THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Civil Action No. 2010-CP-15-00894

Jake Wright and Theresa Gadsden, as Personal Representatives of the Estate Of Jacob Cleveland Wright, and Jake Wright and Theresa Gadsden, individually,.....Respondents,

v.

Colleton County Sheriff's Department,.....Appellant,

INITIAL BRIEF OF RESPONDENTS

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III. Did the trial court err in finding that the testimony of Respondents' expert witness was sufficiently reliable to permit consideration by the jury?

Statement of the Case

On August 31, 2011, Jake Wright and Theresa Gadsden filed this action individually and as Personal Representatives of the Estate of Jacob Cleveland Wright, their son, (the "Respondents") against the Colleton County Sheriff's Department (the "Appellant"). (Compl. ¶¶ 1). The Complaint sought money damages for wrongful death, (Compl. ¶¶ 5-6), and survival, (Compl. ¶¶ 8-9), and asserted causes of action for negligence, (Compl. ¶¶ 5-6), and negligent hiring and supervision (Compl. ¶¶ 11-14). On September 24, 2010, the Appellant answered, denying the allegations set forth in the complaint and asserting affirmative defenses. (Answer). After the parties engaged in discovery, the case proceeded to a jury trial, which was held on March 5-9, 2012 in Colleton County.

During their case in chief, the Respondents offered the testimony of Martin D. Schussel, a mechanical engineer, as an expert. The Appellant objected by a written motion *in limine* (Mot. *in limine*). (Trial Tr. p. 370; p. 383, lines 15-16; pp. 419-20). The Respondents proffered the testimony of Mr. Schussel. (Trial Tr. pp. 370-75). At the close of his proffer testimony, the Appellant objected to him testifying as an expert. (Trial Tr. p. 383, lines 15-16; pp. 388-89). The trial court overruled the objection. (Trial Tr. p. 388, lines 10-20; pp. 391-92).

At the close of the Respondents' case in chief, the Appellant moved for a directed verdict. (Trial Tr. pp. 469-72; pp. 474-75). The Court denied the motion. (Trial Tr. pp. 472-75).

Following the defense presentation of evidence and after the Respondent rested, the Appellant again moved for a directed verdict. (Trial Tr. p. 590, lines 13-23). The Appellant also asked the trial court to direct a verdict on the issue of negligent hiring. (Trial Tr. p. 590, lines 20-25). The trial court denied the motions. (Trial Tr. p. 591, lines 2-3).

The jury returned a verdict for the plaintiffs in the amount of $700,000 on the wrongful death claim. (Trial Tr. p. 695, lines 4-5) The trial court permitted the parties 10 days to file post-trial motions. (Trial Tr. p. 696, lines 12-13, 20-21).

On March 16, 2012, the Respondents filed post-trial motions. (Resp't Mot. for JNOV or New Trial); (Resp't Mot. for Costs). On March 22, 2012, the Appellant filed post-trial motions. (Appellant Post-Trial Mot.). The trial court filed orders on June 25, 2012 (Order) and June 26, 2012. (Order). On June 27, 2012, the Appellant filed a motion to alter or amend the trial court's orders (Appellant Mot. to Alter or Amend), and the trial court denied the motion, with the exception of the request to reduce the verdict to

the statutory cap, in an Order filed August 8, 2012. (Order). The Appellant served its Notice of Appeal on August 28, 2012.

Statement of the Facts

On the evening of January 13, 2009, Jake Wright and his family had just finished their evening meal. (Trial Tr. p. 145, lines 18-25; p. 146, lines 1-3). His wife, Rowena, answered a telephone call from ADT, a burglar alarm monitoring service. A burglar alarm had been activated at the Heavenly Baptist Church where Jake Wright served as pastor. After Rowena requested that ADT notify the Sheriff's Department Jake and his two sons, Jacob Cleveland Wright and Timothy Wright, drove to the church in Jake's pickup truck. (Trial Tr. p. 146, lines 4-5).

Two Colleton County Sheriff's Deputies in separate cruisers were dispatched to the scene of the alarm which was located near Green Pond, South Carolina. Deputy Scott McCoy received the dispatch when he was on the Bells Highway near I-95 on the far side of Walterboro. Deputy McCoy manually disengaged his cruiser's video camera, thereby overriding a system designed to automatically engage the camera upon activation of the siren and/or flashing lights. (Trial Tr. p. 261, lines 1-3; p. 266, lines 21-22; p. 270, lines 5-23). McCoy drove through the City of Walterboro with flashing lights and sirens activated and testified that he turned off his sirens and flashing lights at some point after he turned on to the Green Pond Highway also known as SC Route 303. Deputy McCoy testified that he drove at

speeds approaching 100 MPH and claimed that he later slowed to 70 to 80 MPH. (Trial Tr. p. 272, lines 19-25; p. 273, lines 1-9; p. 284, lines 6-8).

When Jake Wright and his sons arrived at the Heavenly Baptist Church they found nothing amiss. After waiting for a period of time no deputy arrived. (Trial Tr. p. 130, lines 16-25; p. 131, lines 1-5). They then left the church and headed home by driving north on the Green Pond Highway. Mr. Wright's route home would include a left turn off the Green Pond Highway at the intersection with Clover Hill Road. As Jake Wright proceeded north on the Green Pond Highway, Deputy McCoy was traveling south on the same highway toward the Green Pond area.

McCoy could see the headlights of Jake Wright's pickup truck approaching from the opposite direction. (Trial Tr. p. 273, line 25; p. 274, lines 1-2). McCoy testified that Wright's truck appeared to be traveling slowly. (Trial Tr. p. 349, lines 1-3). Jake Wright recalled seeing the headlights of an oncoming vehicle approximately one quarter mile ahead when he initiated his left turn onto Clover Hill Road traveling toward his home. (Trial Tr. p. 117, lines 2-4; p. 135, lines 16-18). A collision occurred at the intersection. Jake Wright and his son, Timothy, were injured. Jacob Cleveland Wright was killed in the crash.

It was undisputed at trial that Deputy McCoy was traveling in excess of the posted speed limit without flashing lights or sirens as required by statute and the policy of Colleton County Sheriff's Department. McCoy specifically admitted he was in violation of the department policy when he turned off his flashing lights outside of viewing range of the Heavenly Baptist Church. (Trial Tr. p. 290, lines 15-22).

The South Carolina Highway Patrol MAIT Team performed an accident reconstruction and found the speed of the police vehicle to be between 62 and 70 MPH at the point of impact. Don Roberts, an accident reconstructionist hired by the Appellant, found the Deputy's speed to be most probably 62 MPH. Marty Schussel, the Respondents' accident reconstructionist, testified as to his accident reconstruction which placed the speed of the police cruiser at 83 MPH at the point of impact.

The Sheriff of Colleton County has the sole power to hire and fire his deputies. The Sheriff hired Deputy Scott McCoy with no personal knowledge of McCoy's driving record, criminal history, or employment records. (Trial Tr. p. 226, lines 2-9). Scott McCoy's ten year driving record pulled by the Department showed 19 moving violations. (Trial Tr. p. 240, lines 18-23; Plaintiff's Exhibit Number Five (5)). Further examination behind McCoy's application for employment (Plaintiff's Exhibit Number

One (1)) uncovered an undisclosed arrest for a gun violation, (Trial Tr. p. 321, lines 19-24), a civil judgment, (Trial Tr. p. 330, lines 16-25; pp. 331-332); and a failure by McCoy to discuss his prior job at Lieber Correctional Institution where he was fired for contraband and fraternizing with prisoners' families. (Trial Tr. p. 326, lines 20-25, p. 327, lines 1-22).

Standard of Review

> When reviewing the denial of a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The appellate court will reverse the trial court only where there is no evidence to support the ruling below.

Elam v. South Carolina Department of Transportation, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004).

Argument

I. Respondents presented ample evidence that Deputy McCoy's negligence was a proximate cause of the accident.

"Ordinarily, questions of negligence, proximate cause, and contributory negligence are questions of fact for the jury and the trial judge's only function regarding these questions is to determine whether particular conclusions either are or are not the only reasonable inferences to be drawn from the evidence." *Brown v. Howell*, 284 S.C. 605, 607, 327 S.E.2d 659, 660 (Ct. App. 1985).

In its argument that the trial court erred the Appellant relies upon the "speed does not matter" defense. The unusual cases of *Horton v. Greyhound*

Corp., 241 S.C. 430, 128 S.E.2d 776 (1962) and *Odom v. Steigerwald*, 260 S.C. 422, 196 S.E.2d 635 (1973) are cited and discussed at length to support this argument. In the *Blanding v. Hammell*, 267 S.C. 352, 228 S.E.2d 271 (1976) case also cited for support by Appellant it is noteworthy that in that case Justice Ness states: "Of course, in most automobile accidents, speed creates imponderable issues of their distance which must be resolved by the jury." *Blanding,* 267 S.C. at 357, 228 S.E.2d at 273. It is a rare case which is controlled by the *Odom* and *Horton* argument.

Immediately prior to the accident Colleton County Deputy Scott McCoy was traveling to the Heavenly Baptist Church at a speed close to 100 MPH. (Trial Tr. p. 272, line 21). Deputy McCoy claimed he slowed down to a range of high 70's to low 80's MPH prior to reaching the intersection. (Trial Tr. p. 273, lines 8-9). At trial he did not recall his speed at the time of the accident nor whether he applied his brakes. (Trial Tr. p. 286, lines 1-5). He did not know where he was in relation to the church which was his destination. (Trial Tr. p. 288, lines 8-9; Trial Tr. pp. 289-290). Deputy McCoy admitted at trial that he had turned off his siren and flashing blue light somewhere along the Green Pond Highway even though he was traveling at a high rate of speed. (Trial Tr. pp. 270-271). Additionally, the in car camera which would have recorded his speed and presumably even

the accident itself had been manually overridden by McCoy. (Trial Tr. p. 270, lines 7-23).

Jake Wright saw the oncoming car of Deputy McCoy at a distance that he thought was a quarter of a mile. (Trial Tr. p. 117, lines 2-4). Therefore, he thought he had time to make the turn off of Green Pond Highway on to Clover Hill Road as he had done many times in the past on his way home from the church he pastored. (Trial Tr. p. 134, lines 19-21). Although the experts differed as to Deputy McCoy's speed at the time of the accident, and the MAIT team found a median speed in between, the Respondents' expert placed Deputy McCoy's speed at 83 MPH. (Trial Tr. p. 422, lines 20-22). This speed is consistent with the "high 70's, low 80's" which Deputy McCoy estimated was his speed earlier on Green Pond Highway after he had slowed from nearly 100 MPH. At this speed, or even close to it, Jake Wright would not have been able, especially at night, to determine that he did not have time to make his turn. If Deputy McCoy had simply left his blue light flashing or siren on as required by law (S.C. Code §56-5-760) and by Sheriff Department policy (Plaintiff's Exhibit Number Seven (7)) then Jake Wright would have been warned and the accident would never have happened. (Trial Tr. p. 290, lines 9-22).

In the present case McCoy was negligent not only in speeding, but also in turning off his siren and flashing blue light. He did not know where the church was or how far he was from it. (Trial Tr. pp. 288-290). Further, he knew another deputy was ahead of him and would presumably reach the church before he did. (Trial Tr. p. 288, lines 14-18). It was not logical for McCoy to cut off his siren and flashing lights when he admitted he did not know where the church was or how far he was from it. (Trial Tr. pp. 288-290). In fact, Deputy McCoy's testimony as a whole was so lacking in credibility that during arguments on motions at the close of the Appellant's case the trial judge stated:

> "At that point and time, when that deputy turned off those flashing lights and that siren, he removed from the people of the State of South Carolina on the roads, the ability to know that you've got a meteor coming at you. What that next section says is that when they do that, and they may only do that in a very specific circumstance, that I think in this case – which is why I'm troubled by it, because I think his testimony is unbelievable. How about that?" (Trial Tr. P. 583, lines 16-24).

Our appeals courts have considered the "speed does not matter" argument on numerous occasions and with rare exception found that *Horton* and *Odom* just do not apply.

In *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000), Cantrell was driving a Mustang GT over the speed limit with the hazard lights flashing when she went through an intersection as Anderson, the operator of

another vehicle, was waiting to make a left turn into a gas station across two lanes of traffic. Anderson waited for a car or two to go by and then started turning left when the collision with Cantrell occurred. Cantrell's expert placed her speed slower than the state trooper who investigated the accident, but as in the instant case Cantrell was exceeding the speed limit even by the lower estimation. Cantrell's expert testified that the primary cause of the accident was Anderson's decision to turn left in front of Cantrell's oncoming car. A jury found Cantrell eighty-four percent at fault in the accident. Relying on *Horton*, Cantrell argued that the trial court erred and that the Court of Appeals erred also in affirming the trial judge who refused to charge as follows:

> "It is without legal significance that speed was a contributing factor in placing the vehicle at a particular location on the favored road when the emergency arose, since the driver of such vehicle had the legal right to occupy that portion of the road."

Clark, 339 S.C. at 388, 529 S.E.2d at 538.

The Supreme Court in *Clark* held that this proposed instruction was improper and irrelevant because the speed of the vehicle plainly was of legal significance in deciding the cause of the accident. *Clark*, 390 S.C. at 388, 529 S.E.2d at 539.

The Supreme Court in *Clark* further stated:

> "We recently made it clear that a judgment as a matter of law pursuant to *Horton* and its progeny is proper only in the exceedingly rare case when the evidence, viewed in the light most favorable to the non-moving party, shows the speed of a vehicle could not have contributed to the cause of the accident."

Clark, 339 S.C. at 389, 529 S.E.2d at 539.

In *Carter v. Beals*, 248 S.C. 526, 151 S.E.2d 671 (1966) our Supreme Court decided a case very similar to the instant case. In *Carter* a police officer was alleged to have been driving at a high speed with no warning lights and no siren. The other driver, Carter, came to a stop sign where he had to yield the right of way. Carter entered the roadway at a moment when there was no immediate hazard. The Court in *Carter* stated that if Carter entered the roadway with no immediate hazard then he would have the right to occupy it and then it becomes the duty of those approaching the intersection to yield the right of way to him. After Carter entered the highway he had a right to be there and to expect others to honor such right. Carter also cites *Warren v. Watkins Motor Lines*, 242 S.C. 331, 130 S.E. 2d 896 (1963) in support of this holding. The Court in *Carter* went on to state:

> It could be concluded from the testimony of the respondent that when he entered Wichman street, the automobile operated by the appellant did not constitute an immediate hazard for the reason that a prudent person would have had ground to believe that such a motor vehicle proceeding at a lawful speed was so far distant from the intersection that he could safely cross the intersection in advance thereof. There is also evidence from which the jury could have concluded that the appellant in the

> operation of his automobile failed to keep a proper lookout and hence did not see the car of the respondent enter the intersection when the appellant's car was at least two hundred feet there from. Admittedly, the appellant was operating his vehicle at a speed that was in violation of the statute and there was a conflict in the testimony as to what that speed was.

Carter, 248 S.C. at 533, 151 S.E.2d at 675.

Another similar case is *Wilson v. Marshall*, 260 S.C. 271, 195 S.E.2d 610 (1973), in which a Plaintiff, who was probably speeding, had a verdict directed in his favor at trial with the trial judge apparently relying upon *Horton*. In *Wilson* the Court held that even though the Defendant in the case did not stop at an intersection that when the evidence was viewed in a light most favorable to the Defendant the Court concluded that his entry was susceptible of the reasonable inference that there was a failure on the part of the Plaintiff to exercise due care in keeping a proper lookout and slowing down under the circumstances and that such negligence on Plaintiff's part could be a contributing proximate cause of the collision. The Court in *Wilson* notes the Plaintiff's reliance on *Horton*, but does not follow the *Horton* line of reasoning, which has been rarely applied by our Courts. *Wilson*, 260 S.C. at 276, 195 S.E.2d at 612.

It appears in *Wilson* that the Plaintiff was possibly speeding, but not guilty of any other traffic offense. Even though the Plaintiff was otherwise not lacking in his driving performance, the Court in that case clearly

concluded that a jury might still find he failed to keep a proper lookout and/or failed to slow appropriately. This type of case is best decided by a jury and only in rare cases has that not occurred.

Appellant also attacks the trial court's citation of *Flowers v. South Carolina State Highway Department*, 206 S.C. 454, 34 S.E.2d 769 (1945) during the trial court's explanation of why a directed verdict in favor of Appellant was denied. Appellant argues at length about the factual differences in *Flowers* and the instant case. However, the trial court was not citing *Flowers* as an example of a factually similar case, but rather the trial court cited *Flowers* to emphasize that any driver using due care himself in the absence of any circumstances which reasonably should put him on notice to the contrary is entitled to assume that others on the highway will also exercise reasonable care. *Flowers*, 206 S.C. at 458, 34 S.E.2d at 771. This general principle applies much more broadly than just to the narrow factual situation presented in *Flowers* and this principle certainly applies in the instant case. The trial court did not base the denial of Appellant's motion for a directed verdict solely on *Flowers*. The trial court explained that taking the evidence in a light most favorable to the non-moving party the facts presented numerous acts and omissions by Deputy McCoy that raise an inference of negligence and even gross negligence. (Trial Tr. pp. 472-473).

The court in *Flowers* was primarily concerned with whether more than one inference could be drawn from the facts, and after determining that was the case, the Court affirmed the jury's verdict in favor of the injured Plaintiff. *Id* at 461, 34 S.E.2d at 771.

The Appellant attempts to go even further with *Flowers*. The Appellant argues that *Flowers* should have been read in favor of the Appellant because Deputy McCoy is compared to the driver in *Flowers* who was "exercising due care himself". *Id* at 458, 34 S.E.2d at 771. Clearly, many facts were proven otherwise and neither the jury, nor the trial judge, believed Deputy McCoy was exercising due care.

Appellant argues that the accident was unavoidable by Deputy McCoy because he reacted faster according to Appellant's expert than the average person and he attempted to brake and swerve. However, McCoy did not claim that he hit his brakes. (Trial Tr. pp. 347-349). The reaction time testified to by Appellant's expert would of course be from when McCoy noticed a turning vehicle. Only a jury could decide if he should have kept a better lookout or driven with his vehicle under better control. McCoy chose the speed at which he was traveling and clearly the greater his speed the less time he had to avoid the collision with Jake Wright's turning truck. If McCoy had kept his emergency flashers on or driven at an appropriate speed

or paid attention to a slowing vehicle at an intersection then the accident would never have occurred.

Respondents' expert Martin Schussel analyzed where the vehicles would have been in the roadway if McCoy had been driving within the speed limit and how long it would have taken for the vehicles to have covered certain distances immediately before impact. (Trial Tr. p. 429, lines 7-23). Schussel testified that if McCoy had traveled within the speed limit then Jake Wright would have "long cleared" the intersection by the time McCoy got to it. (Trial Tr. p. 429, lines 18-21; p. 425, lines 2-16). The experts disagreed at trial and the jury presumably found Schussel's testimony more convincing. However, this issue is well summarized, as quoted hereinabove, by Judge Ness in *Blanding*. Speed obviously creates imponderable issues of the distance traveled which must be resolved by a jury. *Blanding*, 267 S.C. at 357, 228 S.E.2d at 273.

II. The Respondents presented ample evidence that the Department violated the Sheriff's common law duty to exercise due care in the hiring of his deputies.

George Malone, in his capacity as Sheriff of Colleton County, is an elected public official. The legal requirements and qualifications for his

election and service as Sheriff are minimal and do not include any required scientific, technical, or specialized knowledge or background.

The Appellant misconstrues the case law of South Carolina by insisting that this Sheriff's conduct, in hiring, must be measured against the standard established by expert testimony and that expert testimony must establish the Defendant's departure from that standard. The appellant has cited no cases which hold that, under the facts of this case, a jury would require the testimony of an expert to comprehend the evidence or determine the facts in dispute. Sheriff Malone gave testimony, in camera, and before the jury, setting forth his standards and procedures for vetting prospective applicants for the position of Deputy Sheriff. The matters to be reviewed included investigation of the applicant's criminal history, his references, his work records and previous employment, local judgments, and the applicant's driving record. (Trial Tr. p. 66, lines 19-24).

The Sheriff then admitted that he reviewed no records whatsoever prior to hiring Deputy Scott McCoy. (Trial Tr. p. 67, line 23; p. 68, line 1; p. 69, lines 13-16; p. 226, lines 2-7).

Every case cited by the appellant requiring expert testimony to establish a standard of conduct involved bona fide professions such as accounting, engineering, law and medicine.

Folkens v. Hunt, 290 S.C. 194, 200, 348 S.E.2d 839, 843 (Ct. App. 1986) (public accountant); *City of York v. Turner-Murphy Co.*, 317 S.C. 194, 196, 452 S.E. 2d 615, 616-17 (Ct. App. 1994) (engineering); *Hatfield v. Van Epps*, 358 S.C. 185, 192, 594 S.E.2d 526, 529 (Ct. App. 2004) (law); *Hoeffner v. Citadel*, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993) (physician).

The trial judge found, within her sound discretion, that the Sheriff conducted no personal review of McCoy's application, personnel file, driving record, job references or criminal record of judgments or references. Failure to review any part of the deputy's record deprived the Sheriff of information which, most probably, would have disqualified Scott McCoy as a hire for the position of deputy. When questioned, "...if you had this driving record and it had been called to your attention, would you have hired him?" The Sheriff answered, "probably not." (Trial Tr. p. 240, lines 18-23). Respondents did not need an expert when the Sheriff testified to his standard for hiring a deputy sheriff and admitted that he did not follow his own standards in hiring McCoy.

III. The Respondents' expert witness was qualified and gave reliable testimony.

The Respondents agree with the Appellant that *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) controls the use of expert testimony in this state and controls our instant case. The Appellant admits that the Respondents' expert, Martin Schussel, is a skilled and qualified expert in accident reconstruction, but denies that Schussel's testimony in this case was reliable and argues the trial judge should not have allowed it.

The Appellant primarily argues that Schussel's testimony was not reliable because his method had not been tested, published or critiqued by others. This argument completely distorts Schussel's testimony. Schussel plainly testified that he relied upon accepted accident reconstruction principles taken from publications by the Institute for Police Technology and Management. This Institute teaches accident reconstruction to police and accident reconstructionists. (Trial Tr. p. 372, lines 15-21). Schussel explained in detail determining speed from spin analysis. (Trial Tr. pp. 373-374). He has testified using this method and principles many times and his company had also internally verified its validity. (Trial Tr. p. 374, lines 3-5). It is not a new or novel approach and is the recommended approach in accident reconstruction. (Trial Tr. p. 373, lines 13-14). Martin Schussel has never failed to be qualified as an expert witness in accident reconstruction. (Trial Tr. p. 375, lines 19-22).

The Appellant pounces upon Schussel's method of performing the calculations to challenge his results. Schussel uses an Excel spreadsheet in order to simplify the math which must be done for each analysis. (Trial Tr. p. 376, lines 10-16). In using the Excel spreadsheet Schussel is able to use multiple segments of data for varying frictions as a vehicle slides and rotates which makes the analysis more accurate. (Trial Tr. p. 373, lines 1-7). The Excel spreadsheet simply automates the process. The Appellant attempts to distort this method used by Schussel as untested guesswork which ignores that his analysis is based upon accepted principles that have been published and critiqued (Trial Tr. p. 377, lines 12-14) and peer reviewed (Trial Tr. p. 378, lines 1-5) and he has his own method of performing the math. He would have reached the same results if the math had been done by him one step at a time. Accident reconstructionists use Excel as a tool in doing calculations. (Trial Tr. p. 377, lines 24-25). They do not want to go through doing hundreds of calculations to reach a result. (Trial Tr. p. 374, lines 14-16). Yet, the Appellant challenges this process used by Schussel and argues it makes his analysis unreliable.

The trial judge clearly understood what Schussel had done and when Schussel's testimony was challenged at trial the trial judge inquired of Schussel in the following exchanges:

EXAMINATION BY THE COURT:

Q. You can do the calculations manually?

A. That's correct.

Q. And everybody knows what the Excel program is, and you use Excel, and the software, I gather, is proprietary and is within your group. And what it does, if I understand what you were telling me, is it just saves the time, energy, and effort and probably -- and I heard you say something like, maybe it's a little more accurate because the calculations are a part of the software.

A. And secondly, less error prone, because you're not going to transpose numbers when you move them from one place to another to do the net set of calculations, yes.

Q. Right. Or be bored, or get a telephone interruption, or anything.

A. And you're also tempted not to do as many segments and not to do it as accurately where I could put in and say, do a hundred segments between here and here, and it would do that for me. Instead, they recommend you do eight, because that's the maximum they think anybody's ever going to spend their time to do it. (Trial Tr. pp. 383-384).

And:

Q. You could have sat with paper and pen and done exactly the same thing?

A. And would have done exactly the same thing, yes. (Trial Tr. p. 385, lines 11-13).

Clearly, the trial court understood Schussel had simplified the math computations necessary to do his analysis and this should not be confused

with the fundamentals of his analysis method which are tested, proven and accepted by experts in this field. What should have been noticed by Appellant is that its expert also used an Excel spreadsheet to do his math. (Trial Tr. p. 504, lines 12-16).

Appellant also attempts to discredit Respondents' expert Schussel by arguing he used only one approach to reach his results. Although Appellant's expert relied heavily upon a technique called photogrammetry to do a "crush" analysis, Schussel explained why photogrammetry was not dependable in this accident reconstruction. (Trial Tr. pp. 494-495) Simply, the photographs were not good enough to obtain reliable results. (Trial Tr. p. 380, line 5 – p. 381, line 10). The photographs available were taken at night with a flash camera. (Trial Tr. p. 433, line 17). Additionally, there were not enough photographs. (Trial Tr. p. 434, lines 10-11). When Schussel used these photos with his computer program for this type of analysis it issued a warning that there was too much uncertainty (Trial Tr. p. 434, lines 8-24). Therefore, Schussel understandably did not estimate speed based upon a "crush" analysis because the photos were not good enough and therefore doing a crush analysis made no sense to him. (Trial Tr. p. 433, lines 7-10; p. 439, lines 2-13). Schussel's refusal to use a method which was deficient in this case perhaps bolstered his credibility with the jury.

Finally, Appellant argues Schussel's testimony was not reliable because he did not go to the accident scene and instead relied upon measurements taken by others. Schussel relied upon the detailed measurements taken by the MAIT team. (Trial Tr. p. 404, lines 2-7; p. 386, lines 6-7). The MAIT team in this case was led by Sergeant David William Lee of the South Carolina Highway Patrol. (Trial Tr. p. 551, lines 15-16). At the time of trial he had been employed with the South Carolina Highway Patrol for 25 years. (Trial Tr. p. 551, line 18). Sergeant Lee has 2500 hours of specific training in collision reconstruction and is one of the instructors for the MAIT program. (Trial Tr. p. 552, lines 11-13). Sergeant Lee returned to the accident scene "a couple of days" after the date of the accident and mapped it out. (Trial Tr. p. 558, lines 19-21). Schussel did not become involved in this case until well over one year after the accident date. (Trial Tr. p. 399, lines 1-4). It makes sense that he would rely upon the MAIT team's measurements of the accident scene taken shortly after the accident by highly experienced officers. In choosing to use the MAIT measurements Schussel made another logical, sensible decision in performing his analysis as the MAIT data was highly likely more accurate than anything he could glean at the accident site himself well over a year later.

Even if Schussel's testimony should not have been admitted, and it clearly was properly admitted, then the Appellant must show that it was prejudiced by the admission of Schussel's testimony. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008). The Appellant cannot make such a showing with the facts of this case. Deputy McCoy admitted he was traveling nearly 100 MPH shortly prior to the accident at night and that he intentionally turned off his flashing blue lights and siren even though another deputy was ahead of him traveling to the church where the burglar alarm had sounded.

Further, pictures of the vehicles showing tremendous damage to both were admitted into evidence. It was well within the ability of any juror with general experience in life to conclude this accident was proximately caused by the negligence of Deputy McCoy. The testimony of Schussel was merely cumulative in that it offered another opinion as to speed. The MAIT team's range of estimated speed and Appellant's own expert all placed McCoy's speed above the speed limit. Schussel's testimony was not necessary to support the jury's decision and Appellant cannot show prejudice in the admission of Schussel's testimony.

Conclusion

The Respondents presented evidence at trial which supports the jury verdict rendered. Based upon this evidence, the law of this state, and the arguments presented herein this Court should affirm.

Respectfully submitted,

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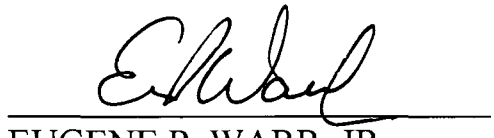

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Attorneys for the Respondents

March 13, 2013
Florence, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Civil Action No. 2010-CP-15-00894

Jake Wright and Theresa Gadsden, as Personal Representatives of the Estate Of Jacob Cleveland Wright, and Jake Wright and Theresa Gadsden, individually,.....Respondents,

v.

Colleton County Sheriff's Department,.....Appellant,

PROOF OF SERVICE

We certify that on March 13, 2013, we served the Initial Brief of Respondents on the Appellant by depositing a copy in the United States Mail with postage prepaid and addressed to Marshall H. Waldron, Jr., Griffith, Sadler & Sharp, P.A., Post Office Drawer 570, Beaufort, SC 29901-0570, and Matthew D. Cavender, Griffith, Sadler & Sharp, P.A., Post Office Drawer 570, Beaufort, SC 29901-0570.

[SIGNATURE PAGE FOLLOWS]

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v.

Colleton County Sheriff's
Department,.....Appellant,

RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

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The Respondents designate the following to be included in the Record on Appeal:

1. Order filed June 25, 2012

2. Order filed June 26, 2012

3. Order filed August 8, 2012

4. Complaint

5. Answer

6. Trial Transcript pp. 66, 117, 130-131, 134-135, 145-146, 240, 261, 266, 269-273, 278, 283-290, 321, 326-327, 330, 347-349, 372-390, 394-400, 404, 418-422, 425-426, 428-429, 432-434, 439, 470-473, 494-495, 504, 524, 541, 551-552, 558, 583-584, 695-696

7. Respondents' Motion for Costs

8. Plaintiff's Exhibit #1 McCoy's Employment Application

9. Plaintiff's Exhibit #5 Deputy McCoy's 10 Year Driving Record

10. Plaintiff's Exhibit #7 Colleton County Sheriff's Office Policy Manual

The undersigned certify this Designation contains no matter which is irrelevant to the appeal.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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PROOF OF SERVICE

We certify that on March 13, 2013, we served the Designation of Matter to be Included in the Record on Appeal on the Appellant by depositing a copy in the United States Mail with postage prepaid and addressed to Marshall H. Waldron, Jr., Griffith, Sadler & Sharp, P.A., Post Office Drawer 570, Beaufort, SC 29901-0570, and Matthew D. Cavender, Griffith, Sadler & Sharp, P.A., Post Office Drawer 570, Beaufort, SC 29901-0570.

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