THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC 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 Final Reply Brief

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ARGUMENT

I. THE SHERIFF'S BRIEF CONTINUES THE IMPROPER DEFENSE TACTICS USED IN THE TRIAL COURT.

The very first *sentence* of the Sheriffs narrative begins with a significant misleading statement of fact:

> Plaintiff Martha Foster Watts (the Appellant), commenced this action on August 13, 2015 in the Laurens County Court of Common Pleas against Defendant Laurens County Sheriff's Office (the Respondent), *asserting a claim for negligence arising out of an automobile collision the Plaintiff had with a non-party, Sherill King* ("Ms. King").

(Initial Brief of Defendant-Respondent, p 2[1]) (emphasis added).

In truth, Mrs. Watts' complaint and amended complaint consistently assert a claim for negligence arising from a Deputy Sheriffs negligence in causing a wreck involving two collisions, in quick succession, the first between (later identified) Deputy, Barton Holmes ("Dep. Holmes") and Mrs. King, and the second between Mrs. Watts and Mrs. King. (R. p. 13-15; 20-22)

We all make mistakes. It is human nature. But the law is one of few remaining self-governing professions, and this self-governance depends upon enforcement of the duties of candor to the Court and fairness to opposing parties. "A lawyer shall not knowingly ... make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" RPC 3.3(a)(1). "Fair competition in the adversary system is secured by prohibitions against ... obstructive tactics ... and the like." RPC 3.4 (Comment 1).

Experienced attorneys prize collegiality too and, perhaps, we do a disservice by giving the benefit of the doubt when it appears that opposing counsel forgets his duty of scrupulous candor to the tribunal. In this case, defense counsel's tactics have repeatedly included overtly misleading

[1] (Mrs. Watts cites to Respondent's Initial Brief because she has not yet been served with their Final Brief.)

and outright false statements of fact in memoranda and argument to both the trial Court and this Court. The Sheriff's brief includes other significant misleading or overtly false statements of fact, similar if not verbatim to misleading statements made to the trial Court, as follows:

> In fact, Ms. King testified that Deputy Holmes' headlights, taillights and blue lights were on when the Plaintiff hit her vehicle. (R. p. 131, 136)

(Initial Brief of Defendant-Respondent, p. 4; 6)

The truth is that Mrs. King testified that Dep. Holmes' blue light was not on until after he caused the collision with her car; Holmes' car had been no more than two car lengths or twenty feet ahead of her in the right lane, while she was in the left lane, when he made a left U-turn in front of her without a turn-signal, blue lights or siren; she had no time to avoid the collision with him; and, he did not get out of his car until after the King-Watts collision, which was only a two seconds after the King-Holmes collision, as follows:

> **[Direct exam]** Q **Would it have been more than 20 feet**?
> A **No, sir**.
> ...
> Q Okay. So as you headed down that road, **he's two car lengths ahead of you**. Did anything unusual happen?
> A **Yes, sir**.
> Q Can you tell the jury what happened?
> AAs I was traveling towards Clinton, the Highway Patrol made an unlawful U-turn in front of me and it caused the accident. So when he did an unlawful U-turn in front of me, he caused me to hit him, and then **two seconds later I got hit from the back**.

(R. p. 117, line 1-2; p. 117 line 21 -p. 118, line 4) (emphasis added)

> Q ... And **when the sheriff made the U-turn, what lights or signals did you see**?
> A I didn't see **no lights or signal**.
> Q **Did he ever engage a light or signal**? Did he ever put one on?
> A **No, sir.**
> Q Okay. After you hit him, did he put a light on?
> A **No, sir**.

(R. p. 119, line 9-16) (emphasis added)

> Q Okay. And **how much time passed by as you best remember after you struck the rear of his car that another car hit the rear of your car?**
> A **Like two seconds later**.

(R. p. 120, line 5-8) (emphasis added)

Q Okay. Now, I thought you had earlier testified in other forums or hearings that the officer had put his lights on immediately after he hit you once he was over there in the median. Did you not testify to that?
A Yes, sir.
Q Is that correct?
A Yes, sir.
Q **So he did have a blue light on**.
A **Yes, sir**.
Q **But it was after he hit you**.
A **Yes, sir**.
(R. p. 120, line 11-21) (emphasis added)

Q Okay. Now, before you were struck by the car Ms. Watts was driving, did Officer Holmes get out of his car?
A No, sir.
Q Okay. **Did he ever get out of his car**?
A Yes, sir.
Q And when was that?
A **After I got struck by Ms. Watts**.
Q Pardon me?
A **After I got struck by Ms. Watts.**
(R. p. 120, line 24 -p. 121, line 8) (emphasis added)

Q Okay. Did you try to avoid the collision with the sheriff's car?
A Well, **I didn't have time to do anything to avoid anything. It happened so fast**, so –
(R. p. 122, line 9-12) (emphasis added)

Q I forgot one area that I wanted to ask you about. When Mr. Holmes turned in front of Okay. And **during the course of his turning in front of you, did he engage a siren**?
A **No, sir**.
Q He did not do that.
A No, sir.
Q Tell the jury when you first saw the blue light.
A **When I first saw the blue light**, that's when he turned did an unlawful U-turn in front of me, and he caused me to hit him. That's when I -- that's when I noticed it.
Q Okay. **After the metal had hit metal**.
A **Yes, sir.**
(R. p. 122, line 25 -p. 123, line 15) (emphasis added)

[Cross exam] A Yeah. **He was in the right lane, I was in the left**
lane.
Q Okay. He was in the right lane and you were in the left.
A. Yes, sir

(R. p. 128, line 2-6) (emphasis added)

> Q Okay. Now, I think you told us a minute ago that it was **how many seconds between** the time your car got hit and the time -- excuse me. How many seconds was it between the time you and the sheriff's car hit each other and you got rear-ended from the back?
> A **Two seconds**.
> Q Two seconds. So whoever hit you from the back was two seconds behind you, obviously, right?
> A Yes, sir.
> Q Okay. And **do you know how close that car was behind you**?
> A **I didn't know how close it was, but I know it was two seconds. It was fast, so.**
> Q So Mrs. Watts, according to what you're telling us now, was so close behind you that **her car hit your car within two seconds of the time you and Barton Holmes had your accident**.
> A **Yes, sir**.

(R. p. 129, line 11 -p. 130, line 3) (emphasis added)

> Q Now, I want to make sure I understand. **When was it that you said the deputy turned on the blue lights?**
> A I thought he -- I thought he did **when he did that U-turn in front of me**.
> Q And to make sure now, make sure, did you ever tell us under oath just like you're sitting here today that the deputy turned on his blue lights after your accident and **before** Ms. Watts hit you?
> A **Yes, sir**.
> Q You told us that.
> A Yes, sir.
> Q **In a deposition**.
> A **Yes, sir**.

(R. p. 130, line 10-23) (emphasis added)

The Sheriff's brief again misleads by stating:

> Deputy Holmes also initially estimated that the second collision occurred five to ten seconds after the first collision and then testified that the second collision occurred about forty seconds after the first collision. (Holmes Dep., p. 54)

(Initial Brief of Defendant-Respondent, p. 6)

The truth is that Holmes' deposition testimony as to the time between collisions was *excluded* from evidence by the trial Court on Plaintiff's argument that portions of Dep. Holmes' *de bene esse* video deposition (in which he offered a new, longer estimate of the interval between impacts than he originally told investigators) should be excluded because the revised estimate was

based on having viewed the Video (R. p. 711 and D's Exhibit 6) and having been convinced by a State Police investigator that, *based on the Video,* the time between impacts was actually 41 seconds. (R. p. 35, line 21 -p. 41, line 6) The court reviewed Plaintiff's memorandum regarding Dep. Holmes' objectionable testimony (R. p. 45, line 17-20), then sought argument as to Plaintiff's objections to the Video underlying Dep. Holmes' changed opinion. (R. p. 46, line 13 -p. 53, line 17) After viewing the Video, the court ruled that Dep. Holmes deposition testimony, on which counsel could not agree, would be redacted and the remainder was played in evidence at trial. (R. p. 99, line 5-7; p 102, line 17-18) Additionally, the court ruled that defense counsel could not comment to the jury that there were 41 seconds between collisions, as there was no testimony to that effect from any witness and the video does not depict the impacts:

> 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.

(R. p. 390, line 24 -p. 391, line 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.

(R. p. 392, line 4-6)

The Sheriff's brief falsely re-states his argument to the trial Court 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." (R. p. 494, line 22-25) In his brief, the Sheriff states "the video was playing in real time and sixty seconds were in each minute; therefore, the video fairly and accurately represented the time" (Initial Brief of Defendant-Respondent, p. 25)

The Sheriff's brief falsely states that, at 10:58:07 the Video "**clearly shows headlights** that swung wide and became stationary at 10:58:09 p.m. **It can be deduced from the video** that the first collision occurred then." (Initial Brief of Defendant-Respondent, p. 24) (emphasis added). As

the Court will see when viewing the Video, and Mrs. Watts hereby requests that the Court do so, no vehicle is identifiable in it and neither of the collisions is on the Video. (R. p. 711 and D's Ex. 6.) It is a blur of indistinct images time-stamped for twenty minutes *after* the wreck was called in by Dep. Holmes from the scene[2]. The Sheriffs brief also states, falsely: "The video later **shows sparks when the vehicles collided[.]"** (*Id.*)

But, as the Sheriff reluctantly concedes in his brief, the Video does not depict either of the collisions. (Initial Brief of Defendant-Respondent, p. 24) And it is inherently misleading to state to the Court that the Video "clearly" shows anything or that the time of the first collision can be "deduced" from this blurry and unreliable Video.

These statements of fact are consistent with the misleading defense tactics used at trial. The Sheriff argued to the trial Court that the Video "shows **Mrs. Watts's crash into the fence**. It shows **her car**. It shows s**parks coming from her car.** ... it shows **lights which indicate when the first accident happene**d. But it **actually shows her car running into the fence**." (R. p. 20, line 19-23) (emphasis added). Likewise, the Sheriffs brief to this Court states: "The video **clearly shows** that there are numerous lights on various vehicles before and at the time the **Plaintiff's vehicle** is shown crossing the highway and hitting a fence. The video also **shows other cars passing the first collision** without incident." (Initial Brief of Defendant-Respondent, p. 24) (emphasis added)

The first collision is not depicted on the Video and no vehicle is identifiable in it. Thus, the Sheriffs statements of fact in his brief are inherently misleading and prejudicial. In addition to arguing these misleading statements to the *courts*, the defense improperly misled the *jury* with similar statements as to what is visible on the Video, as addressed in Mrs. Watts brief, and in this

[2] Compare, P's Ex. 1, Sheriffs Incident Report admitted in evidence (R. p. 142, line 20-22), showing the incident was called in at "2237" or 10:37 p.m., versus D's Ex. 6, the Video beginning at 10:57 p.m.

Reply.

This appeal results from unfairness and obstructive tactics by defense counsel, in discovery and in response to Mrs. Watts' evidentiary motions, as well as unfairly prejudicial use of the Video and false statements in closing argument to the jury. This began with discovery abuse, for which Plaintiff gave defense counsel the benefit of the doubt, until the day trial began.

Mrs. Watts argued to the trial Court on the first day of trial, and to this Court in her brief, that the defense withheld the Video in discovery; Plaintiff was not made aware of its existence until a year after she requested photographic evidence; and it was first produced at mediation in June 2017, long after the original had been destroyed (R. p. 86-91) (And see, Appellant's Final Brief p. 8; P's Memo. of Law Supporting Motion to Suppress Video (R. p. 522; 532-533); and P's 4/18/2018 Memo. of Law Supporting her Motion in Limine (R. p. 540; 550; 553-558).)

The Sheriff's repeated use of misleading statements of fact to the trial Court, counsel, the jury, over objection, and now to this Court, must not be tolerated if this profession is to continue to be honorable and self-regulated.

II. MRS. WATTS' ISSUES ARE PRESERVED ON APPEAL.

The Sheriff contends that Mrs. Watts failed to preserve her objections to his comments during closing argument on appeal. First, Mrs. Watts objected to admission of the Video itself in pre-trial motions[3] and again when it was offered in evidence[4], on multiple grounds (not produced in discovery; not properly authenticated because inaccurate, incomplete and altered during the process of copying from the original which was not available for comparison; too blurry to be

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[3] R. p. 34-57; 77-100; 203-285) (P's Memo. Of Law Supporting Motion In Limine (R. p. 540; 550; 553-558) (The defense never tried to offer in evidence the animated video addressed in pages 12-13); P's Memo. Of Law Supporting Motion To Suppress p. 1-12 and Exhibits 1-6 attached thereto (R. p. 522-539))

[4] (R. p. 283, line 3 -p. 284 line 8)

helpful to the jury) boiling down to unfair prejudice to Mrs. Watts' case.

Mrs. Watts sought instruction from the trial Court *before* closing argument[5], so as to prevent improper and unfairly prejudicial comments from the defense, on the grounds that no expert testimony had been offered as to it and it was expected that defense counsel would comment on what the Video does not depict.

And when the defense did make improper comments on what is not depicted on the Video, Mrs. Watts objected to these unfairly prejudicial comments at the time that they were made in closing argument, twice, and was overruled both times[6]. Mrs. Watts was not required to continue objecting after she had clearly argued the unfair prejudice resulting from commenting on what is not depicted in the Video, both before closing arguments began and twice during closing argument.

"For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." *State v. Simmons*, 423 S.C. 552, 562, 816 S.E.2d 566, 571–72 (2018), *reh'g denied* (Aug. 2, 2018) (citation omitted) ("A second objection was not necessary in this case. Petitioner was not required to be a jack-in-the-box ... to preserve his objection." *Id.* *See, also, Fettler v. Gentner*, 396 S.C. 461, 469, 722 S.E.2d 26, 31 (Ct. App. 2012) ("This court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

Then, in her post-trial motion, memoranda and oral argument, Mrs. Watts argued that the Video should not have been admitted and that it was unfairly prejudicial for all of the same reasons she had sought to keep it out of evidence and she argued that defense comments on the Video

[5] (R. p. 390-394)
[6] (R. p. 443, line 13-24; 444, line 13-19)

during closing argument unfairly prejudiced her because he invited the jury to speculate as to what the Video does not depict.[7]

Mrs. Watts thus preserved all of her issues for this appeal. *See Young v. Warr,* 252 S.C. 179, 200, 165 S.E.2d 797, 807 (1969) ("[T]he proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon." (citing *Crocker v. Weathers,* 240 S.C. 412, 424, 126 S.E.2d 335, 340 (1962))). "This rule is designed to enable the trial court to timely address and remedy a founded objection." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 59, 777 S.E.2d 176, 190 (2015) (citing *Herron v. Century BMW,* 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (citations omitted)).

Mrs. Watts' objections at trial and her post-trial motion were sufficiently clear to alert counsel and the Court as to the errors complained of. She was "not required to use the exact name of a legal doctrine in order to preserve the issue." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). She was only required to state her arguments and objections in a way that was "sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood[.]" *Id.* at 470, 719 S.E.2d at 644 ("We are mindful of the need to approach issue preservation rules with a practical eye and *not in a rigid, hyper-technical manner.*") (emphasis added). If, as here, the party is "reasonably clear in his objection to the perceived error", his right to challenge the erroneous ruling on appeal is preserved. *S.C. Dep't of Transp. v. First*

[7] (R. p. 560-562; 572-590; 606-610)

Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007).

"[O]ver-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332–33, 730 S.E.2d 282, 287, (2012), Toal, C.J. concurring in result and dissenting in part. "I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys by showcasing their alleged mistakes, at the expense of their clients." *Id.* "[B]ehind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests." *Id.* "[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Id. Accord*, *Garrison v. Target Corp.*, 429 S.C. 324, 358, 838 S.E.2d 18, 36 (Ct. App. 2020), *reh'g denied* (Feb. 20, 2020).

Mrs. Watts's issues are preserved for appeal because she argued to the trial Court, in writing and in her oral argument, in detail, how and why the Video was inherently misleading and that defense counsel's tactics unfairly prejudiced her in the way he used the Video in closing argument, including his misleading commentary to the jury about what is not depicted on the Video. (R. p. 42, line 19-23; p. 485-486)[8]

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[8] See, also, P's Memo. of Law Supporting her Motion for New Trial, *passim,* arguing "inherently misleading video" "compounded by defense counsel's interpretations of the video and references to information that was not conveyed by the video"; "the vehicles cannot be identified from the largely indecipherable video; the video begins twenty minutes after the collisions; and the collisions are not on the video"; "defense counsel twice told the jury to see "blue lights" on what the Court will recall was a black-and-white video"; and "defense's commentary in closing argument compounded the prejudicial effect of the video." (R. p. 572-590) *And, See* P's Supp. Memo For New Trial, *passim*, amply quoting defense closing argument and arguing "defense's commentary in closing argument compounded the prejudicial effect of the video"; it "overtly misleads the Court because "real time" was never defined at trial [and] it is unrefuted that the time shown on the video does not correspond to the times of the collisions [because] time stamp on the video is 20 minutes later than the collisions, [therefore] the video is not accurate"; "playback speed on the video is not consistent"; it "speeds up and slows down" [hence] "playback speed is not accurate"; and "in closing argument, the defense repeatedly misled the jury [by testifying] about the video"; "in its closing argument [defense counsel]

Mrs. Watts' objection to the use of experts by the defense was argued *extensively*, prior to the start of trial and, as a result, the defense *explicitly waived the use of any experts*. (R. p. 83-98; 217) Mrs. Watts moved to exclude the Video in part because the video had never been produced in discovery, despite her 2016 request for all photographic evidence and despite that the Video was first produced after discovery had closed, at mediation, more than a year she requested such evidence. Because the defense brief attempts to convince the Court that this issue was not preserved for appeal, Mrs. Watts' arguments and the Court's comments and rulings are crucial to a full understanding of how the issue was preserved before trial, during trial and on the motion for new trial. Prior to the start of trial, Mrs. Watts opposed the use of any expert by the Sheriff:

> MR. BRYAN: Your Honor, I want to make sure at this time he's not trying to qualify him as an expert, is he?
>
> THE COURT: I don't know exactly what Mr. Harter is planning to do. I felt like for me to make a ruling on the admissibility of this, again, it's been called a surveillance video, because a lot of your objections, Mr. Bryan, would be related to whatever Trooper Duncan would testify to. So, I mean, for purposes of this in-camera testimony, I don't think we necessarily need to get into his qualifications as an expert necessarily. I'm not sure exactly if I understand where you're coming from.
>
> MR. BRYAN: Your Honor, if I may, **I have an objection to using him as an expert witness and I have a memorandum and other motions to make concerning that if he is trying to make him an expert at this point in time.**
>
> THE COURT: Okay.
>
> MR. BRYAN: I'll go ahead and do it now. If he's just going to ask him some questions about when he took the video or something like that, but if he gets into anything that is an expert testimony, I would like to make my motion before he does that.

(R. p. 83, line 24 -p. 84, line 20) (emphasis added)

> **THE COURT: Okay. Well, let's deal with his qualifications as well because we'd have to do that in camera anyways. So I expect you're going to offer him as an expert in the area of accident reconstruction, are you not?**

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clearly testified about the video in direct contravention of the Court's restrictions". (R. p. 606-610)

THE COURT: All right. Let's deal with that as well.

MR. BRYAN: You want me to do my motion or wait, Your Honor?

THE COURT: Let's go ahead and get his testimony and see what he says, even though I'm certainly familiar with Trooper Duncan.

(R. p. 85, line 2-14) (emphasis added)

THE COURT: Let's put this on the record. All right. **So you're raising a discovery issue as it relates to Trooper Duncan, correct?**

MR. THOMPSON: **Any expert he may call.**

(R. p. 86, line 5-8) (emphasis added)

MR. BRYAN: All right. Your Honor, **I have a memorandum here concerning expert testimony, and I will submit to you the defendant's answers to his interrogatories along with the memorandum.**

(R. p. 86, 12-15) (emphasis added)

MR. BRYAN: ... But the main thing about interrogatories, if you could look at the interrogatories, and the brief will spell a lot of this out, I won't go through everything in the briefs, but I know you'll read that, but ... in the interrogatories, on page 10, Number 4, "**Defendant has retained no expert witnesses to testify** to date." **We have never been notified of any expert witness until approximately ten days ago** Mr. Harter told me he was going to call Trooper Duncan to reconstruct the accident. On Number 2, he named literally nearly 23 people and says, I may offer expert testimony in -- they may offer expert testimony in the areas of expertise. That is the extent of our notice. There is no summary of what the witnesses are going to say. Number 5 says, For each person the witness -- facts, that a sufficient summary be to inform the parties the important -- the typical interrogatories Your Honor is familiar with. And he says, "See response to Interrogatory Number 1." There is nothing on Number 1. There was never any summary of what witnesses will say, there was never naming a person as an expert. It was generalities. And we have had absolutely no opportunity to know who to depose, never thinking there would be any kind of an expert reconstructionist because we were never notified of that, and just general answers like that. And I've got a lot of information in the brief concerning that.

That just flies in the face of the discovery rules, and **we have just been put at a great disadvantage** with them **coming at the last minute.** Where do you find an accident reconstructionist at the last minute? Where do you go to get one? How do you get him to the spot? How do you get him and meet with him? There's just not people around here like that. You have to go off and find them. And they put us at a great disadvantage -prejudicial disadvantage because they've never named an expert. Naming -- saying I haven't retained an expert and I may question these people in areas of expertise and have 20 some odd people named after that would put us in a position of having to take twenty-something

depositions.

And we are at a great disadvantage if he uses any expert because he clearly never gave us notice of an expert until the first time I heard it was ten days ago, a little over ten days ago.

THE COURT: How were you notified ten days ago?

MR. BRYAN: Mr. Harter came down I want to say Wednesday or Thursday the week before last, and **he made comment that he was going to use Trooper Duncan concerning a thumb drive he had sent me last fall as a reconstructionist. And that's the only notice I've ever had that he's going to use any particular person as an expert. And this is the only notice we've had there's going to be any - before that time any kind of expert at all**.

So what we've got here, **he's putting up something he's never given us notice of that he was going to do, and then we have no way to rebut it at this late date**. But it is clear to read these interrogatory answers that we just -- and then on the tape, on his redactions, I'll give the Court a copy of that. **We got this – our interrogatories were sent April 6, 2016. And our motion to produce, we got these responses July 17, 2017**. And here **it asks for photographs and videos and things like that. We got that video in June of '17 even though we requested it over a year earlier, requested all photographs which includes videos.**

So that's another issue on the video is **we requested in I believe it's April '16** -- April 6, 2016. **We get it by hand at mediation June of 2017**, and we get the answers to our interrogatories and our request for productions in July of '17. And **nowhere has he ever said he's going to use an expert.** That language, general language is just all that has ever been said. No particular person. And as I mentioned in my brief, I think if I counted right, it would be something like 23 people we would have to take depositions of -- take the deposition of to figure out which one's going to be an expert or what they're going to say. **There was no summary of what they were going to say,** all the things required, and **there's nothing to give us notice that there's any kind of expert until approximately 10, 11 days ago. And we object to them having any kind of expert because we've never been given notice,** have no opportunity to respond, no opportunity to deal with them, and it's impractical to ask a client of modest means to take 23 depositions.

(R. p. 87, line 1 -p. 90, line 16) (emphasis added)

The defense denied any discovery abuse and Mrs. Watts responded:

MR. BRYAN: Your Honor, Mr. Harter is not even arguing the issue. We've had that MAIT Team report and those videos since last June, which is more like ten months and not over a year. The issue is expert witnesses. And I ask Your Honor to read the interrogatory answers. **It does not give us the name of an expert. It says specifically we haven't retained an expert,** then he said he may call this list of people, which is some -looks like about 20 something people, may call them. Well, actually, he says he will call the medical

and police people in the expertise area of their expertise. And if you look at -- add the medical to it, it's like probably 30 something people there that he's giving us that he may call in the area of expertise **without any specifics, no statements of what they're going to testify to.**

The issue is Mr. Duncan being an expert when he has never given us notice that Mr. Duncan is an expert. The MAIT Team report is just an investigation. Mr. Duncan is not even the primary investigator. Trooper Hunter was the primary investigator of the accident. He's just investigating from the State's perspective because a law enforcement vehicle was involved. That does not give us any notice that he's an expert. The MAIT Team, I've heard of it. I don't know what the MAIT Team is. I've never heard anybody say the MAIT Team people are experts on something. And to note just because he mentioned the word "MAIT Team" I'm supposed to know that means he's an expert reconstructionist, there's no possible way anybody would know that.

And the argument is not when we got the MAIT report. We got the MAIT report last June. We said that. The argument is **we've never been given notice of any kind of expert, and we have no opportunity to rebut his experts** with another expert or get another expert. **We have no idea what he is going to say.** If he'd have told me this is going to be an accident reconstructionist, I would certainly have taken his deposition and possibly tried to get an accident reconstructionist myself. But that's just not somebody you can get around here.

To come here, tell me that ten days before we come to trial after that's been sitting on -- we got that last July, no experts. We filed this case in August of 2015 and then we asked for -- **sent interrogatories and things April of 2016**. **We got those interrogatories last July** [2017] **and it said no experts, no experts**. And they get a long list and say we may call them about the experts. He did not even answer. **How am I supposed to know that Mr. Harter has left something critical out. How am I supposed to know he left something critical out? And am I supposed to read his mind?** He wants me to make a motion. We had a deposition, and Mr. Harter can get fired up like me. And **I asked him because of some other** situations of **things we didn't get, he says, what else do you want?" I said, "I don't know. What else have you not given me?" And he says, "I don't know. You've got everything."** I said, **"If you've given me everything, okay."** This was at a deposition in Mr. Cruickshank's office.

He has had opportunity. **We've had discussions about the problems with discovery, and we've talked to him about that. We had this conversation at mediation because we were talking about things we had never seen before**. But **those interrogatories are clear that he does not have an expert, and to allow him to put up an expert now at this stage of trial is unbelievably prejudicial to this lady**. And it is just **because of the way they did it.** I hate it for them. I hate they did that. Maybe they wanted to. Maybe they just decided it may be just at this point in time decided to call an expert. But whatever happens, I don't know.

> Your Honor, **I don't know what else they're going to call. They had people, experts out there Friday looking at the scene of the accident. Are they going to call those people? I don't know what they're going to call. I don't know what we're going to get in here.** But **I would ask the Court to read the memorandum, and I would ask the Court to read the interrogatories. And I think it is abundantly clear we have no notice of an expert, and it would be greatly unfair, prejudicial**, and I go through all that in the memorandum and the law and rules. Thank you.
>
> THE COURT: Okay. **Here's what we're going to do because I want to get moving with this case.** Mr. Harter, just during a break if you can get me the MAIT Team report, I want to review that.

(R. p. 94, line 6 -p. 97, line 18) (emphasis added)

The Court took Mrs. Watts' motion to exclude defense experts under advisement pending resolution of Mrs. Watts' motion to exclude portions of Dep. Holmes' videotaped deposition. That motion was grounded on the fact that he changed his estimate of the time between collisions from 5-10 seconds to 41 seconds solely on the basis of the prejudicial Video and Al Duncan's prejudicial statements about the Video:

> THE COURT: We're going to just lay to the side right now any issues related to Trooper Duncan and the video.

(R. p. 98, line 3-4)

Then, while arguing the admissibility of the Video itself, **the defense explicitly waived the use of any experts including Al Duncan:**

> MR. HARTER: ... And to cut to the chase and to shorten things and to just cut to the heart of the matter, we're proposing to introduce this surveillance video. **We are not offering any expert testimony.**
>
> THE COURT: Okay.
>
> MR. HARTER: **We are not asking for expert testimony to comment about that. The plaintiffs have objected to Al Duncan or anybody else testifying as an expert, so we're not offering any expert testimony in conjunction with this video surveillance.**

(R. p. 217, line 1-10) (emphasis added)

And, because no expert testimony was offered about the Video, Mrs. Watts objected to the Video being offered into evidence:

MR. BRYAN: ... **[Defense counsel is] talking about arguing it, that is one of our concerns ... he would take that video and argue that it means this and it means that, which would take speculation and conjecture**. Rule 403 says although relevant evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue or misleading the jury ... And if the Court will review the cases that we put together in the memorandum, those cases clearly talk about videos of videos, the unclearness of the videos, **having to use speculation and conjecture to interpret it, and it is fact-driven on that**. ... I'd like the Court make that clear. **I don't think a lawyer on an argument can start taking a video and making interpretations of things that are not on there or any part of it.** He has to let the jury deal with that. But I don't see how it can be anything but prejudice under the cases and under Rule 403, and we object to it being in evidence, Your Honor.

(R. p. 283, line 3 -p. 284, line 8) (emphasis added)

This objection was overruled, and the Video was admitted. Then, as trial drew to a close, anticipating improper commentary from the defense in closing argument, Plaintiff sought a ruling preventing the defense from commenting on the Video. She specifically argued the fact that no expert had testified to what the flashes of light on the extremely blurry Video represented:

THE COURT: **... I don't think you're entitled to add to the video anything that the video does not show, okay?"**

(Tr. 4/19/2018 in camera, p 4) (R. p. 390, lines 20-21)

THE COURT ... But **if the video does not show something, then you certainly cannot, because it almost would be testifying, and certainly you cannot do that**.

(R. p. 390, line 24 -p. 392, line 2)

MR. THOMPSON: One other point. There's a lot of **flashing lights on that video,** and **I don't think Mr. Harter could testify to what those flashing lights mean because we haven't had an expert get on the stand and say this light represents this and that.**

THE COURT: Okay. **<u>They're going to have to reach their own conclusion as far as what that video -what that video means</u>.**

...

THE COURT: Well, yeah. You can't give your own interpretation. They can interpret it. You can point out certain things that the video shows, but

MR. HARTER: I **think we can suggest interpretations** for it.

THE COURT: **Well, let's just get - let's get into it. And I'm confident that if Mr. Bryan or Mr. Thompson feels like you're crossing the line, then, you know, let them take the appropriate course of action or lack thereof.** (Tr. 4/19/2018 in camera pp 5-7) (R. p.

392, line 9 -p. 393, line 12)
(P's Supp. Memo for New Trial pp 3-4) (emphasis added) (R. p. 608-609)

In the exchange above, **defense represents to the Court that the video "shows the real time". This statement overtly misleads the Court because "real time" was never defined at trial. 'Accurate' is a reasonable meaning of "real time". But it is unrefuted that the time shown on the video does not correspond to the times of the collisions.** The time stamp on the video is 20 minutes later than the collisions, as Plaintiff's counsel pointed out, in the above exchange. Hence the time on the video is not accurate. And, **it is further established that the playback speed on the video is not consistent, but speeds up and slows down at various point. Hence the playback speed is not accurate.**

Thereafter, **in closing argument, the defense repeatedly misled the jury with testimony about the video**. The Defendant in its closing argument clearly **testified about the video in direct contravention of the Court's restrictions.** See page 19 (R. p. 443, line 4-20) where **counsel testified Barton Holmes at 58:07 made a U-turn**; see page 20 (R. p. 444, line 2-12) where **counsel testified that the Holmes and King vehicles came to a stop at 58:09**; see page 20 (R. p. 444, line 13-19) where defense **counsel testified that the vehicles headed to Clinton were passing stationary blue lights;** see page 20 (R. p. 444, line 11-12) where defense **counsel testified lights were stationary at 58:09;** see page 21 (R. p. 444, line 18-19) where defense **counsel testified to stationary blue lights**; see page 22 (R. p. 445, line 23 -p. 446, line 9) where defense **counsel testified there were lights on the King and Barton Holmes motor vehicles**; see page 22 (R. p. 446, line 11-17] where defense **counsel testified vehicles were moving through the area without difficulties;** and see page 23 (R. p. 447, line 4-8) where defense **counsel testified the lights were stationary**. Plaintiff's counsel did object on two (2) occasions to defense counsel's improper testimony, and since the objections were overruled, Plaintiff was not in a position to ask for curative instructions. Curative instructions are only given, when the objection to an argument is sustained; however, Plaintiff stated her ground for the objections, i.e. Defendant was testifying to what, in its opinion, the video depicted which the Court had previously ruled to be "out of bounds".

(P's Supp. Memo for new trial pp 3-5) (emphasis added)[9].

At the hearing on the motion for new trial, the Court noted twice that it did not recall the specifics of the motions, rulings and evidence presented. (R. p. 483, line 14-19; p. 486, line 7-11) The defense then took advantage of the holes in the Court's memory by misrepresenting the Video as if it actually showed decipherable images of identifiable vehicles and the wreck:

MR. HARTER: ...On the video at 10:58:07, the video shows lights panning across the road

[9] (Transcript references in Mrs. Watts' Supplemental Memorandum were to a short excerpt. The entire trial transcript had not yet been transcribed. The corresponding references to the Record are added for convenience.)

> like this and coming back in this other direction, lights on. And then at 10:59 -- 10:58:09, all the lights are stationary. And then at 10:58:49, approximately 41 seconds later, **you see a vehicle hit the rear of Miss King's car,** veer off to the left, and hit the fence. Now, that image, **that video captured pertinent parts of this accident**.

(R. p. 492, line 20 -p. 493, line 4)

It is undisputed that the Video does not portray either of the two vehicle collisions. The defense conceded this point before trial. (R. p 47, line 19 -p. 51, line 4) Thus, the above argument at the hearing on the motion for new trial crucially misled the trial Court. And in its brief to this Court, the defense goes even further to mislead, stating: "**All of the relevant images from the night of the collisions were captured in real time on the video** ... The **Plaintiffs vehicle is clearly seen** crossing over the median and two lanes of traffic and coming to a rest in the fence of the recycling facility." (Initial Brief of Respondent p. 16) (emphasis added). Mrs. Watts again, respectfully, but strenuously requests that this Court view the fifteen-minute Video itself. In doing so, the Court will see that the "relevant images" of the collisions are not on the Video; no vehicle is "clearly" identifiable, nor is any other image "clear".

The defense made additional completely unsubstantiated statements to the trial Court, that the Video kept accurate time:

> [HARTER:] 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.**

(R. p. 494, line 22-25) (emphasis added).

Likewise, the Sheriffs brief to this Court also misleads on this same point:

> The relevant incidents in the present case were the two collisions, and the re-recording **captured events that occurred relative to the two collisions**. The events that occurred relative to the two collisions were re-recorded **in real time**. The time clock at the top of the screen from 10:54:42 pm on Channel 5 and 10:54:40 pm on Channel 6 through the remainder of the videos, shows that **there are sixty (60) seconds in each minute; therefore, the playback speed concerning all relevant events is accurate and in real time**.

(Initial brief of Respondent p. 23-24) (emphasis added).

In actuality, no evidence showed how fast the Video ticked off the seconds. The Video does not always count to 60 before the minute changes; it fast-forwards repeatedly and sometimes skips whole minutes, which Cagle and Duncan both admitted. (R. p. 227, line 20 -p. 229, line 1; p. 244, line 1-4; p. 301, line 7-13) (Cagle); (R. p. 254, line 14 -p. 255, line 2; p. 255, line 12-19; p. 309, line 1-4) (Duncan) and which the Court can see for itself.

Even more importantly however, Mr. Harter's repeated representations to the Court that the time stamp or count of seconds and minutes was accurate is entirely unsupported. No evidence was presented that suggests that the Video speed was ever calibrated, nor that the speed at which the seconds ticked by on the Video was accurate, slow, fast or even *consistent*. Cagle testified:

Cagle admitted that he had no training in video surveillance equipment (R. p. 244, line 10-12); four of his twelve system cameras did not work at the time of the wreck (R. p. 220, line 5-13); eight did not work by the time of trial (R. p. 233, line 23-25); he had not adjusted the time since he installed it in 2013 – five years prior to trial. (R. p. 241, line 12-25) His opinion that his system was "reliable" (R. p. 295, line 7-8) was, thus not based in fact.

Tr. Duncan testified:

> THE COURT: Mr. Duncan, let me ask you, Mr. Bryan had asked you on Trooper Hunter's accident report, he indicates a time of 10:38.
> [Duncan]: Yes, sir.
> THE COURT: Okay. Does that video have any images at the time of 10:38.
> THE WITNESS: I -- **I can't say what was prior to or even if the time was synced up to verify what time was on his surveillance as I was standing there.**

(R. p. 274, line 13-21) (emphasis added)

> 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.**

(R. p. 275, line 18 -p. 276, line 1; p. 276, line 14 -p. 277, line 10) (emphasis added)

Thus, the defense has repeatedly misrepresented the facts about the accuracy of the time on the Video, first to the trial Court and now to this Court. It is precisely this sort of misleading statement that the defense has used throughout this case and that Mrs. Watts has diligently worked to correct, without seeking sanctions (i.e. failing to produce the Video in discovery and failing to admit that fact; failing to identify expert witnesses until an offhand comment made ten days before trial). Courts punish such behavior, when, as here, it becomes apparent that it is unrelenting.

> This case presents at least one clear, affirmative misrepresentation ... The remainder of the sanctioned conduct forms a mosaic of half-truths, inconsistencies, mischaracterizations, exaggerations, omissions, evasions, and failures to correct known misimpressions created by their own conduct that, in their totality, evince lack of candor to the court and disrespect for the judicial process. The district court relied, to its detriment, on these distortions.

Six v. Generations Fed. Credit Union, 891 F.3d 508, 511 (4th Cir. 2018) (affirming sanctions by the district court).

Juries have the right to disbelieve any evidence they wish, but it is recognized that juries can be improperly influenced by misleading statements of counsel (which is not evidence) such as those in this case and by rulings by the Court which appear to give credence to the improper commentary. Here, the Sheriff clings to his misleading descriptions of "clear" images that are not on the Video, but he has never addressed, let alone *refuted*, the prejudicial effect of telling the jury that they could see "blue lights" and other images that are not depicted on the blurry, black and white Video. (R. p. 444)

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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CERTIFICATE OF COUNSEL IN APPELLANT'S FINAL REPLY BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Donald B. Hocker, Circuit Court Judge

Case No. 2019-001514

Martha Foster Watts, Appellant,

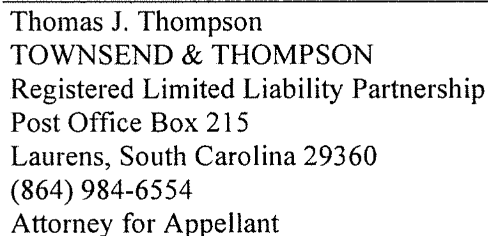
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211 (b), SCACR.

Dated: August 24, 2020



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