURT: But, my question is, what I'm concerned about, Mr. Duncan, is if, in fact, the crash happened at 10:38 and the evidence indicates that both crashes were very close in time, would that mean that the time of the Cagle recording would be almost 20 minutes off? Would it tell me that? Is that what it's telling me? *If the crash happened at 10:38 but the recording equipment says it happened at 10:58, then would the recording equipment be off 20 minutes?* ...

[DUNCAN]: ... *As far as the time goes on this, I have had conversation with Mr. Cagle,* as I'm sure you're aware. *I don't know how well he functions with keeping* [objection omitted] *things up to date to make sure that the time is being kept up with to be exact.* ... So would it be the first time that a camera has been off in relation to what time something actually occurred? No, sir."

(T. pp. 248/18 – 249/1; 249/14 – 250/10) See, also, P's Ex. 1: Sheriff's Incident Report, showing call time as "2237" or 10:37 p.m.; D's Ex. 6, beginning at 10:57; and Cagle's testimony that the Video begins at 10:57 p.m. on both channels. (T. pp. 196/10; 204/19; 210/12-24)

This unresolved time discrepancy bars authentication. See, e.g., *United States v. Oriach,* 222 Fed. Appx. 312, 315-16 (4th Cir. 2007) (holding district court erred in admitting the photographic exhibits as having been taken on the specified date and time without proper authentication because detective "could not testify that photographs were generated by a *reliable* imaging process"; detective was "unable to testify from *personal knowledge* that the photographs were actually taken at the *specified date and time*"; he "was *not present* on the scene at the time the videotaping occurred"; and, "the videotape itself contained an *inaccurate date stamp*") (emphasis added).

Here, as in *Oriach, supra,* Tr. Duncan could not testify that the surveillance equipment kept reliable, *accurate* time. "[Duncan] As far as the time goes on this ... I don't know how well he functions with keeping [] things up to date to make sure that the time is being kept up with to be exact." (T. p. 249/21 – 250/3 (objection omitted)) Neither Cagle nor Duncan was present on the night of the wrecks, when the surveillance equipment recorded the *Original* footage. Cagle

testified that he discovered his damaged fence the day after and viewed the footage then for the first time. (T. pp. 194/4 – 195/2) Thereafter, law enforcement was notified about the footage for the first time. (T. p. 211/10-14) And, also as in *Oriach*, the Video time stamp is inaccurate, beginning twenty minutes *after* the wrecks. Thus, the evidence failed to authenticate the Original or the Video under Rules 1001, 1003, and 901 SCRE.

See, also, *State v. Brown*, 424 S.C. 479, 489, 818 S.E.2d 735, 740–41 (2018) (holding that testimony "failed to authenticate because it *shed no light on the accuracy*" of the items; "argument that authentication was fulfilled through other means fails to appreciate the nature of GPS records and that these records are g*enerated and result from, at least in part, the process or system used by a machine"*; the records were "*not in sequential or even chronological order*", "contained *inconsistent* serial *numbers*" and "*time* and date *gaps*") (emphasis added).

> As recognized by the Fourth Circuit Court of Appeals, "Any concerns about the reliability of such machine-generated information is addressed through the process of authentication ...." *United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007). "When information provided by machines is mainly a product of 'mechanical measurement or manipulation of data by well-accepted scientific or mathematical techniques,' " then "a *foundation* must be established for the information through authentication, which Federal Rule of Evidence 901(b)(9) allows such proof to be authenticated by evidence 'describing [the] process or system used to produce [the] result' and *showing* it 'produces an *accurate result*.' " *Id.* (citation omitted).

Id., 424 S.C. at 489–90, 818 S.E.2d at 741 (emphasis added). In other words, Cagle's blanket lay witness opinion that his system's time stamp was accurate did not "show" that the system produced an "accurate result" because he failed to demonstrate an understanding of how it worked and had no training on it that would provide a foundation for such testimony.

Authentication of mechanically produced evidence is made under Rule 901(b)(9) SCRE because "*evidence derived from the operation of a machine* or instrument normally *depends for its validity on the premise that the device was in proper working order*". *State v. Brown*, 424 S.C. at

490, note 9, 818 S.E.2d at 741 (citations omitted) (emphasis added). That authentication failed in this case.

> "With the exception of subsection (b)(10) ... [Rule 901, SCRE] is identical to the federal rule." Note, Rule 901, SCRE. This remains true even after the Federal Rules of Evidence were restyled in 2011 as there was "no intent to change any result in any ruling on evidence admissibility." Fed. R. Evid. 901 advisory committee's note to 2011 amendment.

State v. Brown, 424 S.C. 479, 489, note 6, 818 S.E.2d 735, 740 (2018). Thus, federal precedent regarding Rule 901 authentication is directly relevant here.

The Video failed authentication under Rule 901 SCRE and is unfairly prejudicial under Rule 403 SCRE because it consists of extremely hazy and indistinct black and white images, that are obscured by the added ghost image of Tr. Duncan, and are further obscured by the white time stamp across the top of the frame. (D's Ex. 6) The Video has no audio[2] from which a jury could infer anything. The Video does not depict either of the vehicle impacts at issue, nor the placement of any vehicle before the impacts; nor blue lights, nor any distinct vehicle, nor any identifiable person, or even the roadway. The most distinct image throughout is Duncan's ghost image. (D's Ex. 6)

When video evidence such as this is of "such poor quality that its admission is more prejudicial than probative, the remedy ... would be to redact [those portions from] the video and exclude testimony about [it]." *State v. Gordon*, 414 S.C. 94, 100, 777 S.E.2d 376, 379 (2015) (holding that admission of a video was error; because the issue to which the video was relevant "focuses on eye movement, common sense dictates that the head *must be visible on the video.*")

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[2] Tr. Duncan testified that the sound was removed from the Video exhibit to avoid confusion from the background noise around him, captured by his camcorder when he filmed what played on Cagle's monitor. (T. p. 222/22 – 223/4) Cagle testified that his Original surveillance footage has no audio. (T. p. 197/2)

Id. at 99, 777 S.E.2d at 378 (emphasis added)). The *Gordon* Court would, in this case, require that the impacts and the vehicles must be visible on the Video for it to be admissible on the issues of proximate cause and comparative fault.

The *combined effect* of all of the problems with this Video is confusion, conjecture and speculation by the jury as to what the Video does not show – (1) the impacts; (2) the distance between Dep. Holmes and King before the first impact; (3) whether they were in the same lane or different lanes; (4) if the same lane, whether it was the left or right travel lane; (5) whether Dep. Holmes' rear blue light was on; (6) whether it was visible to Ms. King; if so, (7) for how long before the first impact – all issues relevant to Dep. Holmes' negligence in making the U-turn; (8) the distance between King and Watts vehicles at the time of the first impact; (9) whether Holmes' rear blue light was visible to Mrs. Watts after the first impact, despite that it was facing in the opposite direction; and, if so, (10) for how long before her impact; and, (11) what amount of time passed between impacts.

Speculation on these eleven factual issues unfairly prejudiced Mrs. Watts because the overwhelming weight of the other evidence proved that Holmes was negligent and proximately caused Mrs. Watts' wreck and that Mrs. Watts was not comparatively at fault for her wreck:

(1) Dep. Holmes did not give due regard and attention to vehicles around him – he lacked personal knowledge of close proximity to him of other vehicles when he made his U-turn. He only testified to Mrs. Watts' location based on the placement of impact with his vehicle. "[Q] Now, it's your testimony that Ms. King was behind you in your lane, the No. 1 lane? [Holmes] -- based on the fact of how she struck my vehicle, yes, sir." (Holmes video dep. pp. 52/24 – 25/2) He testified "The -- there wasn't a lot of traffic on the road. And I just remember a -- a vehicle traveling in the No. 1 lane, again, probably going at or around the speed limit – it didn't seem to

be going particularly fast – but basically traveling down the hill." (Holmes video dep p. 24/14-19); Ms. King testified that she was two car lengths behind Dep. Holmes. (T. pp. 88/24-25; 90/16-17) Joe Williams testified he was two car lengths behind Mrs. Watts. (T. p. 120/1-2) And Ms. King testified that Mrs. Watts hit her from the rear two seconds after the first impact. (T. pp. 91/3-4; 93/5-8; 102/11 – 103/3; 112/3-5);

(2) Dep. Holmes twice testified that he did not use a siren or warning other than his rear blue light and automatic brake lights, before making the U-turn, and this is consistent with his lack of awareness of the close proximity of the King vehicle. (Holmes video dep. pp. 17/2-16; 50/13-20) and "I have a little light control module that controls my blue lights and my siren. I would have put on -- put that into first position which is *just my rear blue lights[.]*" (excerpt of Holmes 8/15/2017 dep. read into evidence) (emphasis added) (And see T. p. 331/13-16);

(3) Ms. King testified that Dep. Holmes was in the lane to her right and slightly ahead of her, by two car lengths, when he made the left U-turn in front of her without a siren and without time for her to avoid hitting him. (T. pp. 86/10-18; 88/12-25; 90/16-17; 92/11-16; 93/11-21; 96/1-15); and,

(4) Mrs. Watts, Dep. Holmes, Cagle and eyewitness Joe Williams testified to visibility conditions requiring *extra* care by Dep. Holmes - the location of the wrecks was over the crest of a hill and very dark at that time, despite the presence of vehicles with headlights on. Mrs. Watts testified it was so dark she did not see the stopped King vehicle until just before impact. (T. p. 150/4-22) Joe Williams testified it is downhill and "It's dark down there. I didn't know what she had hit" (T. p. 120/16-17; 127/2-5) Ms. King testified that it is downhill there. (T. p. 98/14-15) Cagle testified that his business (where Mrs. Watts hit his fence) is located on the slope of a hill as the road goes downhill. (T. p. 270/6-8) Even Dep. Holmes testified that it was over the crest

of a hill and so dark there that he could not describe the speeding vehicle that prompted him to try to make the U-turn. (Holmes video dep. p. 16/2-25)

Under Rule 403 the Video unfairly prejudiced the outcome because its flashes of white on a hazy black background (obscured by the white time stamp across the frame and further obscured by Dep. Duncan's ghost image) begins twenty minutes after the wrecks occurred and does not depict the events at issue. See, *United States v. Williams*, 271 F.R.D. 1, 3–4 (D.D.C. 2010) (excluding video under Rule 403 FRE[3] in part because there was "no evidence that the videotape contains an *accurate depiction of the events*") (emphasis added).

> [A] court must take special care to ensure that a demonstration *fairly depicts the events at issue* because demonstrative evidence *is highly persuasive*. ... [T]he video was calculated to cause the jury to accept [the proponent's] *theory* over [the opponent's] *evidence*. By unfairly prejudicing the jury on the *pivotal issue in the case*, it is likely that the video's admission had a *substantial prejudicial effect, warranting reversal.*

Burchfield v. CSX Transp., Inc., 636 F.3d 1330, 1337–38 (11th Cir. 2011) (citations, quotation marks and brackets omitted) (emphasis added).

> Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the *danger of unfair prejudice, confusion of the issues, or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis, such as an emotional one.

State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) (citation omitted) (emphasis added).

This "danger of unfair prejudice" was unquestionably demonstrated first when the Video

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[3] Rule 403 SCRE and Rule 403 FRE were "identical" until the federal rule was amended December 1, 2011, ""as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules." Rule 403, FRE, advisory committee's note. The changes to Rule 403, FRE, are "stylistic only," with "no intent to change any result in any ruling on evidence admissibility." *Id.*" *State v. Collins*, 398 S.C. 197, 208, 727 S.E.2d 751, 757 (Ct. App. 2012), *rev'd, on other grounds*, 409 S.C. 524, 763 S.E.2d 22 (2014). For this reason, federal precedent on Rule 403 SCRE analyses is considered as persuasive by our appellate Courts and is relevant here.

caused Dep. Holmes to change his estimate of the time between impacts in his testimony. Plaintiff objected to admission of portions of Dep. Holmes' *de bene esse* video deposition in which he offered a new, longer estimate of the interval between impacts, because it was based on having viewed the Video and having been told by a State Police investigator that, *based on the Video,* the time between impacts was actually 41 seconds. (T. pp. 9/21 – 14/6) The Sheriff agreed to redact all but a few of the objectionable portions. (T. p 8/4-19) The court reviewed Plaintiff's memorandum regarding Dep. Holmes' objectionable testimony (T. p. 18/17-20), then sought argument as to Plaintiff's objections to the Video underlying Dep. Holmes' changed opinion. (T. pp. 19/13 – 26/17) After viewing the Video, the court ruled that remaining objectionable video deposition testimony, on which counsel could not agree, would be redacted and the remainder was played in evidence at trial. (T. p. 71/5-7; 75/17-18) But the fact remains that one of the people actually involved in the wrecks, present at the time and place of the wrecks, was persuaded by "highly persuasive", *Burchfield v. CSX Transp., Inc.*, 636 F.3d at 1337–38, Video, that does not depict the events at issue to change his mind about the time between them.

The jury's finding that Dep. Holmes was not negligent in making his left U-turn, on an unlit and very dark stretch of road at night, without a siren, without overhead flashing lights or even a turn signal, when there were at least three other vehicles following close behind him, was the *full* effect of this "unfair prejudice". And the court erred a second time by denying Plaintiff a new trial as a result of this unfair prejudice.

Saltz held that relevant and *authentic* evidence that defendant was absent from school on a specific date *unfairly prejudiced* the appellant, *confused* the issues, and *misled* the jury, because it *encouraged the jury to speculate* that this evidence "*must be significant to the case in some way unknown to them*" and, for this reason, it should have been excluded under Rules 401 and 403

SCRE. *Id.* at 128, 551 S.E.2d at 248 (emphasis added).

Likewise, here, the Video invites the jury to speculate that the Video is significant to what is unknown because it is not on the Video. While speed, distance, lanes, impacts and blue lights may be *hinted at* on the silent, indistinct, black and white Video, those things are not *depicted* on it.

In South Carolina, evidence is not admissible if it "allow[s] the jury to arrive at a verdict through *surmise, conjecture, or speculation*". *Weddle v. Charleston Cty. Sheriff's Office*, No. 2016-002526, 2019 WL 3715004, at *2 (S.C. Ct. App. Aug. 7, 2019) (citing 22 Am. Jur. 2d *Damages* § 933 (1988) (emphasis added). All evidence must "enable the factfinder to make a determination with reasonable *certainty or accuracy*" and neither "the existence, nor amount of damages can be left to *conjecture, guess or speculation.*" *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991) (citation omitted) (emphasis added). Evidence presenting *"speculative, theoretical,* and *hypothetical* views" should not be submitted to a jury. *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citation omitted) (emphasis added).

> Persons who have to act in the face of sudden and imminent peril, are not to be judged in the light of later events, but are to be judged under all the circumstances which surround them at the time, by the standard of what a person of ordinary prudence would have been likely to do under the same conditions.

Watson v. Aiken, 243 S.C. 368, 373, 133 S.E.2d 833, 836 (1963).

In the face of the sudden emergency created by Dep. Holmes' U-turn, Ms. King and Mrs. Watts were *not* required to avoid the impacts that followed. They were required only to act with the same care as any ordinary person. But the defense offered the Video to prove that Ms. King and Mrs. Watts could and *should have* avoided this accident.

> [Harter] ... every motorist has a duty to maintain a proper lookout, to pay attention to what's happening ahead of them, it's common sense, and to brake, stop, slow, or *do whatever you*

need to do in order to avoid a collision with another vehicle.

(T. p. 413/4-8)

> [Harter] ... *the proximate cause of this accident*, because of the roadway conditions, the environment, that *the proximate cause of this accident was, for whatever reason, [Mrs. Watts] was not paying proper attention.*

(T. p. 414/5-9)

No evidence was presented from which to infer that Ms. King acted *unreasonably* under the circumstances of Dep. Holmes' U-turn. Her testimony was unrefuted:

> Q Okay. Did you try to avoid the collision with the sheriff's car?
> [Ms. King] Well, I didn't have time to do anything to avoid anything. It happened so fast, so -

(T. p. 95/9-12)

No evidence was presented from which to infer that Mrs. Watts acted as anything other than a person of ordinary prudence, under the circumstances of Dep. Holmes' U-turn, on the dark, unlit road, without siren, flashing lights or turn signal, and with three vehicles (King, Watts and Williams) following close behind him.

Mrs. Watts was traveling on a familiar road at the speed limit of thirty-five to forty miles per hour a few car lengths behind Ms. King, heading home after bingo. (T. p. 150/4-22) Mrs. Watts did not see the Holmes/King impact in time to avoid hitting Ms. King; she tried to do so by veering to the left, but she hit Ms. King and crashed into Cagle's fence. (T. p. 151/4-24)

Mrs. Watts testified that it was dark where the wrecks happened. (T. p. 151/18-21) Joe Williams, who was not far behind Mrs. Watts, heading to his own home after bingo, testified: "It's dark down there. I didn't know what she had hit." (T. p. 120/16-17) Mr. Williams testified that before Mrs. Watts hit Ms. King, the only lights he saw were Mrs. Watts' lights ahead of him. (T.

pp. 131/2-12)

Dep. Holmes testified that the wrecks occurred "over the crest of the hill" and "where our vehicles came to a rest, I would say a couple hundred yards back there is a crest in the hill". (Holmes video dep. pp. 16/23; 18/3-5) And he himself testified that it was so dark that he could not identify the speeding vehicle that prompted him to try to make a U-turn and pursue it. (Holmes video dep. p. 16/13-17) He admitted that only his *rear* blue light was on at the time of his U-turn and that after he hit King, he was facing in the *opposite* direction, meaning that Mrs. Watts could not have seen that rear blue light as she approached the stopped King vehicle.

What Mrs. Watts did was clearly an act of ordinarily prudent judgment under these circumstances. "Where a motorist is suddenly placed in an emergency situation, through no fault of his own, and is compelled to act instantly to avoid a collision, he is not negligent if he makes a choice that a person of ordinary judgment might make if placed in the same emergency situation." *Estate of Haley ex rel. Haley v. Brown*, 370 S.C. 240, 244, 634 S.E.2d 62, 64 (Ct. App. 2006) (citation omitted).

It is undisputed that the impacts were only seconds apart, but the Video was used to convince the jury that there was a long time between impacts, so as to place liability on Mrs. Watts. No witness but Dep. Holmes testified that the impacts were more than ten seconds apart. And that was Dep. Holmes' initial estimate too, but he changed his mind based on the hazy, obscured, short but extremely persuasive Video that does not show either of the impacts. The jury speculated as to what the Video did not depict, so as to ignore the evidence that Dep. Holmes did not act with due care for the motorists around him when he attempted the U-turn in the dark.

As the court instructed the jury, "[t]he driver of an authorized emergency vehicle is not relieved from the duty to drive with due regard for all persons." (T. p. 343/23-25) Despite that Dep.

Holmes was not required to use his siren when pursuing a speeder, he *was* required to be aware of Ms. King's and Mrs. Watts' locations in close proximity to him[4] and to each other and to avoid hitting them when he made his sudden U-turn, using, according to him, only his rear blue light and brake lights for warning.

For these reasons, the court erred by admitting the Video into evidence and by denying Plaintiff's motion for new trial as a result of the unfairly prejudicial Video.

III. MRS. WATTS IS ENTITLED TO A NEW TRIAL BECAUSE DEFENSE COUNSEL'S CLOSING ARGUMENT UNFAIRLY PREJUDICED THE OUTCOME.

Before closing arguments, the court ruled and directed counsel as follows:

> THE COURT: Whatever the video shows, you can certainly argue that as they can, but if the video does not show something, then you certainly cannot – because it almost would be testifying, and certainly you cannot do that. ... So I'll allow you to argue what is on the video, but if it's not on the video, then you can't add to it.

(T. pp. 363/24 – 364/13)

> THE COURT: I'm not going to allow you to get to tell them this 41 seconds difference. They can reach their own conclusions.

(T. p. 365/4-6)

In closing arguments, the Sheriff's counsel repeatedly invited the jury to speculate as to determinative facts that are not depicted on the Video, i.e., the placement and distance between the Holmes, King and Watts vehicles before and after the first impact; length of time between impacts;

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[4] Mr. Williams testified that he was traveling about thirty-five miles per hour and was two car lengths behind Mrs. Watts. (T. p. 120/23 – 121/1) Ms. King testified she was two car lengths behind Holmes. (T. p. 90/16-17) Dep. Holmes testified that Ms. King was in his lane, "slightly offset behind my vehicle". (Holmes video dep. p. 33/14-16) But he does not appear to have been aware of the King vehicle at the time of attempting his U-turn. "Q Now, it's your testimony that Ms. King was behind you in your lane, the No. 1 lane? [Holmes] I -- based on the fact of how she struck my vehicle, yes, sir." (Holmes video dep. pp. 33/14-16; 52/24 -53/2)

the general lighting conditions on the road; the presence of vehicle lights at the time of the impacts; the color of lights visible at the time of the impacts. These things are not on the Video. Plaintiff's counsel objected twice, but the court overruled the objections, thereby signaling to the jury that the court agreed with defense counsel's implications – that if they looked well enough they would see on the Video that Mrs. Watts caused the wreck, despite Dep. Holmes' unsafe U-turn. A careful examination of the defense's closing argument is required:

> MR. HARTER: Now, Barton Holmes and Ms. King all say that Barton Holmes did a U-turn. And if he did a U-turn, *you could maybe see or expect where his lights would go.* So Barton Holmes, according -- if he had his lights on would be traveling in Lane Number 1 and make a turn that would have taken him back in the direction or faced his vehicle back in the direction of Laurens. *I invite you to look at this video on Channel 5 and pay attention to what is happening before. You see lights, I'm going to suggest, moving in each direction on 76. Lights moving. At some point in time, and I'm going to suggest to you it might be right around 58:07 that the video might show you some evidence that would indicate that there was lights that panned around in this direction and made possibly a U-turn.* But you decide that.
> MR. THOMPSON: Your Honor, we object to this testimony of Mr. Harter's about the video.
> THE COURT: He can argue the video so long as he does not add anything to what the video may depict.
> MR. HARTER: Thank you, Judge.
> THE COURT: You may proceed

(T. p. 416/5 – 417/1)

As detailed in the Statement of Facts and Argument above, the hazy, dark, black and white Video does not show any distinct or identifiable vehicle or other object, except for the reflected image of Tr. Duncan, which has no probative value or relevance whatsoever. Mr. Harter's comments above invite the jury to "*see*" Dep. Holmes' lights as he made his U-turn – none of which is distinguishable on the Video. And the court erred by failing to sustain Plaintiff's objection.

Cagle, who was familiar with his own property, testified that the Video shows "A vehicle come across and went through the fence." (T. p. 263/9-10) Tr. Duncan told the jury that the Video

captures lights going on 76." (T. p. 279/3)

No expert testimony was offered in this case, interpreting the Video and no lay witness identified any vehicle on the Video. No other evidence was offered from which the jury could make an inference that the Holmes, King or Watts vehicles were depicted there.

Compare, *State v. Fripp,* where this court determined that two lay witnesses could identify a person depicted on an unclear surveillance videotape whose admissibility and relative probativeness were challenged under Rule 403 as unfairly prejudicial. 396 S.C. 434, 438-40, 721 S.E.2d 465, 467-68 (Ct. App. 2012) (citations omitted). There, a suspect's image was caught on store surveillance videotape and witnesses identified him "based on their perceptions of Fripp" "during the time they had known and observed him in the Store. Brown ... knew Fripp very well and saw him all the time and he came into the Store frequently-once a day. Sometimes twice a day. She further testified *the videotape contained a good shot of his face* on one of the angles on the tape." *Id.,* 396 S.C. at 439, 721 S.E.2d at 467 (quotation marks omitted).

In another analysis of unfair prejudice under Rule 403 SCRE, this Court found the "fuller perspective" of such witness testimony "especially helpful where, as here, the photographs used for identification are less than clear." *State v. Mitchell*, 399 S.C. 410, 418, 731 S.E.2d 889, 894 (Ct. App. 2012) (citation omitted). Here, there was no such witness to identify any vehicle in the extremely poor-quality Video, and Mr. Harter's invitation to see lights panning around to make a U-turn invited the jury to speculate on what is not on the Video.

See also, *State v. Henley*, No. 2016-000844, 2019 WL 6720100, at *6 (S.C. Ct. App. Dec. 11, 2019) (affirming exclusion of evidence that "would have likely led to jury confusion because it would have invited the jury to speculate") (citing Rule 403, SCRE).

By failing to sustain Plaintiff's objection and by failing to give a corrective instruction, the

court heaped *additional* prejudice onto the case by signaling to the jury that it approved of Mr. Harter's suggestion that Dep. Holmes' U-turn is visible from lights on the Video. *See, e.g., State v. Sweet*, 342 S.C. 342, 351, 536 S.E.2d 91, 95 (Ct. App. 2000) ([T]he challenged argument clearly placed an adverse inference before the jury. Moreover, ... the comment ... was immediately objected to and allowed to stand uncorrected in the jury's presence, thereby allowing the jury to perceive it met with judicial approval.")

"Other cases refuse to hold that improper jury argument can be cured by a general instruction in the court's charge to the jury where an immediate curative instruction was needed." *Id.*, 342 S.C. at 351, 536 S.E.2d at 96 (citations omitted). *See, State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996) (Solicitor made improper comment, but "the trial judge, not wanting to exacerbate the situation, refused to give a curative instruction. We hold this was error. Furthermore, the trial judge's general charge, which was given shortly afterwards, did not cure the error.") *Id.* 320. S.C. at 530, 466 S.E.2d at 366.

Likewise, Mr. Harter's statements such as " But you decide that" did not cure the unfair prejudice caused by his improper invitations to speculate on what the Video does not show. Mr. Harter's powers are surely not greater than those of the presiding judge and even the court's jury charge is no cure, per *Pickens, supra*, where an immediate curative instruction from the court was necessary.

Moreover, Mr. Harter's comments, above, were followed by additional improper invitations to speculate on what is not in the Video:

> MR. HARTER: *Just look at Section 58:07 ... See if you see any lights pan to the left. And* then after that, *immediately after that, what happened in the King-Barton Holmes accident? The vehicles came to a stop, one facing toward Clinton, and one facing toward Laurens.* I'm going to *invite you to look to see if any of the lights which would be evidence of vehicles*

moving up and down 76 stop. I invite you to *look and see if you see any lights stop or become stationary. And that may be around 58:09.* Ladies and gentlemen, I want to ask you to *pay attention to the video, the surveillance video after 58:09,* and as you do, make your determination as to whether or not *you see vehicles drive in this direction* from Clinton -- from Laurens, I'm sorry, *toward Clinton passing those stationary blue lights. How many vehicles do you see drive past those stationary blue lights?* And then, ladies and gentlemen, I want to ask you to *focus or look at a section of the video at or around 10:58:47* and/or 46 -- 49 and see if you find anything worthwhile or *evidence that would indicate to you that Mrs. Watts' vehicle veers off from this roadway and strikes a fence.*

You know, I'm going to tell you, *I represent some radiologists sometimes*, and radiologists look at this world where *they look at images*, you know. *And they have findings on those images,* and sometimes those images are so findings [sic]. But you look at them. *They know what to look for. And sometimes when you look at images the first time, you don't see them, you don't see anything.* But then as you -- and, ladies and gentlemen, *y'all are detectives today* because you're looking for the truth, and that's what we want. I want the truth. Whatever it is, I want the truth.

And let me tell you something. I don't see this stuff as good guy, bad guy, you know. I'm old enough to think I want to come in here and I want to see the right thing done, and I want to see the truth come out. But *like the Waldo thing*, you know, the thing where they used to have the drawing and you would -- *there would be this image in there and you'd look for it*. Well, *where's Waldo* or whatever it is? Waldo, where is he? You know, where is he? And then you see him, and every time you look at it, you see Waldo, you know.

I'm going to suggest to you -- and I'm not asking you to review this thing bunches of times. You review it whenever you want. *But there are images in there that I think are enlightening that will support and prove important facts in this case, and they will prove, I submit to you, that there were lights on Ms. King's vehicle, Barton Holmes had lights on, and that there was a significant -- and you go with your calculations about the time delay between what this video shows as to what appears to be the collision involving Barton Holmes and Ms. King and then the later collision involving Ms. Watts*. But I'm trying to give you kind of the heads-up, the narrative, invite you to look at it again with your trained eyes, 24 eyes. You may see fine things much different than me. I invite you to do that.

But *I offer this to you as evidence that* I submit would indicate that *there were lights on out there, there was a significant time delay between these two impacts, that other vehicles move through the area without any difficulty, and that Mrs. Watts' vehicle sometime, multiple seconds later, you figure out when that is, she collides with the King vehicle.*

...

(WHEREUPON, Defendant's Exhibit Number 6, a video, was played in open court)
MR. HARTER: *Vehicle movement, lights. ... Lights stationary.*
MR. BRYAN: Your Honor, we had specific directions about comments.
THE COURT: Again, he cannot add anything that is not depicted on the video.
MR. HARTER: I won't. We won't. We aren't.

(T. pp. 417/2 – 420/9)

Once again, Mr. Harter invited the jury to "*see*" "*calculate*" and "*figure out*" from the Video what is not depicted: "*stationary blue lights*"; "*vehicles ... drive past those stationary blue lights*"; and "*Mrs. Watts' vehicle veers off from this roadway and strikes a fence*". He suggests that the jury has *expertise* they do not have, like "*radiologists*" or "*detectives,*", intimating that if they use this mythical skill they will "see" *hidden images*, as in "*Where's Waldo*". He suggests these powers will enable them to "*see*" images that "*prove*" what lights the *King and Holmes vehicles* had on; they will "*see*" images that "*prove*" a "*significant*" "*time delay*" between impacts; and, they will "*see*" "*other vehicles move through the area without any difficulty" between impacts*. But the jurors were not radiologists or detectives and no blue lights are on the black and white Video; no vehicle in the Video was identified by any testimony; and the impacts are not on it.

Suggesting that the jury had special skills was flattery, calculated to arouse their emotions, personal beliefs, intuitions, passions, biases and prejudices. It "invited the jury to base its verdict on passion *rather than reason.*" *Branham v. Ford Motor Co.*, 390 S.C. 203, 235, 701 S.E.2d 5 (2010) (emphasis added). "[C]losing argument must not appeal to the personal biases of the jurors ... [it] may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624-25 (1996). Closing argument must not include such a "naked ... appeal to the jurors' emotions". *Matter of Campbell*, 427 S.C. 183, 194, 830 S.E.2d 14, 20 (2019).

Suggesting to the jury that they were "detectives today" improperly suggested that their duty was to uncover evidence that was not on the Video. *See, e.g. State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502, (2018), *reh'g denied* (May 25, 2018), *cert. denied,* 139 S. Ct. 432, 202 L. Ed. 2d 318,

(2018) (noting that improper suggestions as to the jury's role may impact the burden of proof, and collecting cases) (citations omitted).

And, once again, by failing to sustain Plaintiff's objection, the court signaled its approval of these invitations to speculate and for the jury to use its non-existent radiologist/detective "*Where's Waldo*" powers to see what is not there. This is reversible error. *State v. Sweet*, 342 S.C. at 351, 536 S.E.2d at 95. These repetitive erroneous rulings on defense counsel's improper comments were not cured by the court's general instructions to the jury, because "immediate curative instructions" were necessary. *Id.* 342 S.C. at 351, 536 S.E.2d at 96 (citations omitted).

And the defense's improper comments did not stop there.

(WHEREUPON, Defendant's Exhibit Number 6, a video, continued to play in open court)

MR. HARTER: *47 is coming up. ... Stop.*

...

And when you go back to deliberate, the judge will give you a verdict form, and in that verdict form, you're going to be asked to check certain boxes and answer certain questions.

...

And then the other question or another question you might get to or might be required to answer was what and/or to what extent *was Mrs. Watts herself responsible or negligent?* And I would submit to you that *there is significant proof that Mrs. Watts' own driving* that evening, nice a lady as she is, *was unfortunately the cause and/or the reason for her injuries in this accident.* You heard what she described, *you saw the evidence*, you heard the witnesses. But, ladies and gentlemen, I submit to you that *the Sheriff's Office is not responsible to Mrs. Watts for her damages and/or injuries in this case.*

The evidence, I believe, *clearly shows* why and *how it happened*.

(T. pp. 420/10 – 422/5)

Once again, while the Video was playing before them, the defense told the jury, that the Video "*clearly shows*" "*significant proof*" that Mrs. Watts caused her wreck. Plaintiff did not raise a third objection at this point, but the error is preserved for this appeal due to the futility of yet another objection. Had she objected again, the court likely would have signaled its approval of the

defense's prejudicial comments a third time.

Our courts recognize a rule of futility of objection: "As to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks ... were such that any objection would have been futile." *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994). *See also, State v. McDaniel,* 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct. App. 1995) ("McDaniel's attorney objected twice. So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon defense counsel to harass the judge by parading the issue before him again."); *State v. Higgenbottom,* 337 S.C. 637, 640–41, 525 S.E.2d 250, 251 (Ct. App. 1999), *rev'd,* on other grounds, 344 S.C. 11, 542 S.E.2d 718 (2001) ("Apodictically, the tone and tenor of the judge revealed the futility of an objection.")

State v. Herring considered whether witness testimony that a flash of light on a business' surveillance video was a gunshot. 387 S.C. 201, 692 S.E.2d 490 (2009). The defendant objected that the lay witnesses lacked personal knowledge of the events and only viewed them on video. *Id.*, 387 S.C. at 216, 692 S.E.2d at 497–98. The trial court agreed and gave a curative instruction, that the Supreme Court held sufficient. *Id.* 387 S.C. at 217, 692 S.E.2d at 498. But here, after multiple improper comments, no curative instruction could un-ring the bells of confusion, speculation and judicial approval reverberating in the jurors' minds.

Defense counsel's multiple improper comments on the Video unfairly prejudiced Plaintiff's case because the Video itself was not admissible and the overwhelming weight of the admissible evidence showed that Dep. Holmes was negligent in making a U-turn in traffic, at night on a dark stretch of road, with no siren and with only a rear blue light for warning, causing the vehicles in close proximity to him to hit first him, then each other. Defense counsel's comments further unfairly prejudiced Plaintiff's case because the overwhelming weight of the admissible evidence

showed that Mrs. Watts acted as an ordinarily prudent person under the circumstances of a sudden emergency, by attempting to avoid the wreck by swerving to the left and attempting to apply her brakes.

Thus, the court erred each time it allowed the defense to make improper comments in closing argument and failed to give an immediate curative instruction; and it erred again when it denied Plaintiff's motion for new trial as a result of the unfair prejudice resulting from this commentary.

CONCLUSION

On the basis of all of the above and foregoing, Plaintiff requests that the Court reverse the trial court rulings as to the Video and as to improper closing argument and remand the case for a new trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LAURENS COUNTY

Donald B. Hocker, Circuit Court Judge

Appellate Case No.: 2019-001514

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant, Martha Foster Watts on Respondent Ricky W. Chastain, Sheriff Laurens County, South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on March 5, 2020, addressed to their attorneys as follows:

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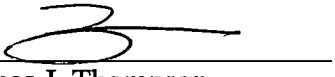

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March 5, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: **Martha Foster Watts v. Ricky W. Chastain, Sheriff Laurens County, South Carolina (2019-001514)**

Dear Ms. Kitchings:

You will find enclosed the Appellant's Initial Brief and Appellant's Designation of Matter to be included in the Record on Appeal and Proof of Service on Respondent's Attorneys of record.

Sincerely,

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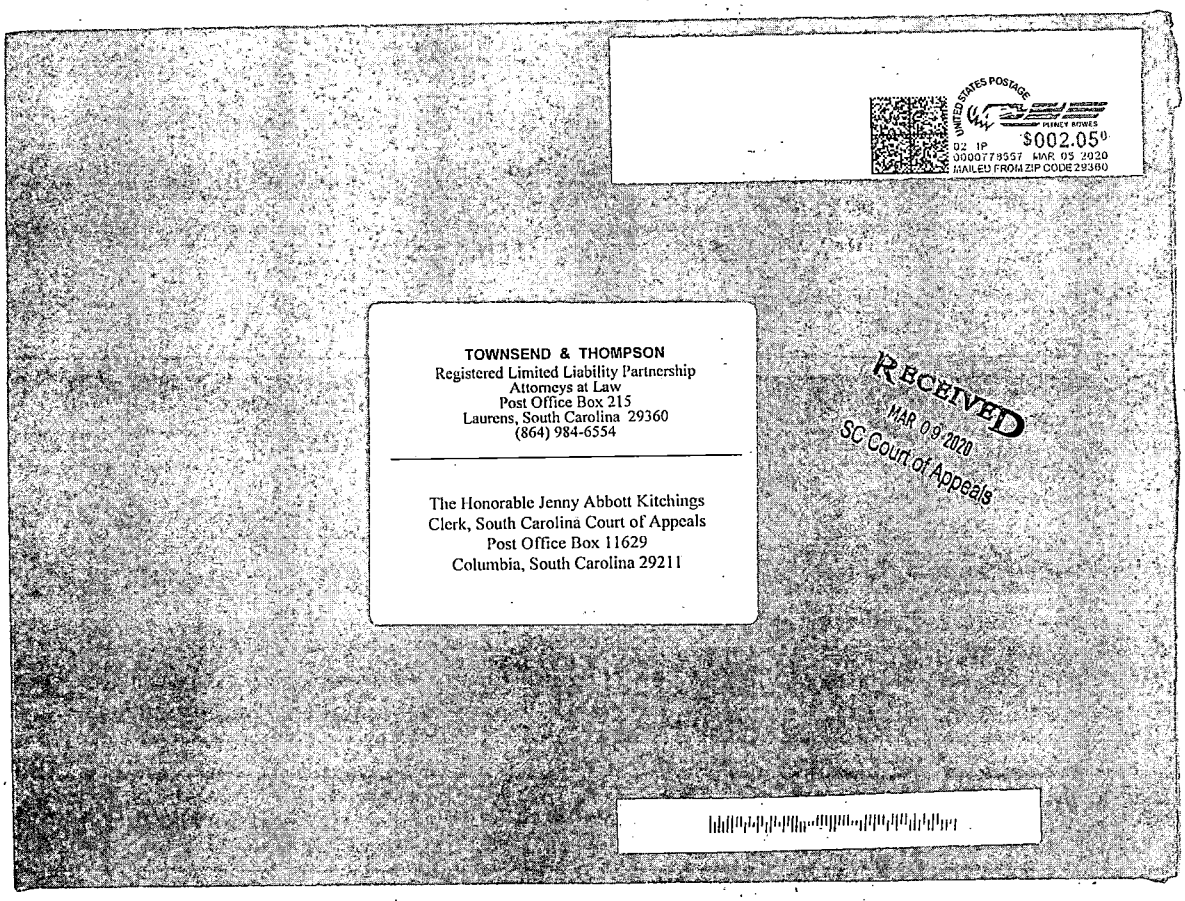
TJT/cav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