

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2020-000071

Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios,..... Appellant,

v.

Dominion Energy South Carolina f/k/a South Carolina Electric & Gas Company,.....Respondent.

RECORD ON APPEAL – VOLUME I

YARBOROUGH APPELATE LLC
William E. Applegate, IV
Liam D. Duffy
Perry M. Buckner, IV
291 East Bay Street, Floor 2
Charleston, SC 29401
843-972-0150

BARNES LAW FIRM, LLC
Kathleen C. Barnes, SC Bar No. 78854
P.O. Box 897
Hampton, SC 29924
803-943-4529

SMITH, ROBINSON, HOLLER, DUBOSE,
& MORGAN, LLC
G. Murrell Smith, Jr.
Shannon N. Peake
Post Office Box 580
Sumter, SC 29151-0580
803-778-2471
Attorneys for Appellants

RICHARDSON PLOWDEN &
ROBINSON, P.A.
Steven J. Pugh
Post Office Drawer 7788
Columbia, SC 29202
803-771-4400

Megan C. White
235 Magrath Darby Boulevard,
Suite 100
Mount Pleasant, SC 29464
843-805-6550

WILLOUGHBY & HOEFER, P.A.
Tracey C. Green
Post Office Box 8416
Columbia, SC 29202
803-771-2128
Attorneys for Respondent

RECEIVED

Aug 31 2020

SC Court of Appeals

INDEX

PAGE

Index.....i

VOLUME I

Notice of Appeal, January 17, 2020.....1

Orders

Order granting Defendant’s motion for a new trial absolute, November 1, 2019.....3

Form 4 Order denying motion to reconsider, December 19, 2019.....13

Form 4 Order denying Defendants’ motion for continuance, September 26, 2019.....16

Order Compelling Production of Records, September 14, 2019.....17

Form 4 Order denying Defendant’s motion for summary judgment, September 6, 2019.....18

Pleadings

Summons and Complaint, June 7, 2017.....21

Answer of Defendant South Carolina Electric & Gas Company, July 11, 2017.....31

Plaintiff’s motion *in limine* No. 3 to exclude evidence regarding Jose Larios’ immigration status or any other witnesses’ immigration status, September 20, 2019.....40

Defendants’ joint motion for continuance, September 13, 2019.....44

Exhibits A-J.....51

Memorandum in support of Defendant’s motion for directed verdict, September 26, 2019.....76

Verdict Form, September 27, 2019.....98

Defendant’s motion for judgment notwithstanding the verdict, in the alternative, for a new trial and for sanctions, October 7, 2019.....100

Defendant’s memorandum of law in support of its motion for judgment notwithstanding the verdict, in the alternative, for a new trial and for sanctions, October 7, 2019.....104

Defendant’s motion for new trial *nisi remittitur* or, in the alternative, new trial absolute, and incorporated memorandum in support, October 7, 2019.....167

Plaintiff’s memorandum in opposition to Defendant’s motions for judgment notwithstanding the verdict, for a new trial, and for sanctions, October 18, 2019.....	181
Plaintiff’s memorandum in opposition to Defendant’s motion for new trial absolute or <i>nisi remittitur</i> , October 18, 2019.....	220
Plaintiff’s notice of motion and motion to reconsider, alter, or amend order granting new trial absolute, November 12, 2019.....	245
Attached affidavits, November 12, 2019.....	256
Defendant’s opposition to Plaintiff’s motion to reconsider, alter, or amend order granting new trial absolute, November 22, 2019.....	265

Transcripts

Transcript of pre-trial hearing on September 23, 2019.....	274
Transcript of trial, September 24-27, 2019.....	288
Opening statement by Mr. Applegate.....	308
Opening statement by Mr. Pugh.....	330

VOLUME II

Richard Carter

Direct examination by Mr. Buckner.....	347
Cross examination by Mr. Pugh.....	360

Marion Whaley

Direct examination by Mr. Applegate.....	371
Cross examination by Mr. Pugh.....	388
Cross examination by Mr. Stegmaier.....	415
Redirect examination by Mr. Applegate.....	417
Recross examination by Mr. Pugh.....	427

Erin Presnell

Direct examination by Mr. Applegate.....	429
--	-----

Cross examination by Mr. Pugh.....	446
Edward Brill	
Direct examination by Mr. Applegate.....	462
Cross examination by Mr. Pugh.....	507
Pedro Abraham	
Direct examination by Mr. Buckner.....	523
Cross examination by Ms. White.....	533
Redirect examination by Mr. Buckner.....	555
Recross examination by Ms. White.....	558
Beverly O'Brien	
Direct examination by Mr. Duffy.....	559
Cross examination by Mr. Pugh.....	576
Mark Branham	
Direct examination by Mr. Duffy.....	586
Cross examination by Mr. Pugh.....	613
Redirect examination by Mr. Duffy.....	614
Ray Jackson	
Deposition video played (print copy of deposition designations played at trial included in record).....	615
Gaspar Larios	
Direct examination by Mr. Applegate.....	615
Tiffany Provence	
Direct examination by Mr. Applegate.....	630
Defendant's motion for a directed verdict.....	642

VOLUME III

Eric Jackson

Direct examination by Mr. Pugh.....656

Cross examination by Mr. Applegate.....684

Redirect examination by Mr. Pugh.....716

Rodney Walker

Direct examination by Mr. Pugh.....721

Cross examination by Mr. Duffy.....733

Redirect examination by Mr. Pugh.....738

Jane Smoak

Direct examination by Mr. Pugh.....739

Cross examination by Mr. Buckner.....745

Redirect examination by Mr. Pugh.....749

Recross examination by Mr. Buckner.....749

Defendant’s motion for a directed verdict.....759

Closing argument by Mr. Applegate.....766

Closing argument by Mr. Pugh.....788

Closing argument by Mr. Applegate.....811

Jury Charge.....814

Verdict.....859

Print copy of Ray Jackson’s deposition designations played at trial.....865

Transcript of post-trial motions hearing on October 24, 2019.....890

Trial Exhibits

Plaintiff’s exhibit 1, photos.....940

Plaintiff’s exhibit 2, pathology report.....948

Plaintiff’s exhibit 4, autopsy photo.....953

Plaintiff’s exhibit 7, photo of chainsaw.....954

Plaintiff’s exhibit 8, benefit flyer.....955

Plaintiff’s exhibit 9, photos of memorial bench.....956

Plaintiff’s exhibit 13, photos.....958

Defendant’s exhibit 1, scene photo.....966

Defendant’s exhibit 3, line photo.....967

Defendant’s exhibit 4, line photo.....968

Defendant’s exhibit 5, night photo.....969

Certificate of Counsel and Compliance

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

RECEIVED
JAN 17 2020
SC Court of Appeals

Civil Action No. 2017-CP-15-0423

Tiffany N. Provence, as Special Administrator
for the Estate of Jose Refugio Licona Larios, Appellant,

vs.

Dominion Energy South Carolina f/k/a
South Carolina Electric & Gas Company, Respondent.

NOTICE OF APPEAL

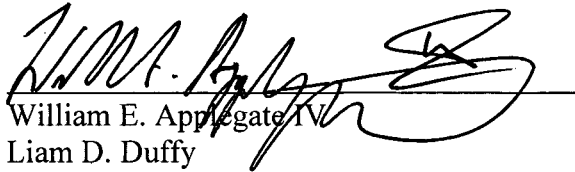
Appellant Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios, respectfully appeals from the Order Granting Defendant's Motion for a New Trial Absolute entered on November 1, 2019, as well as the Form 4 Order denying Appellant's motion to reconsider entered on December 19, 2019.

Undersigned counsel received written notice of entry of the Order by letter from Respondent's counsel on December 19, 2016.

SIGNATURE OF COUNSEL FOLLOWS ON PAGE 2

Respectfully submitted,

YARBOROUGH APPELATE LLC



William E. Applegate IV
Liam D. Duffy
Perry M. Buckner, IV
291 East Bay Street, Floor 2
Charleston, South Carolina 29401
(843) 972-0150

AND

BARNES LAW FIRM, LLC

Kathleen Barnes
Post Office Box 897
Hampton, SC 29924
(803) 943-4529

AND

**SMITH, ROBINSON, HOLLER, DUBOSE,
AND MORGAN, LLC**

G. Murrell Smith, Jr.
Shannon N. Peake
Post Office Box 580
Sumter, SC 29151-0580
(803) 778-2471

January 16, 2020

Other Counsel of Record:

Steven J. Pugh
Richardson, Plowden & Robinson, P.A.
PO Drawer 7788
Columbia, SC 29202
1900 Barnwell Street
Columbia, SC 29201
(803) 771-4400
Attorney for Respondent
Dominion Energy South Carolina f/k/a
South Carolina Electric & Gas Company

court alone has the power to reduce the verdict by granting the defendant's motion for a New Trial *Nisi Remittitur*. *Id.* at 531, 431 S.E.2d at 558. However, the trial court must "set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000). A New Trial Absolute should be granted only if the verdict is "so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury." *Id.* Ordinarily, the trial judge's decision to grant a new trial will not be disturbed on appeal unless the conclusions reached are controlled by an error of law. *Id.* In evaluating a motion for a new trial, the trial court must view the evidence in the light most favorable to the non-moving party. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

This Court is convinced that verdicts for actual damages of \$10 million dollars on the survival action and \$11 million dollars on the wrongful death action, sustained by the beneficiaries of the Estate of Jose Refugio Licono Larios (Plaintiff), is not supported by the evidence and can only be explained upon the basis of sympathy, passion, caprice or some other consideration found outside the evidence that is presented in this case.

I. SURVIVAL

In the survival action, the jury awarded \$10 million dollars to Plaintiff. Based on the evidence presented to this jury, this verdict is grossly excessive. Plaintiff did not submit any medical, surgical, hospital or funeral expenses and the evidence supporting conscious pain and suffering was, at best, minimal and left to guesswork and speculation. There is no evidence in the record as to the exact time the incident occurred and that Mr. Larios was conscious after EMS arrived prior to his death. As a matter of fact, the evidence presented showed that when Mr. Larios

fell, his co-worker, Mr. Abraham, immediately ran to him, found him conscious and injured and then had a passerby call 911. After asking the passerby to call 911, Mr. Abraham returned to Mr. Larios who, by that time according to the testimony, was unresponsive. There is no further evidence presented that Mr. Larios ever regained consciousness. Whether he did or not is never addressed by any witness or testimony.

"Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). The burden of proof is on the plaintiff to show that the deceased was conscious after the accident and prior to her death. *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944). If the plaintiff fails to meet her burden then the plaintiff will not be able to recover for conscious pain and suffering. *Stevens v. Allen*, 342 S.C. 47, 52, 536 S.E.2d 663, 665 (2000). Damages for subconscious pain and suffering, or for pre-impact fear is not recoverable. See *Brooks v. U.S.*, 273 F. Supp. 619 (D.S.C. 1967); *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 214, 734 S.E.2d 142, 144 (2012).

Here, there is no evidence of the amount of medical, surgical, or hospital bills charged to Plaintiff. While there were medical and related expenses, Plaintiff presented no evidence of what expenses were incurred and left it to the jury's pure speculation. In addition, while there were funeral-related expenses, Plaintiff submitted no evidence setting forth what those expenses were. Therefore the medical damages incurred by Plaintiff were left to the jury's speculation.

In addition, there is little evidence of conscious pain and suffering and mental distress. The only medical expert testimony addressing Mr. Larios' injuries came from the pathologist, Dr. Erin Presnell. In her testimony she identified the injuries that Mr. Larios suffered as a result of this

incident; however, there is no testimony as to how those injuries would affect the person prior to succumbing to those injuries.

Based on the evidence presented, Mr. Larios was conscious during the initial shock and immediately after the fall. Mr. Larios was shocked after coming in contact with a seed pod that was in contact with the primary line and after the shock he decided to come down the ladder. After unbuckling himself and taking a few steps down he lost control of his body and fell around 25 feet, where he suffered serious injuries. Even though he said he was fine, his severe injuries from the fall suggested otherwise. Mr. Abraham immediately found someone to call 911. While there is conscious pain and suffering from being shocked, there is no expert to testify on the intensity of the shock. Moreover, there is no medical expert testimony regarding the nature, level, and extent of pain. While there was a burn mark the size of a quarter on Mr. Larios' abdomen, there were no exit wounds nor were there any internal injuries caused by electrocution.

As stated earlier, there is little evidence that Mr. Larios was conscious for very long after the incident. To the contrary, it appears Mr. Larios was unconscious for most of the time from the incident to his death. There is no evidence that Mr. Larios ever regained consciousness after Mr. Larios told Mr. Abraham he was fine within minutes of the fall. Mr. Abraham testified that Mr. Larios was unresponsive after he came back from finding someone on the pathway to call 911. There is no testimony as to what time the incident occurred. There is no evidence of how long Mr. Abraham was away from Mr. Larios while trying to find someone to call 911. Further, there is no testimony from any of the first responders to the condition of Mr. Larios upon arriving to the scene nor is there any testimony about his time in the ambulance. Plaintiffs argue in their submissions that Mr. Larios was pronounced dead some 2 hours after the fall; however, the record of the case is completely void of times as to when the fall occurred, how long EMS worked on Mr. Larios

before putting him into the ambulance, or how long after he actually died was he officially pronounced dead. Nor is there any evidence whatsoever if Mr. Larios EVER regained consciousness after Mr. Abraham found him unresponsive shortly after the fall. This was all left up to the jury to speculate as to how long Mr. Larios was actually conscious after the fall.

Giving the Plaintiff every benefit of the doubt, and more, and taking their own belief of 2 hours of conscious pain and suffering into consideration, the damages of \$10 million dollars for the survival action is grossly excessive. The jury was mostly left to guesswork and speculation regarding the damages suffered by Mr. Larios from the time of the incident to the time he passed away. Without any evidence of actual damages from medical, surgical, or hospital bills, the jury found there was \$10 million dollars in pain and suffering and mental distress despite the fact there was little evidence of actual pain and suffering. As such, this Court finds that the jury's verdict in this matter is grossly excessive and not supported by the evidence presented.

II. WRONGFUL DEATH

In the wrongful death action, the jury awarded \$11 million dollars to Plaintiff. This verdict is grossly excessive because of the lack of evidence in the record of recoverable damages suffered by Plaintiff in a wrongful death action.

Under S.C. Code Ann. § 15-51-20 (Supp. 1993), a personal representative may bring a wrongful death action for the benefit of statutory beneficiaries, including the parents of the deceased, where there is no surviving spouse or child, as in this case. Damages recoverable for wrongful death are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, and loss of society and companionship. *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993); *Smith v. Wells*, 258 S.C. 316, 188 S.E.2d 470 (1972); *Zorn v. Crawford*, 252 S.C. 127, 165

S.E.2d 640 (1969). These damages are, as stated, suffered by the statutory beneficiaries as a result of the death — not by the value of a human life. *Zorn*, at 136-137, 165 S.E.2d at 645. The plaintiff has the burden to show evidence of pecuniary loss as an element of damages, but if there is no pecuniary loss the plaintiff can still recover other damages. *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 197 S.E.2d 97 (1938).

Here, there is little, if any, evidence of pecuniary loss. Plaintiff did not submit any evidence of his earnings, holdings, or assets. Mr. Larios was a 41-year-old man who was unmarried and did not have any children. Since there is no evidence that Mr. Larios had a will, he is presumed to have died intestate, so his heirs or beneficiaries would be his mother and father who live in Mexico. There is evidence Mr. Larios sent some money to his parents in Mexico, but there is no testimony of how much or how often he sent money. There is evidence that he received a law degree while in Mexico prior to moving to the United States; however he was never licensed to practice law in Mexico or the United States and there is no evidence that he ever practiced law in Mexico or the United States. Mr. Larios' brother testified that Mr. Larios hoped to practice law but after living in the United States for 12 or more years, there is no evidence that he ever did anything to work toward making that goal a reality. The only evidence in this case regarding Mr. Larios' earning capacity is that he worked for a landscaping company maintaining yards and properties.

Mr. Larios' brother, Gaspar, testified that after learning of her son's death, his mother began taking medication, which costs about \$100 and she will likely have to take the medication the rest of her life. In addition, Gaspar testified that Mr. Larios' father was out of work for a period of time after the death of Mr. Larios, but that he was now working again. There is no evidence that Mr. Larios' parents depended on him for support or if the money he sent was just the kindness of a son toward his parents. Mr. Larios was an excellent soccer player and teams would pay him to play on

their team when he lived in Mexico. His skill was well known in his local community in Mexico, however, there is no evidence that Mr. Larios ever brought those skills to the United States or that he had any opportunity to play professionally in the U.S. It appeared that the testimony simply related to the things he enjoyed pursuing during his youth in Mexico.

Finally, there is no evidence that Mr. Larios had even seen his parents since he moved to the United States. Mr. Larios had been living in Edisto since 2003 or 2004, and prior to that he worked in both Florida and Georgia, but there is no testimony to how long he had lived in the United States. By the same token, there is no evidence that Mr. Larios had any intention to return to Mexico to see his parents or that he had ever seen them since he left Mexico.

In viewing the evidence in the light most favorable to Plaintiff, the award of \$11 million dollars for the wrongful death action is grossly excessive. The law sets forth the damages that are recoverable in a wrongful death action. These are damages which would inure to the legal and statutory beneficiaries of Mr. Larios, i.e. his mother and father. First, as to (1) pecuniary loss; there is little, if any, evidence of pecuniary loss. There is no evidence of Mr. Larios' earnings, holdings, investments, insurance, or assets. His brother, Gaspar, testified Mr. Larios sent money home to his parents, but there is no testimony as to how much or how often this was done. There is testimony that he did help his brother and his brother's family out financially and helped pay for half their house, but no evidence of how much was invested or the value of the house. It is important to note that the brother, Gaspar, and his family would not be considered statutory beneficiaries under the Wrongful Death statute. Any amount awarded for pecuniary loss would have to be completely based on conjecture, guesswork or speculation.

The remaining factors for the jury to consider are (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of companionship; and (6) deprivation of the use

and comfort of the intestate's society. All of these, again, relate to the damages suffered by the statutory heirs or beneficiaries of Mr. Larios' estate. There certainly is evidence in the record that his parents were shocked upon hearing of their son's death. The testimony is that their pain and grief was great at the loss of their son, as anyone would expect. However, Mr. Larios' parents are in poor health and could not travel to the United States to appear for Court. The only evidence of their reaction and effect came from the testimony of his brother, Gaspar.

While there is evidence of mental shock and suffering, wounded feelings, and grief and sorrow on behalf of the parents learning of the loss of their son, it is hard to ignore the fact that Mr. Larios moved away from his parents to another country and that there is no evidence that he has seen them or been with them in over 12 years other than by way of telephone. The prolonged absence between Mr. Larios and his parents cannot help but affect an award based on loss of consortium, companionship or society. While an amount for these type of damages could possibly be ascertained from the evidence in this record, it is beyond this Court's comprehension that the amount of damages under this evidence could even remotely approach \$11 million dollars.

III. CONCLUSION

In considering the Post-Trial Motions and responses, the oral arguments, and the trial transcript, this Court initially was leaning toward the decision of considering granting the Motion for New Trial *Nisi Remittitur*. After careful review of all the evidence in this case to support the amount of damages proven by Plaintiff, it is the opinion of this Court that to reduce the damages to the amount supported by the evidence would be such a small fraction of the \$21 million dollars awarded by the jury as to make the award by the jury grossly excessive by comparison; therefore, the Defendant should be awarded a new trial. Further, even if this Court wished to reduce the verdict, the evidence of damages in the record would make any reduction purely speculative.

THEREFORE, the Defendant's Motion for a New Trial Absolute is hereby **GRANTED**.

As to the Defendant's Motion for Sanctions, this Court finds that there was no basis or conduct on the part of Plaintiff that would support sanctions being awarded and would respectfully deny the Motion for Sanctions.

Although the Defendant raises several other Motions in the alternative, this Court believes that the granting of a New Trial Absolute is dispositive; therefore, it is unnecessary to address the remaining Motions by the Defendant.

NOW, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

That the Defendant's Motion for Sanctions is **DENIED** and the Motion for a New Trial Absolute is hereby **GRANTED**. Accordingly, this Court hereby sets aside the jury's \$21 million dollar verdict against Defendant and orders a New Trial Absolute in this matter.

AND IT IS SO ORDERED.

Thomas A. Russo
Presiding Judge

The 1st day of November, 2019

Florence, South Carolina.



Colleton Common Pleas

Case Caption: Tiffany N. Provence, As Special Administrator For Estate Of Larios
VS South Carolina Electric & Gas Company , defendant, et al
Case Number: 2017CP1500423
Type: Order/Other

So Ordered

s/Thomas A. Russo #2141

Electronically signed on 2019-11-01 12:14:47 page 10 of 10

Tiffany N. Provence, As Special Administrator For Estate Of Larios
PLAINTIFF(S)

South Carolina Electric & Gas Company et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's motion to reconsider is denied.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/19/2019 .

Thomas Porcher Stoney, II
Dominion Energy South Carolina (Fka)

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Colleton Common Pleas

Case Caption: Tiffany N. Provence, As Special Administrator For Estate Of Larios
VS South Carolina Electric & Gas Company , defendant, et al
Case Number: 2017CP1500423
Type: Order/Electronic Form 4

So Ordered

s/Thomas A. Russo #2141

Electronically signed on 2019-12-19 11:15:00 page 3 of 3

Tiffany N. Provence, As Special Administrator For Estate Of Larios
PLAINTIFF(S)

South Carolina Electric & Gas Company et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendants' motion for continuance is hereby denied.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/26/2019 .

Thomas Porcher Stoney, II

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)
)
Tiffany N. Provence, as Special)
Administrator for the Estate of Jose)
Refugio Licono Larios,)
)
)
Plaintiff,)
)
v.)
)
South Carolina Electric & Gas)
Company; PENSCO Trust Company)
LLC; and Edisto Sales & Rentals)
Realty, LLC,)
)
)
Defendants.)
)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-15-00423

**ORDER COMPELLING PRODUCTION OF
RECORDS**

THIS MATTER COMES BEFORE the Court for an Order seeking the expedited production of all medical records relating to Jose Refugio Licono Larios (DOB: 03/24/1974).

This Court is advised that a subpoena *duces tecum* was served on the Medical University of South Carolina for any and all records pertaining to Jose Refugio Licono Larios (DOB: 03/24/1974), to which records have not been produced. See Exhibit 1.

IT IS ORDERED, ADJUDGED, AND DECREED that the Medical University of South Carolina produce all medical records or other items relating to Jose Refugio Licono Larios (DOB: 03/24/1974) immediately and without further delay.



Judge Carmen T. Mullen
Chief Administrative Judge
Fourteenth Judicial Circuit

Beaufort, South Carolina
September 14, 2019

Tiffany N. Provence, As Special Administrator For Estate Of Larios
PLAINTIFF(S)

South Carolina Electric & Gas Company et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendant PENSICO's Motion for Summary Judgment, Defendant Edisto Realty's Motions for Summary Judgment and for Leave to File a Third Party Complaint, and Defendant SCE&G's Motions for Summary Judgment and for Leave to File a Third Party Complaint are denied.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/05/2019 .

Thomas Porcher Stoney, II

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Colleton Common Pleas

Case Caption: Tiffany N. Provence, As Special Administrator For Estate Of Larios
VS South Carolina Electric & Gas Company , defendant, et al
Case Number: 2017CP1500423
Type: Order/Electronic Form 4

So Ordered

s/Carmen T Mullen 2142

Electronically signed on 2019-09-05 11:01:00 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-___ - _____
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose)	
Refugio Licona Larios,)	
)	
Plaintiff,)	
	)	SUMMONS
vs.)	
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC; Edisto)	
Sales & Rentals Realty, LLC; DLL)	
Operating Co., Inc.; Stevens Irrigation and)	
Landscaping, LLC; and William J. Stevens,)	
)	
Defendants.)	
_____)	

TO: THE ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer thereto on the subscribers at their office located at 291 East Bay Street, Floor 2, Charleston, South Carolina, 29401 within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will move for entry of Default Judgment and apply to the Court for the relief sought therein.

[Signature page to follow.]

YARBOROUGH APPEGATE LLC

291 East Bay Street, Floor 2
Charleston, South Carolina 29401
(843) 972-0150 Office
(843) 277-6691 Fax

s/ William E. Applegate IV
William E. Applegate IV, Esquire
David B. Lail, Esquire
Christopher J. Bryant, Esquire
william@yarboroughapplegate.com
dlail@yarboroughapplegate.com
chris@yarboroughapplegate.com

Attorneys for the Plaintiffs

June 7, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-___ - _____
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose)	
Refugio Licono Larios,)	
)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
vs.)	
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC; Edisto)	
Sales & Rentals Realty, LLC; DLL)	
Operating Co., Inc.; Stevens Irrigation and)	
Landscaping, LLC; and William J. Stevens,)	
)	
Defendants.)	
)	

Plaintiff Tiffany N. Provence, as the Special Administrator for the Estate of Jose Refugio Licono Larios, and the undersigned attorneys, complaining of the Defendants, jointly and severally, would allege and show unto the Court the following:

1. Plaintiff brings this action in her capacity as the Special Administrator of the Estate of Jose Refugio Licono Larios pursuant to S.C. Code Ann. §§ 15-5-90 and 15-51-10 *et seq.* Decedent Jose Refugio Licono Larios was a resident of Charleston County, South Carolina.
2. Defendant South Carolina Electric & Gas Company (hereinafter “SCE&G”) is a corporation formed under the laws of the State of South Carolina and conducts business in Colleton County.
3. Upon information and belief, Defendant PENSCO Trust Company LLC is a limited liability company formed under the laws of the State of Colorado and owns property in Colleton County.

4. Defendant Edisto Sales & Rentals Realty, LLC is a limited liability company formed under the laws of the State of South Carolina and conducts business in Colleton County.

5. Defendant DLL Operating Co., Inc. is a corporation formed under the laws of the State of South Carolina and conducts business in Colleton County.

6. Defendant Stevens Irrigation and Landscaping, LLC is a limited liability company formed under the laws of the State of South Carolina and conducts business in Colleton County.

7. Defendant William J. Stevens is a citizen and a resident of Colleton County and is the owner of Stevens Irrigation and Landscaping, LLC.

8. This suit arises out of an incident that occurred in Colleton County, South Carolina on Sunday, November 29, 2015.

9. Jurisdiction and venue are proper in this Colleton County Court of Common Pleas.

10. Defendant Stevens Irrigation and Landscaping employed Jose Refugio Licono Larios to perform landscaping work from approximately 2008 until he died on November 29, 2015.

11. On November 29, 2015, Larios was sent to 3402 Myrtle Street, Edisto Beach, South Carolina to perform tree trimming and other landscaping services.

12. At approximately 9:30 a.m. Larios was working on a ladder approximately 26 feet in the air trimming palm fronds from the palm trees. While trimming the trees, Larios's chainsaw came into contact with an active SCE&G powerline that was hidden in the trees, he cried out in pain, and fell approximately 26 feet to the ground. Larios subsequently died from injuries sustained as a result of the fall.

13. Defendant Stevens Irrigation and Landscaping provided Larios with all equipment to perform landscaping work at 3402 Myrtle Street, including chain saw, ladder, rope, company trailer, and company truck.

14. Defendant William Stevens directed Larios to perform the work at 3402 Myrtle Street on November 29, 2015.

15. Upon information and belief, Defendant PENSICO Trust Company LLC owns 3402 Myrtle Street.

16. Upon information and belief, Defendants Edisto Sales & Rentals Realty and/or DLL Operating Co. manage and maintain 3402 Myrtle Street as a vacation rental.

**FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS WILLIAM STEVENS
AND STEVENS IRRIGATION AND LANDSCAPING, LLC**
(Negligence Per Se/Negligence/Gross Negligence)

17. Plaintiff realleges and reincorporates all preceding paragraphs as if fully set forth verbatim herein.

18. Defendants William Stevens and Stevens Irrigation and Landscaping, LLC (the “Stevens Defendants”) owed a duty to furnish a place of employment which is free of recognized hazards which may cause death or serious physical harm to its employees and comply with the occupational safety and health rules and regulations promulgated under Title 41, Chapter 15 of the South Carolina Code of Laws. These regulations include, but are not limited to, the duty to train employees and the duty to ensure employees use insulated tools and equipment to remove branches that are within the minimum approach distance of energized parts.

19. The Stevens Defendants knew or should have known that employees trimming trees near energized power lines were exposed to the hazard of direct or indirect contact with energized lines. The Stevens Defendants knew or should have known that employees trimming trees with a chainsaw while on a ladder more than 25 feet in the air were exposed to the risk of falling off the ladder while using the chainsaw.

20. The Stevens Defendants had no safety program, never trained employees how to work from a ladder or use any type of equipment, and did not require employees to wear Personal Protective Equipment.

21. Larios's fall and resulting death were directly due to and proximately caused by the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness on the part of the Stevens Defendants, including, but not limited to, one or more of the following particulars:

- (a) In failing to use reasonable care to inspect the work site at 3402 Myrtle Street;
- (b) In failing to supervise its employees while working;
- (c) In failing to train employees how to work from a ladder;
- (d) In failing to train employees how to properly use tools;
- (e) In failing to train employees to do work near energized power lines;
- (f) In failing to correct an unreasonably dangerous condition;
- (g) In failing to warn of the unreasonably dangerous condition; and
- (h) In failing to provide appropriate tools for the job.

22. Larios did not know and could not reasonably have known about the hazardous and dangerous conditions of the work site at 3402 Myrtle Street until he unexpectedly encountered them on November 29, 2015.

23. That as a direct and proximate cause of the acts and omissions, or both, of the Stevens Defendants, Larios fell from the ladder and experienced conscious pain and suffering until he ultimately died on November 29, 2015.

24. That due to the negligent, grossly negligent, reckless, willful, and wanton conduct of the Stevens Defendants, as well as their violations of statutory law and the standard(s) of care, Plaintiff is entitled to actual and punitive damages in such amount as to be determined by a jury.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANT SCE&G
(Negligence/Gross Negligence)

25. Plaintiff realleges and reincorporates all preceding paragraphs as if fully set forth verbatim herein.

26. Defendant SCE&G had a duty perform adequate inspections of its electric lines, trim or remove trees creating a hazard, provide insulated covering for dangerous parts of the line, and place adequate warnings near the electric lines.

27. Larios's fall and resulting death were directly due to and proximately caused by the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness on the part of the Defendant SCE&G, including, but not limited to, one or more of the following particulars:

- (a) In failing to use reasonable care to inspect its electric lines;
- (b) In failing to use reasonable care to trim or remove the tree that created the hazard;
- (c) In failing to properly insulate its electric lines; and
- (d) In failing to adequately warn of the danger posed by the electric lines.

28. That as a direct and proximate cause of the acts and omissions, or both, of Defendant SCE&G, Larios fell from the ladder and experienced conscious pain and suffering until he ultimately died on November 29, 2015.

29. That due to the negligent, grossly negligent, reckless, willful, and wanton conduct of the Defendant SCE&G, as well as its violations of statutory law and the standard(s) of care, Plaintiff is entitled to actual and punitive damages in such amount as to be determined by a jury.

**FOR A THIRD CAUSE OF ACTION AGAINST DEFENDANTS PENSICO TRUST
COMPANY LLC; EDISTO SALES & RENTALS REALTY, LLC; AND DLL
OPERATING CO., INC.**
(Negligence/Premises Liability)

30. Plaintiff realleges and reincorporates all preceding paragraphs as if fully set forth verbatim herein.

31. Upon information and belief, Defendants PENSICO Trust Company, Edisto Sales & Rentals Realty, and/or DLL Operating Co. (the “Premises Defendants”) or an agent thereof contracted with the Stevens Defendants to perform landscaping work at 3402 Myrtle Street.

32. The Premises Defendants owed Larios a duty of care to discover hidden dangers and take safety precautions to warn of or eliminate unreasonable risks.

33. The Premises Defendants knew or should have known of the hidden danger created by the electrical wires and the tree at 3402 Myrtle Street.

34. The Premises Defendants knew of or should have anticipated the physical harm that could be caused by trimming trees in such proximity to electrical wires.

35. Larios’s fall and resulting death were directly due to and proximately caused by the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness on the part of the Defendants, including, but not limited to, one or more of the following particulars:

- (a) In failing to use reasonable care to inspect and discover hidden dangers on the property;
- (b) In failing to warn the Stevens Defendants about the dangerous condition; and
- (c) In failing to take any steps to eliminate the dangerous condition, such as informing SCE&G.

36. That as a direct and proximate cause of the acts and omissions, or both, of the Premises Defendants, Larios fell from the ladder and experienced conscious pain and suffering until he ultimately died on November 29, 2015.

37. That due to the negligent, grossly negligent, reckless, willful, and wanton conduct of the Premises Defendants, Plaintiff is entitled to actual and punitive damages in such amount as to be determined by a jury.

FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Wrongful Death)

38. Plaintiff hereby incorporates the allegations of the foregoing Paragraphs as if fully restated herein.

39. As a direct and proximate result of the Defendants' negligent, grossly negligent, reckless, willful, and wanton conduct of the Defendants, Larios was fatally injured.

40. As a direct result of the Defendants' acts, Larios's Special Administrator and heirs have incurred pain and suffering, medical expenses, funeral and burial expenses, pecuniary loss, mental shock and suffering, wounded feelings and other losses and injuries.

41. As a direct and proximate result of Defendants' negligent, reckless, willful, wanton, and grossly negligent acts and omissions which caused Larios's death, Plaintiff is entitled to recover actual, consequential, and punitive damages from Defendants as determined by a jury.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Survival)

42. Plaintiff hereby incorporates the allegations of the foregoing Paragraphs as if fully restated herein.

43. That Larios cried out in pain before he fell from the ladder; that he slammed to the ground when he fell from the ladder, experiencing grave and severe injuries ultimately leading to his death; that he did experience grave pain and suffering; all to his injury and damage in an amount of actual and punitive damages to be determined at the trial of this case.

WHEREFORE, Plaintiffs pray unto this Honorable Court as follows:

- a) Judgment against Defendants jointly and severally,
- b) For an award of actual damages in an amount to be determined at trial;
- c) For an award of punitive damages in an amount to be determined at trial;
- d) For a trial by jury; and
- e) For such other and further relief as this Court may deem just and proper.

YARBOROUGH APPEGATE LLC
291 East Bay Street, Floor 2
Charleston, South Carolina 29401
(843) 972-0150 Office
(843) 277-6691 Fax

s/ William E. Applegate IV
William E. Applegate IV, Esquire
David B. Lail, Esquire
Christopher J. Bryant, Esquire
william@yarboroughapplegate.com
dlail@yarboroughapplegate.com
chris@yarboroughapplegate.com

Attorneys for the Plaintiffs

June 7, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON)	
)	
Tiffany N. Provence, as Special	)	Civil Action No. 2017-CP-15-00423
Administrator for the Estate of Jose)	
Refugio Licona Larios,)	
)	
Plaintiff,)	
)	
v.	)	ANSWER OF DEFENDANT SOUTH
	)	CAROLINA ELECTRIC AND GAS
	)	COMPANY
South Carolina Electric & Gas)	
Company; PENSICO Trust Company)	
LLC; Edisto Sales & Rentals Realty,	)	(Jury Trial Demanded)
LLC; DLL Operating Co., Inc.;)	
Stevens Irrigation and Landscaping,)	
LLC; and William J. Stevens,)	
)	
Defendant.)	
)	

Defendant South Carolina Electric and Gas Company (hereinafter referred to as "SCE&G"), answers the Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION

1. SCE&G denies each and every allegation of the Plaintiff's Complaint which is not hereinafter specifically admitted, modified or explained.

ANSWER

2. Upon information and belief, SCE&G admits the allegations contained in Paragraph 1 of the Plaintiff's Complaint.

3. SCE&G admits the allegations contained in Paragraph 2 of Plaintiff's Complaint.

4. Paragraphs 3, 4, 5, 6, 7 and 8 of the Plaintiff's Complaint make no actionable reference or allegation to SCE&G. Should a response to these paragraphs be required of SCE&G, the allegations therein are denied.

5. Paragraph 9 of the Plaintiff's Complaint asserts no allegations against SCE&G and contains conclusions of law to which no response from SCE&G is required. To the extent a response from SCE&G is required, SCE&G avers to its responses to Paragraphs 1 through 8 of the Plaintiff's Complaint.

6. SCE&G does not have sufficient information to determine the truth of the allegations contained in Paragraphs 10 and 11 of the Plaintiff's Complaint and, therefore, denies the same. As to Paragraph 11, SCE&G admits, upon information and belief, that Decedent Jose Refugio Licona Larios ("Decedent") was injured while performing work at or near 3402 Myrtle Street, Edisto Beach, South Carolina.

7. SCE&G denies the allegations contained in Paragraph 12 of the Plaintiff's Complaint, as written. As to Paragraph 12, SCE&G admits, upon information and belief, that Decedent was injured while performing work at or near 3402 Myrtle Street, Edisto Beach, South Carolina.

8. SCE&G does not have sufficient information to determine the truth of the allegations contained in Paragraphs 13, 14, 15 and 16 of the Plaintiff's Complaint and, therefore, denies the same.

ANSWERING THE FIRST CAUSE OF ACTION
(Negligence Per Se / Negligence / Gross Negligence)

9. In response to Paragraph 17, SCE&G repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 16 of the Plaintiff's Complaint.

10. Paragraphs 18, 19, 20, 21, 22, 23 and 24, including all subparagraphs, of the Plaintiff's Complaint make no actionable reference or allegation to SCE&G. Should a response by SCE&G to these paragraphs be required, SCE&G states that its

energized overhead power lines were open, obvious and constructed and maintained in accordance with the National Electric Safety Code.

ANSWERING THE SECOND CAUSE OF ACTION
(Negligence / Gross Negligence)

11. In response to Paragraph 26, SCE&G repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 24 of the Plaintiff's Complaint.

12. SCE&G denies the allegations contained in Paragraphs 26, 27, 28 and 29, including all subparagraphs, of the Plaintiff's Complaint, as written.

ANSWERING THE THIRD CAUSE OF ACTION
(Negligence / Premises Liability)

13. In response to Paragraph 30, SCE&G repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 29 of the Plaintiff's Complaint.

14. Paragraphs 31, 32, 33, 34, 35, 36 and 37, including all subparagraphs, of the Plaintiff's Complaint make no actionable reference or allegation to SCE&G. Should a response by SCE&G to these paragraphs be required, SCE&G states that its energized overhead power lines were open, obvious and constructed and maintained in accordance with the National Electric Safety Code

ANSWERING THE FOURTH CAUSE OF ACTION
(Wrongful Death)

15. In response to Paragraph 38, SCE&G repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 37 of the Plaintiff's Complaint.

16. SCE&G denies the allegations contained in Paragraphs 39, 40 and 41 of the Plaintiff's Complaint.

ANSWERING THE FIFTH CAUSE OF ACTION
(Survival)

17. In response to Paragraph 42, SCE&G repeats, realleges and incorporates herein by reference its responses to Paragraphs 1 through 41 of the Plaintiff's Complaint.

18. SCE&G denies the allegations contained in Paragraph 43 of the Plaintiff's Complaint, as written.

19. SCE&G denies the Plaintiff's Prayer for Relief.

FOR A FIRST AFFIRMATIVE DEFENSE

20. SCE&G asserts that the Plaintiff's Complaint, in whole or in part, fails to state a claim upon which relief may be granted against SCE&G and should, therefore, be dismissed.

FOR A SECOND AFFIRMATIVE DEFENSE

21. If it is determined that SCE&G was negligent as alleged in the Plaintiff's Complaint, which is expressly denied, then the negligence of Decedent should be compared to that of SCE&G and any other's negligence, and the damages awarded to the Plaintiff, if any, should be apportioned by the amount of the Decedent's and any other's fault and negligence in accordance with the comparative negligence law applicable herein.

FOR A THIRD AFFIRMATIVE DEFENSE

22. Any injuries and damages sustained by the Decedent as alleged in the Plaintiff's Complaint, which are denied, were due to and were caused and occasioned by the concurring, intervening and/or superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness of another party or other parties over whom SC&EG had no supervision or control, and SCE&G pleads such

concurring, intervening and/or superseding negligence, carelessness, recklessness, heedlessness, willfulness and wantonness as the direct and proximate cause of the injuries and damages sustained by the Decedent as alleged in the Plaintiff's Complaint.

FOR A FOURTH AFFIRMATIVE DEFENSE

23. SCE&G asserts that the injuries and damages sustained by the Plaintiff, if any, were solely and proximately caused by the negligence, carelessness, gross negligence, willfulness, wantonness, recklessness and/or intentional conduct of others over whom SC&EG had no control and for whose unforeseeable actions SCE&G is not liable.

FOR A FIFTH AFFIRMATIVE DEFENSE

24. Plaintiff's claims are barred, in whole or in part, by Decedent's comparative and/or contributory negligence, gross negligence and/or assumption of risk.

FOR A SIXTH AFFIRMATIVE DEFENSE

25. SCE&G asserts that the condition which allegedly caused injury to the Decedent was an open, obvious and apparent condition which was known or should have been known to the Plaintiff. Furthermore, SCE&G had no duty to warn the Decedent of the condition and, therefore, the Plaintiff's claims should be dismissed.

FOR A SEVENTH AFFIRMATIVE DEFENSE

26. SCE&G was not given notice by Plaintiff, Decedent or by others of any allegedly dangerous condition, nor did SCE&G have any reason to know of any allegedly dangerous condition. Furthermore, SCE&G was not given notice by Plaintiff, Decedent or by others of Decedent's intention to work near the subject power lines and

electrical equipment. SCE&G, therefore, pleads lack of notice as a complete defense to this action.

FOR AN EIGHTH AFFIRMATIVE DEFENSE

27. Decedent's employer had knowledge, equal or superior to SCE&G, with respect to possible health hazards associated with Decedent's employment and, therefore, if there was any duty to warn Decedent or provide protection to him, which is expressly denied, it was the duty of said employer and not of SCE&G and any breach of that duty was an intervening and/or superseding cause of Decedent's alleged injuries.

FOR A NINTH AFFIRMATIVE DEFENSE

28. Plaintiff's and/or Decedent's receipt of benefits or entitlement to benefits under the Workers' Compensation Act, Social Security Administration, long and/or short term disability, or other similar compensatory systems, entitles SCE&G to a reduction, set-off and/or credit against any judgment that might be entered against it in this action.

FOR A TENTH AFFIRMATIVE DEFENSE

29. In the event Plaintiff and/or Decedent has already, or in the future, entered into any settlement or compromise with, or execute any release of, any present or future Defendant, Third-Party Defendant or any non-party, for any of Decedent's alleged injuries and damages, SCE&G is entitled to a credit or set-off of: (a) the amount of consideration to be received by Plaintiff in such settlement or for such release; and (b) the proportionate or pro rata share of liability of the settling or released party or non-party.

FOR AN ELEVENTH AFFIRMATIVE DEFENSE

30. SCE&G acted reasonably in the design, installation, operation, and maintenance of its power lines and electrical equipment.

FOR A TWELFTH AFFIRMATIVE DEFENSE

31. SCE&G would show that the Decedent's alleged injuries and damages were not caused by any departure or deviation from any applicable standards of care by SCE&G.

FOR A THIRTEENTH AFFIRMATIVE DEFENSE

32. SCE&G owed no duty to the Decedent as alleged in the Plaintiff's Complaint. In the alternative, SCE&G asserts that the alleged breach of any duty owed to the Decedent was not a proximate cause of the Decedent's alleged damages.

FOR A FOURTEENTH AFFIRMATIVE DEFENSE

33. SCE&G asserts that some or all of the Plaintiff's claims are barred by the applicable statutes of limitations or statutes of repose.

FOR A FIFTEENTH AFFIRMATIVE DEFENSE

34. Plaintiff's claims are barred by the doctrines of waiver and/or estoppel.

FOR A SIXTEENTH AFFIRMATIVE DEFENSE

35. Plaintiff's claims against SCE&G are preempted by the regulations of the Occupational Safety and Health Administration or other applicable federal laws.

FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

36. SCE&G's power lines and electrical equipment in question were designed, constructed, operated and maintained in compliance with all applicable federal and state regulations and industrial and governmental standards and regulations.

FOR AN EIGHTEENTH AFFIRMATIVE DEFENSE

37. Even if the power lines and electrical equipment at issue were in a dangerous condition, which SCE&G expressly denies, such alleged condition was open,

obvious, commonly known, generally recognizable, and/or contemplated by the Decedent.

FOR A NINETEENTH AFFIRMATIVE DEFENSE

38. SCE&G would show that the Decedent's alleged injuries or damages were caused by the Decedent's willful participation in unforeseeable hazardous activities on the subject premises.

FOR A TWENTIETH AFFIRMATIVE DEFENSE

39. SCE&G asserts that the Plaintiff is barred from recovery because the Decedent was a trespasser as to SCE&G's power lines and electrical equipment on the subject premises.

FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

40. That no acts or omissions on the part of SCE&G were the proximate cause or cause in fact of the alleged injuries and damages.

FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

41. SCE&G pleads industry custom and state of the art as a complete defense to the Plaintiff's Complaint.

FOR A TWENTY-THIRD AFFIRMATIVE DEFENSE

42. SCE&G would show that the Plaintiff's claim for punitive damages is violative of both the United States Constitution and the South Carolina Constitution and, is, therefore, barred.

FOR A TWENTY-FOURTH AFFIRMATIVE DEFENSE

43. Punitive damages are inappropriate in this case since SCE&G did not engage in any malicious, reckless, wrongful or intentional conduct upon which an award of punitive damages could be based.

FOR A TWENTY-FIFTH AFFIRMATIVE DEFENSE

44. SCE&G pleads the limitations on damage awards pursuant to S.C. Code Ann. § 15-32-510, *et. seq.* and requests bifurcation in accordance with these statutes.

Defendant South Carolina Electric and Gas Company prays that Plaintiff takes nothing in this cause and that it recover its costs incurred herein. This Defendant prays for such other and further relief, both general and special, legal or equitable, to which it may be justly entitled.

RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

By: s/ Samia H. Nettles
Steven J. Pugh (SC Bar #14341)
Samia H. Nettles (SC Bar #76094)

ATTORNEYS FOR DEFENDANT SOUTH
CAROLINA ELECTRIC AND GAS COMPANY

July 11, 2017

that would result to Plaintiff if admitted, and, therefore, the evidence should be excluded pursuant to Rule 403, SCRE. Lastly, such evidence is improper character evidence under Rule 404, SCRE.

I. The Immigration Status of Witnesses Has No Relevance to this Trial and Courts Have Prohibited Attempts to Use Such Evidence For Impeachment of a Witnesses' Credibility As Improper Character Evidence

Relevant evidence under South Carolina law is defined as that which has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence.” Rule 401, SCRE. The nationality, country of origin, citizenship, or immigration status of any witness called by Plaintiff is entirely devoid of any connection to this lawsuit, which solely concerns the circumstances surrounding Mr. Larios’ death on November 29, 2015. Allowing such evidence would not bolster or support any fact at issue whatsoever and would only serve to distract the jury from the merits of the case. To the extent Defendants might somehow speculate that Mr. Larios’ immigration status is relevant to Plaintiff’s recovery of economic damages, such a theory must fail because Plaintiff is not seeking lost wages in this case. There is no credible basis under which this evidence could be considered as relevant.¹

Impeachment purposes do not create any exception for the Defendants to admit such evidence. “Immigration status alone does not reflect upon an individual’s character and is thus not admissible for impeachment purposes.” *Figeroa v. U.S. I.N.S.*, 886 F.2d 76, 79 (4th Cir. 1989) (“An individual’s status as an alien, legal or otherwise, however does not entitle [the opposing

¹ South Carolina state and federal courts have not addressed the issue of admissibility of immigration status. However, it should be noted that the only grounds for such information being found to be *discoverable* by South Carolina district courts has been where lost wages were being sought. *Fragoso v. Builders FirstSource Southeast Group LLC*, 2011 WL 767442 (D.S.C. 2011). No South Carolina court has ever found immigration status to be discoverable for potential impeachment purposes, much less admissible during trial.

party] to brand him a liar.”); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 502 (W.D. Mich. 2005) (finding no connection between immigration status and witness credibility); *Solis v. SCA Restaurant Corp.*, 938 F.Supp.2d 380, 401 n.11 (E.D.N.Y. 2013) (noting that “immigration status was irrelevant to issues in the case and not probative on the issue of the credibility of the witnesses”); *Velasquez v. Centrome, Inc.*, 233 Cal.App.4th 1191, 183 Cal.Rptr.3d 150, 168 (2015) (“[I]mmigration status alone has no tendency in reason to prove or disprove any fact material to the issue of a party's credibility.”); *Ayala v. Lee*, 215 Md.App. 457, 81 A.3d 584, 598 (2013) (“Immigration status alone does not reflect upon an individual's character and is thus not admissible for impeachment purposes.”. Accordingly, as a general rule, a witness immigration status constitutes inadmissible character evidence.

II. Even If Somehow Found Relevant, The Court Should Preclude Any Reference to Any Witnesses’ Immigration Status Because Its Probative Value is Substantially Outweighed by Its Prejudice.

Under Rule 403 of the South Carolina Rules of Evidence, otherwise relevant evidence can be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice”. Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” *State v. Tynes*, 402 S.C. 211, 740 S.E.2d 512, 517 (Ct. App. 2013). Even assuming that Defendants were to concoct a theory of relevance, the probative value of any such evidence is substantially outweighed by the danger of unfair prejudice and Rule 403 prohibits such evidence from being considered at trial. There can be no question that this evidence is highly prejudicial and any admission of the same will inevitably inject issues of bias, partiality, and other improper and unfair considerations to the trial of this case. *See, e.g., Ayala*, 81 A3d at 597-99; *see also United States v. Almeida-Perez*, 549 F.3d 1162, 1174 (8th Cir. 2008) (“[T]he use of [immigration] evidence is fraught with the danger of prejudice to a defendant by introducing the possibility of invidious discrimination on the basis of alienage.”); *Galaviz-Zamora*, 230 F.R.D. at

502 (“[D]amage and prejudice which would result . . . if discovery into . . . immigration status is permitted far outweighs whatever minimal legitimate value such material holds for Defendants.”) (emphasis in original). The current political and social environment is replete with strong feelings on both sides of this sensitive issue. *See, e.g., Salas v. Hi-Tech Erectors*, 230 P.3d 583 (Wash. 2010) (finding the low probative value of immigration status with regards to lost future earnings, by itself, is substantially outweighed by the danger of unfair prejudice).

Any conceivable grounds of relevance pale in comparison to the prospects of undue prejudice arising from this evidence being admitted. Under Rule 403, this evidence must be excluded.

Respectfully submitted,

YARBOROUGH APPEGATE LLC

s/ William E. Applegate IV

William E. Applegate IV, Esquire

David B. Lail, Esquire

Liam D. Duffy, Esquire

Perry M. Buckner, IV

291 East Bay Street, Floor 2

Charleston, South Carolina 29401

(843) 972-0150 Office

(843) 277-6691 Fax

william@yarboroughapplegate.com

dlail@yarboroughapplegate.com

liam@yarboroughapplegate.com

perry@yarboroughapplegate.com

Attorneys for the Plaintiff

September 19, 2019

trimming on property owned by Defendant PENSCO Trust Company, LLC (“PENSCO”), when he allegedly came in contact with an energized DESC overhead line in the right of way behind the Property. Plaintiff alleges that the overhead line was obscured by trees in the backyard of the Property. Decedent was operating a chainsaw at the time of the incident and fell approximately 26 feet to the ground and died. (Complaint, ¶¶ 10-14)². Plaintiff’s Complaint makes various allegations of negligence against PENSCO, ESRR (who managed the rental property), and DESC. (Complaint, ¶¶ 25-37). Consequently, Plaintiff seeks damages from the Defendants.

3. A primary issue in this case is causation. One of the defenses that Defendants have pled, conducted extensive discovery, and will raise at trial is the comparative negligence of Decedent. *See Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) (adopting a modified version of comparative negligence whereby “a plaintiff in a negligence action may recover damages [only] if his or her negligence is not greater than that of the defendant” and providing that any recovery by plaintiff “shall be reduced in proportion to the amount of his or her negligence.”).

4. Defendants will also point to the negligence of Stevens. While Plaintiff unilaterally and voluntarily dismissed her claims against Stevens, this dismissal does not prevent the Defendants from pursuing an “empty chair defense,” asserting “that another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages.” *Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017).

5. Despite voluminous written discovery and multiple depositions, Defendants have just learned that Decedent was involved in another tree trimming incident shortly before his fatal

both Stevens and Stevens Irrigation. That Motion was denied by the Honorable Carmen T. Mullen on September 6, 2019.

² Plaintiff’s Complaint also asserts claims against Stevens. (Complaint, ¶¶ 17-24, 38-43).

fall on November 29, 2015. Defendants submit, upon information and belief, that Decedent sustained a serious head injury and received extensive medical treatment at the Medical University of South Carolina (“MUSC”) as a result of this prior incident. Presumably, this prior incident also occurred during Decedent’s work for Stevens.

6. Despite Defendants’ separate and specific discovery requests aimed at learning if Decedent had been in any prior tree trimming incidents and received treatment for any injuries related thereto and Plaintiff’s duties under Rule 26(e), SCRPC, Plaintiff failed to disclose the Decedent’s prior tree-trimming incident, Plaintiff’s prior injuries and treatment providers.

7. Interrogatory No 14 of SCE&G’s First Interrogatories to Plaintiff, inquired whether: “**Decedent had ever been injured trimming trees or performing other landscaping work, other than the incident that is the subject of this action.** If so, please describe the accident/incident, inclusive of the date, Decedent’s employer’s at the time, the injuries, and any subsequent claims or compensation that arose from said accident/incident.” (Emphasis added). Plaintiff responded: “**Plaintiff is not in possession of the information responsive to this interrogatory as Decedent is deceased. To the best of Plaintiff’s knowledge, no.**” (Emphasis added). A copy of Plaintiff’s Answers and Responses to SCE&G’s First Set of Interrogatories and Requests for Production to Plaintiff (dated February 6, 2018) is attached as **Exhibit 1**.

8. SCE&G’s Interrogatory No. 10 to Plaintiff inquired whether Plaintiff is, “**aware of any similar incidents involving Decedent? If so, please identify the date, location and parties involved in each similar incident.**” Plaintiff responded, “**Plaintiff is not aware of any similar incidents involving the Decedent.**” *See Exhibit 1.* (Emphasis added).

9. In Request No. 6 of its First Requests for Production to Plaintiff, SCE&G requested: “**[a]ll medical, billing and office records of each health care provider who**

examined and/or treated Decedent for injuries or ailments during the ten (10) years prior to his death.” Plaintiff did not produce any documents referencing this prior incident. See **Exhibit 1.**

10. SCE&G’s Request No. 25 sought “**[a]ll documents relating to any prior injuries Decedent sustained while working for Stevens or any other company performing landscaping work.**” Plaintiff responded, “**Plaintiff is not in possession of any documents responsive to this request.**” See **Exhibit 2.**

11. On April 24, 2018, SCE&G corresponded with Plaintiff’s counsel, pursuant to Rules 11 and 26, SCRCPC, in an attempt to advise and confer regarding the deficiencies of Plaintiff’s February 6, 2018 discovery responses. SCE&G advised that Plaintiff’s “responses” were insufficient and requested that Plaintiff supplement with the relevant, requested information. SCE&G did not receive any response to this correspondence. On September 11, 2019, SCE&G sent another letter specifically detailing Plaintiff’s failure to provide adequate responses. Again, Plaintiff has failed to provide the requested information. A copy of SCE&G’s April 24, 2018 and September 11, 2019 correspondence to Plaintiff is collectively attached as **Exhibit 2.**

12. Similarly, PENSCO served Interrogatories upon Plaintiff and requested the names and addresses of health care providers who treated [Decedent] in the five years prior to his passing. Plaintiff responded: “**Other than the medical providers identified in Plaintiff’s Answer to Interrogatory No. 5, Plaintiff is not in possession of any information in response to this interrogatory.**” (emphasis added). A copy of Plaintiff’s Answers to PENSCO’s Interrogatories is attached as **Exhibit 3.**

13. Similarly, when Decedent's brother, Gaspar Licona, was asked during his August 20, 2019 deposition about Decedent's health before his fatal fall, Decedent's brother answered "He was fine. He was a big man and strong." Deposition of Gaspar Licona ¶ 17:19-22, August 20, 2019) (hereinafter, "Gaspar Dep."). It is noteworthy that Decedent resided with Gaspar Licona during the time of his prior injury and up to the day of his death. Gaspar Dep., 9:24-10:1; 48:25-49:4 (relevant portion attached as **Exhibit 4**).

14. Rule 26(e), SCRC, provides:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except that requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party.

15. A central issue in this case is what caused Decedent to fall off the ladder on November 29, 2015 (particularly, whether an electric event played any role in his fall). Whether Decedent suffered a traumatic brain injury in a separate incident prior to the incident – **an incident which not even Plaintiff was apparently aware of, based on her discovery responses** – would be critical to the jury in deciding this issue.

16. Moreover, any evidence of a separate incident, Decedent's work practices and serious injuries prior to the incident giving rise to this case is clearly discoverable and is potentially relevant to Decedent's safety practices, causation, negligence, life expectancy and potential damages.

17. "The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003). "Discovery is

the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed.” Id.

18. Defendants respectfully submit that additional time is necessary for the Plaintiff to properly and fully respond to the specific discovery requests which will then permit the Defendants to subpoena and review all medical records from MUSC and potentially other presently undisclosed and unknown medical providers. This extension of time will allow the parties to determine the facts of the prior incident, analyze the extent of Decedent’s prior injuries and the treatment or care provided, any residual effects from Decedent’s injury, and any restrictions upon Decedent’s work. This information is directly relevant to causation, the negligence of Decedent and/or his employer, Stevens, and damages.

19. In a Motion filed on September 12, 2019, Plaintiff asserted that “Plaintiff is otherwise entirely prepared for the trial of this case”. Defendants have been prejudiced by Plaintiff’s failure to comply with her discovery obligations. As such, Defendants respectfully submit that this case is not “entirely prepared for trial”. A copy of Plaintiff’s Motion is attached as **Exhibit 5**.

20. The Consent Scheduling Order in this case provided that trial would occur not before August 15, 2019. This matter first appeared on the roster for August 26, 2019. SCE&G’s motion for continuance was granted and this matter was set for a date certain trial on September 23, 2019.

21. Defendants estimate that an additional ninety (90) days should be sufficient to obtain and review records from MUSC and any other health care providers learned of within those records and to provide Defendants an opportunity to have such records reviewed by any necessary experts.

22. This Motion is being made for good cause, to provide the parties with the opportunity to conduct discovery on a critical issue not previously known or disclosed, and not for the purpose of delay.

23. Defendants certify, pursuant to Rule 11, SCRCP, that consultation with Plaintiff's counsel prior to filing this Motion would serve no useful purpose.

For the foregoing reasons, Defendants request this Motion be granted, and for such other and further relief, both general and special, legal or equitable, to which they may be justly entitled.

Respectfully Submitted,

s/ Robert M. Kennedy, Jr.

ROBERT M. KENNEDY, JR.
S.C. Bar. Number: 102288
robert.kennedy@phelps.com
PHELPS DUNBAR LLP
GlenLake One
4140 ParkLake Avenue, Suite 100
Raleigh, North Carolina 27612-3723
Telephone: 919-789-5300
Facsimile: 919-789-5301

ATTORNEYS FOR EDISTO SALES
& RENTAL REALTY, LLC

s/ Steven J. Pugh

STEVEN J. PUGH
S.C. Bar Number: 14341
spugh@richardsonplowden.com
R. WILDER HARTE
S.C. Bar Number: 101228
wharte@richardsonplowden.com
MEGAN C. WHITE
S.C. Bar Number: 101895
mwhite@richardsonplowden.com
RICHARDSON PLOWDEN & ROBINSON,
P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

ATTORNEYS FOR DEFENDANT
DOMINION ENERGY F/K/A SOUTH
CAROLINA ELECTRIC & GAS

Shene Hawk

From: Shene Hawk
Sent: Friday, April 05, 2019 11:25 AM
To: 'cstegmaier@collinsandlacy.com'; 'mhall@collinsandlacy.com';
'robert.kennedy@phelps.com'; 'Steve Pugh'; 'salbenberg@richardsonplowden.com';
William Applegate; Liam Duffy
Cc: 'eboyd@collinsandlacy.com'; Charity McQueen
Subject: Larios v. SCE&G, et al / Depositions

Good morning,

Please advise your availability in May for the following depositions. I believe that we will need at least 2 days for the depositions. Please let me know as soon as possible, as I am sure that your calendars are filling up quickly as well.

30(b)(6) Deposition of SCE&G
J. Ray Jackson, St. (PENSCO)
PENSCO Representative
Edisto Sales Representative

SCE&G would also like to take the depositions of:
Gaspar Licona
Plaintiff's Expert

Plaintiff's counsel and SCE&G's counsel are available as follows:

May 7, 9, 10, 17, 22 and 23

Thank you,

Shene Hawk, Paralegal
Yarborough Applegate LLC
291 East Bay Street, Second Floor
Charleston, SC 29401
o. (843) 972-0150
f. (843) 277-6691
shene@yarboroughapplegate.com
www.YarboroughApplegate.com

CONFIDENTIALITY NOTICE

This message (and any associated files) is intended only for the use of the individual or entity to which it is addressed and may contain information that is confidential, attorney-client privileged, work product, subject to copyright, or constitutes a trade secret. If you are not the intended recipient you are hereby notified that any dissemination, copying or distribution of this message, or file associated with this message, is strictly prohibited. If you have received this message in error, please notify us immediately by replying to the message and deleting it from your computer. Messages sent to and from us may not be monitored.



Shene Hawk

From: Liam Duffy
Sent: Thursday, May 23, 2019 2:11 PM
To: Elaine M. Boyd; robert.kennedy@phelps.com; spugh@RichardsonPlowden.com; salbenberg@richardsonplowden.com
Cc: Laura R. Baer; Christian Stegmaier; Monica M. McGee; Shene Hawk; William Applegate
Subject: RE: Civil Action No. 2017-CP-15-00423/Claim No. EV2016005935/C&L File No. 1874-104/Larios v. SCE&G, et al.

Christian, I assume Mr. Jackson be the 30(b)(6) designee for PENSICO related to the ownership and management of 3402 Myrtle Street? If so we need depositions dates for him in June. I know you are out the first week of the month but need his deposition before June 24th so we can all make the most productive use of our time on the 24th. Thanks

From: Liam Duffy
Sent: Thursday, May 23, 2019 12:24 PM
To: Elaine M. Boyd <eboyd@collinsandlacy.com>; robert.kennedy@phelps.com; spugh@RichardsonPlowden.com; salbenberg@richardsonplowden.com
Cc: Laura R. Baer <lbaer@collinsandlacy.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>; Monica M. McGee <mmcgee@collinsandlacy.com>; Shene Hawk <shene@yarboroughapplegate.com>; William Applegate <william@yarboroughapplegate.com>
Subject: RE: Civil Action No. 2017-CP-15-00423/Claim No. EV2016005935/C&L File No. 1874-104/Larios v. SCE&G, et al.

Thanks, and please copy William Applegate and Shene Hawk on future communications.

From: Elaine M. Boyd <eboyd@collinsandlacy.com>
Sent: Thursday, May 23, 2019 12:07 PM
To: robert.kennedy@phelps.com; Liam Duffy <liam@yarboroughapplegate.com>; spugh@RichardsonPlowden.com; salbenberg@richardsonplowden.com
Cc: Laura R. Baer <lbaer@collinsandlacy.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>; Monica M. McGee <mmcgee@collinsandlacy.com>
Subject: Civil Action No. 2017-CP-15-00423/Claim No. EV2016005935/C&L File No. 1874-104/Larios v. SCE&G, et al.

The attached is being sent on behalf of Christian Stegmaier.

Attached please find a Subpoena *Duces Tecum* direct to Plaintiff's Expert in the above-referenced matter.

Elaine M. Boyd
 Legal Secretary

Direct: (803) 255-0462
 Main: (803) 256-2660
 Fax: (803) 771-4484
 Vcard: [download vcard](#)
 Web: www.collinsandlacy.com

Shene Hawk

From: Shene Hawk
Sent: Friday, May 24, 2019 2:22 PM
To: Christian Stegmaier; Liam Duffy; Meghan Hall; Robert Kennedy, Jr. (5303); Sam Albenberg; Steve Pugh; William Applegate
Cc: Charity McQueen; Elaine Boyd; Melissa Johnson; Monica M. McGee
Subject: Larios v. SCE&G, et al / Depositions
Attachments: NOD (30b6 PENSCO TBD) 05-24-19.pdf

Good afternoon,

At this time our expert, Edward Brill, is available for deposition on June 13 and 14. Please let me know as soon as possible which date you can make yourself available. This is his only availability prior to mediation.

To date, we have not received the availability of the PENSCO 30(b)(6) Representative, which we assume to be J. Ray Jackson, Sr. I have attached the draft Notice of Deposition for confirmation that Mr. Jackson will be the 30(b)(6) Representative. We will be noticing this deposition for on Wednesday, May 29 if we do not hear from you before then.

Please do not hesitate to contact our office with any questions.

Shene Hawk, Paralegal
Yarborough Applegate LLC
291 East Bay Street, Second Floor
Charleston, SC 29401
o. (843) 972-0150
d. (843) 207-4000
f. (843) 277-6691
shene@yarboroughapplegate.com
www.YarboroughApplegate.com

CONFIDENTIALITY NOTICE

This message (and any associated files) is intended only for the use of the individual or entity to which it is addressed and may contain information that is confidential, attorney-client privileged, work product, subject to copyright, or constitutes a trade secret. If you are not the intended recipient you are hereby notified that any dissemination, copying or distribution of this message, or file associated with this message, is strictly prohibited. If you have received this message in error, please notify us immediately by replying to the message and deleting it from your computer. Messages sent to and from us may not be monitored.

Internet communications cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. Therefore, we do not accept responsibility for any errors or omissions that are present in this message, or any attachment, that have arisen as a result of e-mail transmission. If verification is required, please request a hard-copy version. Any views or opinions presented are solely those of the author and do not necessarily represent those of the firm.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-15-0423
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose)	
Refugio Licona Larios,)	
)	
Plaintiff,	)	NOTICE OF 30(B)(6) DEPOSITION
	)	OF PENSCO TRUST COMPANY LLC
vs.)	
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC;)	
Edisto Sales & Rentals Realty, LLC;)	
Stevens Irrigation and Landscaping, LLC;)	
and William J. Stevens,)	
Defendants.)	

PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, pursuant to Rules 30(b)(6) of the South Carolina Rules of Civil Procedure, will take the deposition upon oral examination of the individual most knowledgeable at Defendant PENSCO Trust Company LLC (hereinafter “PENSCO”) to testify about matters set forth within this Notice, to speak on Defendant PENSCO’s behalf, and/or who has the most knowledge regarding the matters set forth herein.

Prior to the deposition and pursuant to *SCRCP 30(b)(6)*, the entity shall provide each such representative with all non-privileged, responsive information that is “known or reasonably available” to the entity, and each representative must be able and prepared to confirm under oath that this has occurred. Defendant PENSCO’s representative(s) shall be prepared to address the following 30(b)(6) topics:

1. PENSCO’s ownership and management of the property located at 3402 Myrtle Street, Edisto Island, SC;
2. PENSCO’s inspections, repairs, upkeep, or similar property maintenance for the property it owns at 3402 Myrtle Street;

3. PENSCO's relationship with J. Ray Jackson, Sr., including any contracts or other relevant agreements, duties, and responsibilities regarding the property located at 3402 Myrtle Street;
4. Communications, contracts, and/or agreements with Edisto Sales and Rentals Realty, LLC regarding 3402 Myrtle Street;
5. Communications, contracts, and/or agreements between PENSCO and/or J. Ray Jackson, Sr., and Stevens Irrigation and Landscaping, LLC; and
6. Policies, procedures, protocols, or other standards related to property maintenance practices for residential real estate owned by PENSCO.

The deposition of Defendant PENSCO's designated representative(s) will take place **on TBD, beginning at 10:00 a.m.**, at the offices of Yarborough Applegate LLC located at 291 East Bay Street, Floor 2, Charleston, South Carolina, before a duly authorized Notary Public or other authorized person.

Pursuant to SCRCP 30(j)(8), Plaintiffs' counsel anticipates that all documents produced by the Defendants or obtained through other means in this litigation will likely be shown to the deponents and marked as exhibits during the depositions. These depositions will be recorded by videotape and used as evidence at trial.

Pursuant to SCRCP 30(b)(5), the deponents are commanded to produce all documents in their possession which may be relevant to this case, to include all documents and tangible items of any kind regarding this matter which were reviewed in preparing for their depositions in this matter.

Respectfully submitted,

Yarborough Applegate LLC

William E. Applegate IV, Esq.

May 28, 2019
Charleston, South Carolina

David B. Lail, Esq.
Christopher J. Bryant, Esq.
Liam D. Duffy, Esq
291 East Bay Street, Floor 2
Charleston, SC 29401
843-972-0150 phone
843-277-6691 fax
william@yarboroughhapplegate.com
dlail@yarboroughhapplegate.com
chris@yarboroughhapplegate.com
liam@yarboroughhapplegate.com
Attorneys for the Plaintiffs

Shene Hawk

From: Monica M. McGee <mmcgee@collinsandlacy.com>
Sent: Wednesday, May 29, 2019 2:54 PM
To: Liam Duffy; Shene Hawk; Christian Stegmaier; Robert Kennedy, Jr. (5303); Sam Albenberg; Steve Pugh; William Applegate
Cc: Charity McQueen; Elaine M. Boyd; Melissa Johnson
Subject: RE: Larios v. SCE&G, et al / Depositions

Yes he is.

From: Liam Duffy <liam@yarboroughapplegate.com>
Sent: Wednesday, May 29, 2019 2:53 PM
To: Monica M. McGee <mmcgee@collinsandlacy.com>; Shene Hawk <shene@yarboroughapplegate.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>; Meghan Hazelwood Hall <mhall@collinsandlacy.com>; Robert Kennedy, Jr. (5303) <robert.kennedy@phelps.com>; Sam Albenberg <salbenberg@richardsonplowden.com>; Steve Pugh <spugh@richardsonplowden.com>; William Applegate <william@yarboroughapplegate.com>
Cc: Charity McQueen <cmcqueen@richardsonplowden.com>; Elaine M. Boyd <eboyd@collinsandlacy.com>; Melissa Johnson <melissa.johnson@phelps.com>
Subject: Re: Larios v. SCE&G, et al / Depositions

Is he going to be the 30(b)(6) witness for PENSICO to answer questions regarding the topics we circulated previously?
 Thanks.

Liam D. Duffy, Esq.
 YARBOROUGH APPLGATE LLC
 (843) 972-0150 (Office)
 (202) 258-9191 (Cell)

From: Monica M. McGee <mmcgee@collinsandlacy.com>
Sent: Wednesday, May 29, 2019 2:50 PM
To: Shene Hawk; Christian Stegmaier; Meghan Hazelwood Hall; Robert Kennedy, Jr. (5303); Sam Albenberg; Steve Pugh; Liam Duffy; William Applegate
Cc: Charity McQueen; Elaine M. Boyd; Melissa Johnson
Subject: RE: Larios v. SCE&G, et al / Depositions

Good afternoon. We have heard back from our client and he is available for deposition on June 19th or 20th. It will need to be held near his address in Rumbling Bald Resort, 165 Jergenson Lane, Lake Lure, NC 28746.

From: Shene Hawk <shene@yarboroughapplegate.com>
Sent: Friday, May 24, 2019 2:31 PM
To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Meghan Hazelwood Hall <mhall@collinsandlacy.com>; Robert Kennedy, Jr. (5303) <Robert.Kennedy@phelps.com>; Sam Albenberg <SAlbenberg@RichardsonPlowden.com>; Steve Pugh <SPugh@RichardsonPlowden.com>; Liam Duffy <liam@yarboroughapplegate.com>; William Applegate <william@yarboroughapplegate.com>
Cc: Charity McQueen <CMcQueen@RichardsonPlowden.com>; Elaine M. Boyd <eboyd@collinsandlacy.com>; Melissa Johnson <Melissa.Johnson@phelps.com>; Monica M. McGee <mmcgee@collinsandlacy.com>
Subject: RE: Larios v. SCE&G, et al / Depositions



**YARBOROUGH
APPLEGATE**
ATTORNEYS AT LAW

June 5, 2019

VIA US MAIL

VIA EMAIL: spugh@richardsonplowden.com

salbenberg@richardsonplowden.com

Steven J. Pugh, Esquire

Samia H. Albenberg, Esquire

Richardson, Plowden & Robinson, P.A.

171 Church Street, Suite 150

Charleston, SC 29401

VIA US MAIL

VIA EMAIL: robert.kennedy@phelps.com

Robert M. Kennedy, Jr., Esquire

Phelps Dunbar LLP

GlenLake One

4140 ParkLake Avenue, Suite 100

Raleigh, NC 27612-3723

VIA US MAIL

VIA EMAIL: cstegmaier@collinsandlacy.com

Christian Stegmaier, Esquire

Collins & Lacy, P.C.

P.O. Box 12487

Columbia, SC 29211

1330 Lady Street, 6th Floor

Columbia, SC 29201

Re: Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licon
Larios v. South Carolina Electric & Gas Company; et al.
Case No.: 2017-CP-15-0423
Our File No.: 16-017

Dear Counsel,

Enclosed please find the Notice of 30(b)(6) Deposition of PENSICO Trust Company, LLC, set for June 21, 2019. Please note that this depositions will take place at the **Rutherford County Courthouse in Rutherfordton, North Carolina**. Our office will secure the court reporter. Please let me know if you have any questions or concerns.

Sincerely,

Shene Hawk

Paralegal to Liam D. Duffy

PLAINTIFF'S
EXHIBIT

E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-15-0423
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose)	
Refugio Licona Larios,)	
)	
Plaintiff,	)	NOTICE OF 30(B)(6) DEPOSITION
	)	OF PENSCO TRUST COMPANY LLC
vs.)	
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC;)	
Edisto Sales & Rentals Realty, LLC;)	
Stevens Irrigation and Landscaping, LLC;)	
and William J. Stevens,)	
Defendants.)	

PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, pursuant to Rules 30(b)(6) of the South Carolina Rules of Civil Procedure, will take the deposition upon oral examination of the individual most knowledgeable at Defendant PENSCO Trust Company LLC (hereinafter “PENSCO”) to testify about matters set forth within this Notice, to speak on Defendant PENSCO’s behalf, and/or who has the most knowledge regarding the matters set forth herein.

Prior to the deposition and pursuant to *SCRCP 30(b)(6)*, the entity shall provide each such representative with all non-privileged, responsive information that is “known or reasonably available” to the entity, and each representative must be able and prepared to confirm under oath that this has occurred. Defendant PENSCO’s representative(s) shall be prepared to address the following 30(b)(6) topics:

1. PENSCO’s ownership and management of the property located at 3402 Myrtle Street, Edisto Island, SC;
2. PENSCO’s inspections, repairs, upkeep, or similar property maintenance for the property it owns at 3402 Myrtle Street;

3. PENSCO's relationship with J. Ray Jackson, Sr., including any contracts or other relevant agreements, duties, and responsibilities regarding the property located at 3402 Myrtle Street;
4. Communications, contracts, and/or agreements with Edisto Sales and Rentals Realty, LLC regarding 3402 Myrtle Street;
5. Communications, contracts, and/or agreements between PENSCO and/or J. Ray Jackson, Sr., and Stevens Irrigation and Landscaping, LLC;
6. Policies, procedures, protocols, or other standards related to property maintenance practices for residential real estate owned by PENSCO; and
7. PENSCO's pleadings and discovery in this matter.

The deposition of Defendant PENSCO's designated representative(s) will take place on **June 21, 2019, beginning at 11:00 a.m.** The deposition will take place in the **Grand Jury Room** of the **Rutherford County Courthouse** located at **229 N. Main Street in Rutherfordton, NC**, before a duly authorized Notary Public or other authorized person.

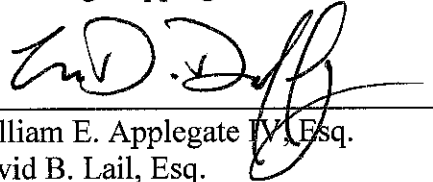
Pursuant to SCRCP 30(j)(8), Plaintiffs' counsel anticipates that all documents produced by the Defendants or obtained through other means in this litigation will likely be shown to the deponents and marked as exhibits during the depositions. These depositions will be recorded by videotape and used as evidence at trial.

Pursuant to SCRCP 30(b)(5), the deponents are commanded to produce all documents in their possession which may be relevant to this case, to include all documents and tangible items of any kind regarding this matter which were reviewed in preparing for their depositions in this matter.

[Signature block on following page.]

Respectfully submitted,

Yarborough Applegate LLC



William E. Applegate IV, Esq.

David B. Lail, Esq.

Christopher J. Bryant, Esq.

Liam D. Duffy, Esq.

291 East Bay Street, Floor 2

Charleston, SC 29401

843-972-0150 phone

843-277-6691 fax

william@yarboroughapplegate.com

dlail@yarboroughapplegate.com

chris@yarboroughapplegate.com

liam@yarboroughapplegate.com

Attorneys for the Plaintiffs

June 5, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-15-0423
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose)	
Refugio Licono Larios,)	
)	
Plaintiff,	)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC;)	
Edisto Sales & Rentals Realty, LLC;)	
Stevens Irrigation and Landscaping, LLC;)	
and William J. Stevens,)	
Defendants.)	

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure on this 5 day of June, 2019.

Steven J. Pugh, Esquire
Samia H. Albenberg, Esquire
Richardson, Plowden & Robinson, P.A.
171 Church Street, Suite 150
Charleston, SC 29401
spugh@richardsonplowden.com
salbenberg@richardsonplowden.com

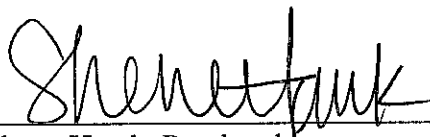
Robert M. Kennedy, Jr., Esquire
Phelps Dunbar LLP
GlenLake One
4140 ParkLake Avenue, Suite 100
Raleigh, NC 27612-3723
919-789-5300
robert.kennedy@phelps.com

Attorneys for Defendant SCE&G

Attorney for Defendant Edisto Sales & Rentals Realty, LLC

Christian Stegmaier, Esquire
Collins & Lacy, P.C.
P.O. Box 12487
Columbia, SC 29211
1330 Lady Street, 6th Floor
Columbia, SC 29201
cstegmaier@collinsandlacy.com

Attorney for Defendant PENSCO Trust Company LLC


Shene Hawk, Paralegal

Shene Hawk

From: Kelsey J. Brudvig <kbrudvig@collinsandlacy.com>
Sent: Thursday, June 6, 2019 9:13 AM
To: Liam Duffy <liam@yarboroughapplegate.com>
Cc: William Applegate <william@yarboroughapplegate.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>;
 Monica M. McGee <mmcgee@collinsandlacy.com>
Subject: Provence v. Pensco // 30b6 notice to Pensco
Importance: High

Liam-

I hope you are well.

We are reviewing your 30b6 deposition notice to Pensco and have forwarded the same to Mr. Jackson. There may have been a miscommunication re: Jackson's relationship with Pensco. Pensco holds the title to the property and is located in Denver, CO. Mr. Jackson and Pensco are separate and distinct; Mr. Jackson is not involved with Pensco (he is not an owner, member, etc.). Therefore, Mr. Jackson cannot answer for Pensco on these topics. You may depose Jackson on June 21, but not as a 30b6 designee for Pensco. While he may be able to provide some of the information that is requested in these topics, his testimony will not be on behalf of Pensco.

I am in and out of depositions the majority of today, but available all day tomorrow. Please call me anytime to discuss.

Best,
 KJB

Kelsey J. Brudvig

Direct: 803.255.0418
 Main: (803) 256-2660
 Fax: (803) 771-4484
 Vcard: [download vcard](#)
 Web: www.collinsandlacy.com

1330 Lady Street, 6th Floor
 Columbia, SC 29201



PLAINTIFF'S
 EXHIBIT

F

Confidentiality Note: The preceding email message may be confidential or protected by the attorney-client privilege. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this message in error, please (i) do not read it, (ii) reply to the sender that you received the message in error, and (iii) erase or destroy the message. Legal advice contained in the

Shene Hawk

From: Liam Duffy
Sent: Thursday, June 06, 2019 9:29 AM
To: Kelsey J. Brudvig
Cc: William Applegate; Christian Stegmaier; Monica M. McGee; Shene Hawk; Robert Kennedy, Jr. (5303); Steve Pugh
Subject: RE: Provence v. Pensco // 30b6 notice to Pensco
Attachments: RE: Larios v. SCE&G, et al / Depositions

Kelsey: I appreciate you telling me that but we have been running in circles trying to schedule PENSCO's 30(b)(6) deposition on these topics before mediation. I don't think the communications could have been any clearer. See the email attached, for example. My paralegal first circulated a draft of the 30(b)(6) notice on 5/24/19 (to confirm Jackson would be PENSCO's designee on those issues) and I have exchanged countless emails with everyone (including Christian and Monica) specifically about a 30(b)(6) deposition of PENSCO—not an individual deposition of Mr. Jackson—for weeks now.

Since your position has now changed—who is going to be PENSCO's 30(b)(6) on these topics, and when are they available for deposition, preferably before mediation? I am copying Bob and Steve so they are aware of this development.

Liam D. Duffy, Esq.

YARBOROUGH APPLGATE LLC

291 East Bay Street, Second Floor
Charleston, South Carolina 29401
liam@yarboroughapplegate.com

(843) 972-0150 Office

(202) 258-9191 Cell

(843) 277-6691 Fax



**YARBOROUGH
APPLGATE**

A CATASTROPHIC INJURY &
COMPLEX LITIGATION LAW FIRM



**YARBOROUGH
APPLEGATE**
ATTORNEYS AT LAW

July 15, 2019

VIA US MAIL

VIA EMAIL: spugh@richardsonplowden.com

Steven J. Pugh, Esquire
Richardson, Plowden & Robinson, P.A.
171 Church Street, Suite 150
Charleston, SC 29401

VIA US MAIL

VIA EMAIL: robert.kennedy@phelps.com

Robert M. Kennedy, Jr., Esquire
Phelps Dunbar LLP
GlenLake One
4140 ParkLake Avenue, Suite 100
Raleigh, NC 27612-3723

VIA US MAIL

VIA EMAIL: cstegmaier@collinsandlacy.com

Christian Stegmaier, Esquire
Collins & Lacy, P.C.
P.O. Box 12487
Columbia, SC 29211

Re: Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios v. South Carolina Electric & Gas Company; et al.
Case No.: 2017-CP-15-0423
Our File No.: 16-017

Dear Counsel,

Enclosed please find the Amended Notice of 30(b)(6) Deposition of PENSICO Trust Company, set for August 6, 2019 at our office. Also enclosed please find the Notice of Depositions of Landis Bunton and Allen Frasier, also set for August 6, 2019 at our office. Our office will secure the court reporter and videographer. Please let me know if you have any questions or concerns.

Sincerely,

Shene Hawk
Paralegal to Liam D. Duffy

Enc.

PLAINTIFF'S
EXHIBIT

H

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-15-0423
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose)	
Refugio Licona Larios,)	
)	
Plaintiff,	)	AMENDED NOTICE OF
	)	30(B)(6) DEPOSITION OF
vs.	)	PENSCO TRUST COMPANY LLC
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC;)	
Edisto Sales & Rentals Realty, LLC;)	
Stevens Irrigation and Landscaping, LLC;)	
and William J. Stevens,)	
Defendants.)	

PLEASE TAKE NOTICE that the Plaintiff, by and through the undersigned attorney, pursuant to Rules 30(b)(6) of the South Carolina Rules of Civil Procedure, will take the deposition upon oral examination of the individual most knowledgeable at Defendant PENSCO Trust Company LLC (hereinafter "PENSCO") to testify about matters set forth within this Notice, to speak on Defendant PENSCO's behalf, and/or who has the most knowledge regarding the matters set forth herein.

Prior to the deposition and pursuant to *SCRCP 30(b)(6)*, the entity shall provide each such representative with all non-privileged, responsive information that is "known or reasonably available" to the entity, and each representative must be able and prepared to confirm under oath that this has occurred. Defendant PENSCO's representative(s) shall be prepared to address the following 30(b)(6) topics:

1. PENSCO's ownership and management of the property located at 3402 Myrtle Street, Edisto Island, SC;
2. PENSCO's inspections, repairs, upkeep, or similar property maintenance for the property it owns at 3402 Myrtle Street;

3. PENSCO's relationship with J. Ray Jackson, Sr., including any contracts or other relevant agreements, duties, and responsibilities regarding the property located at 3402 Myrtle Street;
4. Communications, contracts, and/or agreements with Edisto Sales and Rentals Realty, LLC regarding 3402 Myrtle Street;
5. Communications, contracts, and/or agreements between PENSCO and/or J. Ray Jackson, Sr., and Stevens Irrigation and Landscaping, LLC;
6. Policies, procedures, protocols, or other standards related to property maintenance practices for residential real estate owned by PENSCO; and
7. PENSCO's pleadings and discovery in this matter.

The deposition of Defendant PENSCO's designated representative(s) will take place on **August 6, 2019, beginning at 10:00 a.m.**, at the offices of **Yarborough Applegate LLC** located at **291 East Bay Street, Floor 2, Charleston, South Carolina**, before a duly authorized Notary Public or other authorized person.

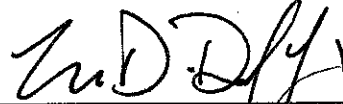
Pursuant to SCRCP 30(j)(8), Plaintiffs' counsel anticipates that all documents produced by the Defendants or obtained through other means in this litigation will likely be shown to the deponents and marked as exhibits during the depositions. These depositions will be recorded by videotape and used as evidence at trial.

Pursuant to SCRCP 30(b)(5), the deponents are commanded to produce all documents in their possession which may be relevant to this case, to include all documents and tangible items of any kind regarding this matter which were reviewed in preparing for their depositions in this matter.

[Signature block on following page.]

Respectfully submitted,

Yarborough Applegate LLC



William E. Applegate IV, Esq.

David B. Lail, Esq.

Christopher J. Bryant, Esq.

Liam D. Duffy, Esq.

291 East Bay Street, Floor 2

Charleston, SC 29401

843-972-0150 phone

843-277-6691 fax

william@yarboroughapplegate.com

dlail@yarboroughapplegate.com

chris@yarboroughapplegate.com

liam@yarboroughapplegate.com

Attorneys for the Plaintiffs

July 15, 2019

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.: 2017-CP-15-0423
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose)	
Refugio Licono Larios,)	
)	
Plaintiff,	)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC;)	
Edisto Sales & Rentals Realty, LLC;)	
Stevens Irrigation and Landscaping, LLC;)	
and William J. Stevens,)	
Defendants.)	

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure on this 15 day of July, 2019.

Steven J. Pugh, Esquire
Richardson, Plowden & Robinson, P.A.
PO Drawer 7788
Columbia, SC 29202
spugh@richardsonplowden.com

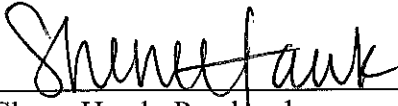
Christian Stegmaier, Esquire
Collins & Lacy, P.C.
P.O. Box 12487
Columbia, SC 29211
cstegmaier@collinsandlacy.com

**Attorneys for Defendant South Carolina
Electric & Gas Company**

**Attorney for Defendant PENSCO Trust
Company LLC**

Robert M. Kennedy, Jr., Esquire
Phelps Dunbar LLP
GlenLake One
4140 ParkLake Avenue, Suite 100
Raleigh, NC 27612-3723
robert.kennedy@phelps.com

**Attorney for Defendant Edisto Sales
& Rentals Realty, LLC**



Shene Hawk, Paralegal

be recorded by videotape and used as evidence at trial.

Respectfully submitted,

Yarborough Applegate LLC



William E. Applegate IV, Esq.

David B. Lail, Esq.

Christopher J. Bryant, Esq.

Liam D. Duffy, Esq.

291 East Bay Street, Floor 2

Charleston, SC 29401

843-972-0150 phone

843-277-6691 fax

william@yarboroughapplegate.com

dlail@yarboroughapplegate.com

chris@yarboroughapplegate.com

liam@yarboroughapplegate.com

Attorneys for the Plaintiffs

July 15, 2019

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios,

Plaintiff,

vs.

South Carolina Electric & Gas Company; PENSICO Trust Company LLC; Edisto Sales & Rentals Realty, LLC; Stevens Irrigation and Landscaping, LLC; and William J. Stevens, Defendants.

IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NO.: 2017-CP-15-0423

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure on this 15 day of July, 2019.

Steven J. Pugh, Esquire Richardson, Plowden & Robinson, P.A. PO Drawer 7788 Columbia, SC 29202 spugh@richardsonplowden.com

Christian Stegmaier, Esquire Collins & Lacy, P.C. P.O. Box 12487 Columbia, SC 29211 cstegmaier@collinsandlacy.com

Attorneys for Defendant South Carolina Electric & Gas Company

Attorney for Defendant PENSICO Trust Company LLC

Robert M. Kennedy, Jr., Esquire Phelps Dunbar LLP GlenLake One 4140 ParkLake Avenue, Suite 100 Raleigh, NC 27612-3723 robert.kennedy@phelps.com

Attorney for Defendant Edisto Sales & Rentals Realty, LLC

Shene Hawk, Paralegal

Shene Hawk

From: Shene Hawk
Sent: Wednesday, July 31, 2019 2:59 PM
To: Christian Stegmaier; Liam Duffy; Robert Kennedy, Jr. (5303); Steve Pugh; William Applegate
Cc: Charity McQueen; Elaine Boyd; Melissa Johnson; Monica M. McGee; Vickie J. Storey (vstorey@richardsonplowden.com)
Subject: RE: Larios v. SCE&G, et al
Attachments: L-Counsel (ANOD Pensco, NOD Bunton and Frasier 08-06-19) 07-15-19.pdf

Good afternoon,

Please allow this email to confirm that the below depositions are going forward on Tuesday, August 6, 2019.

Thank you,

Shene Hawk, Paralegal
Yarborough Applegate LLC
291 East Bay Street, Second Floor
Charleston, SC 29401
o. (843) 972-0150
d. (843) 207-4000
f. (843) 277-6691
shene@yarboroughapplegate.com
www.YarboroughApplegate.com

From: Shene Hawk
Sent: Monday, July 15, 2019 11:16 AM
To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Liam Duffy <liam@yarboroughapplegate.com>; Robert Kennedy, Jr. (5303) <Robert.Kennedy@phelps.com>; Steve Pugh <SPugh@RichardsonPlowden.com>; William Applegate <william@yarboroughapplegate.com>
Cc: Charity McQueen <CMcQueen@RichardsonPlowden.com>; Elaine Boyd <eboyd@collinsandlacy.com>; Melissa Johnson <Melissa.Johnson@phelps.com>; Monica M. McGee <mmcgee@collinsandlacy.com>; Vickie J. Storey (vstorey@richardsonplowden.com) <vstorey@richardsonplowden.com>
Subject: Larios v. SCE&G, et al

Good morning,

Attached please find the Amended Notice of 30(b)(6) Deposition of PENSCO Trust Company, set for August 6, 2019 at our office. Also attached please find the Notice of Depositions of Landis Bunton and Allen Frasier, also set for August 6, 2019 at our office. Please let me know if you have any questions or concerns.

Shene Hawk, Paralegal
Yarborough Applegate LLC
291 East Bay Street, Second Floor
Charleston, SC 29401
o. (843) 972-0150



d. (843) 207-4000

f. (843) 277-6691

shene@yarboroughapplegate.com

www.YarboroughApplegate.com

CONFIDENTIALITY NOTICE

This message (and any associated files) is intended only for the use of the individual or entity to which it is addressed and may contain information that is confidential, attorney-client privileged, work product, subject to copyright, or constitutes a trade secret. If you are not the intended recipient you are hereby notified that any dissemination, copying or distribution of this message, or file associated with this message, is strictly prohibited. If you have received this message in error, please notify us immediately by replying to the message and deleting it from your computer. Messages sent to and from us may not be monitored.

Internet communications cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. Therefore, we do not accept responsibility for any errors or omissions that are present in this message, or any attachment, that have arisen as a result of e-mail transmission. If verification is required, please request a hard-copy version. Any views or opinions presented are solely those of the author and do not necessarily represent those of the firm.

Shene Hawk

From: Christian Stegmaier <cstegmaier@collinsandlacy.com>
Sent: Monday, August 05, 2019 9:27 AM
To: Shene Hawk; Liam Duffy; Robert Kennedy, Jr. (5303); Steve Pugh; William Applegate
Cc: Charity McQueen; Elaine M. Boyd; Melissa Johnson; Monica M. McGee; Vickie J. Storey (vstorey@richardsonplowden.com)
Subject: RE: Larios v. SCE&G, et al

William/Liam-

The stars have not aligned for me re: confirming our deposition for tomorrow at 10.00. My deponent is from Colorado; logistically, we're going to need another date to get him deposed up. Moreover, internally, we're scrambling to determine who is available to be in Charleston tomorrow; nevertheless, we are good with the other depos set and will be there. I apologize. We'd be good to go from 8/12 through the end of August based on your availability.

CS

From: Shene Hawk <shene@yarboroughapplegate.com>
Sent: Wednesday, July 31, 2019 2:59 PM
To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Liam Duffy <liam@yarboroughapplegate.com>; Robert Kennedy, Jr. (5303) <Robert.Kennedy@phelps.com>; Steve Pugh <SPugh@RichardsonPlowden.com>; William Applegate <william@yarboroughapplegate.com>
Cc: Charity McQueen <CMcQueen@RichardsonPlowden.com>; Elaine M. Boyd <eboyd@collinsandlacy.com>; Melissa Johnson <Melissa.Johnson@phelps.com>; Monica M. McGee <mmcgee@collinsandlacy.com>; Vickie J. Storey (vstorey@richardsonplowden.com) <vstorey@richardsonplowden.com>
Subject: RE: Larios v. SCE&G, et al

Good afternoon,

Please allow this email to confirm that the below depositions are going forward on Tuesday, August 6, 2019.

Thank you,

Shene Hawk, Paralegal
Yarborough Applegate LLC
291 East Bay Street, Second Floor
Charleston, SC 29401
o. (843) 972-0150
d. (843) 207-4000
f. (843) 277-6691
shene@yarboroughapplegate.com
www.YarboroughApplegate.com

PLAINTIFF'S
EXHIBIT

J

075

STATE OF SOUTH CAROLINA)
)
 COUNTY OF COLLETON)
)
 Tiffany N. Provence, as Special)
 Administrator for the Estate of Jose)
 Refugio Licono Larios,)
)
 Plaintiff,)
)
 v.)
)
 South Carolina Electric & Gas)
 Company; PENSCO Trust Company)
 LLC; and Edisto Sales & Rentals)
 Realty,LLC,)
)
 Defendants.)
)
)
)
)
)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-15-00423

**MEMORANDUM IN SUPPORT OF
 DEFENDANT SOUTH CAROLINA
 ELECTRIC & GAS COMPANY N/K/A
 DOMINION ENERGY SOUTH CAROLINA'S
 MOTION FOR DIRECTED VERDICT**

Defendant South Carolina Electric & Gas Company n/k/a Dominion Energy South Carolina (“DESC”), submits this Memorandum in support of its Motion for Directed Verdict (“Motion”),¹ pursuant to Rule 50(a), SCRPC. As a matter of law, Plaintiff has failed to introduce evidence that would allow the finder of fact to find in favor of Plaintiff. Specifically, as more fully discussed below, Plaintiff has failed to establish that Plaintiff received an electrical shock or that DESC had a duty to Larios in view of the fact that he was improperly and unlawfully in proximity to the electric line and, thus, was a trespasser to whom DESC had no duty; DESC did not in any event proximately cause Larios’ injuries, which were instead proximately caused by the intervening and superseding negligence of Larios, Larios’ employer, or both; and DESC is not liable based on the evidence of Larios’ overwhelming negligence and Larios’ primary

¹ DESC’s Motion was made in open Court on September 26, 2019.

assumption of risk. DESC therefore is entitled to a Directed Verdict as to all of Plaintiff's claims.

Background

Plaintiff Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios ("Plaintiff") filed this wrongful death and survival action against Defendants DESC; PENSCO Trust Company, LLC ("PENSCO"); Edisto Sales & Rentals Realty, LLC ("Edisto Sales"); William J. Stevens ("Stevens"); and Stevens Irrigation and Landscaping, LLC ("Stevens Irrigation"),² for injuries and damages sustained as a result of the death of Jose Refugio Licona Larios ("Larios").

According to the Complaint, this case arises out of a November 29, 2015 incident in which Larios was trimming a palm tree at a rental property in Edisto Beach, South Carolina. See Compl. ¶1. He was using a chain saw while working approximately twenty-six (26) feet in the air when he fell. *Id.* at ¶12. Plaintiff alleges that Larios' fall occurred when the chain saw he was operating contacted—either directly or indirectly through the palm tree itself—a single-phase, 13,800-volt DESC powerline. *Id.*

The palm tree Larios was trimming was located on property owned by PENSCO and marketed for short-term vacation rentals by Edisto Sales. *Id.* at ¶¶15–16. Stevens and Stevens Irrigation were hired to perform periodic landscape services at this property. *Id.* at ¶31. At the time this incident occurred, Larios was working for Stevens and Stevens Irrigation. *Id.* at ¶9.

² On July 29, 2019, Plaintiff unilaterally dismissed Defendants Stevens and Stevens Irrigation pursuant to Rule 41(a)(1)(A), SCRCP. On August 8, 2019, DESC filed its Motion for Leave to File Third-Party Complaint against both Stevens and Stevens Irrigation. The Court denied that Motion on September 6, 2019. A Motion to Reconsider was filed on September 16, 2019 which was denied on September 26, 2019.

The incident was investigated by the Edisto Beach Police Department, Colleton County Coroner's Office, South Carolina Occupational Safety and Health Administration ("OSHA"), and DESC.

As a result of this incident, Stevens Irrigation was cited by OSHA for violating S.C. Code Ann. § 41-15-210 and related regulations, for failing to furnish a place of employment free of recognized hazards, among other reasons. The Citations state as follows in pertinent part:

1. Citation 01—Item 001 (Serious): "Employer knew or should have known that employees trimming trees in close proximity (within 10 feet) to energized power lines were exposed to the hazard of contact with energized lines. Attached as **Exhibit 1**."
2. Citation 01—Item 002 (Serious): "Employer knew or should have known that employees trimming trees from a Louisville ladder in excess of approximately twenty three feet were exposed to the hazard of falling off the ladder while using a chainsaw." Attached as **Exhibit 2**."
3. Citation 01—Item 004 (Serious): "Employer did not assess the workplace to determine the hazards to employees of trimming trees and which personal protective equipment (PPE) such as, but not limited to eye and face protection, head protection, foot protection, and hand protection would be required for trimming trees at the 3402 Myrtle Street job site." Attached as **Exhibit 3**."
4. Citation 02—Item 001a (Serious): "Employer did not provide leg protection constructed with cut-resistant material, such as ballistic nylon, to cover the full length of the thigh to the top of the boot on each leg to protect against contact with a moving chain saw for one employee using a chain saw at the 3402 Myrtle Street job site." Attached as **Exhibit 4**."
5. Citation 02—Item 001b (Serious): "Eye and face protection from flying particles was not used by two Landscapers operating a STIHL MS 170 chain saw to trim trees at 3402 Myrtle Street job site." Attached as **Exhibit 5**."
6. Citation 02—Item 001c (Serious): Protective helmet was not worn by one Landscaper working under trees that were being trimmed at 3402 Myrtle Street job site." Attached as **Exhibit 6**."

Pl.'s Mot. in Limine No. 2, Ex. B. Thus, the OSHA investigator issued to Stevens two (2) "Serious" citations, containing multiple "Items," one of which found that Stevens knew or should have known that Larios and other employees "trimming trees in close proximity (within 10 feet) to energized power lines were exposed to the hazard of contact with energized lines." See **Exhibit 1** (OSHA Citation 01 Item 001). Stevens Irrigation was also cited for failing to assess the workplace to determine the hazards its employees would be exposed to while trimming trees. See **Exhibit 3** (OSHA Citation 01 Item 004).

DESC was not cited by OSHA or any other regulatory or administrative body as a result of this incident.

Uncontroverted Dispositive Facts

The following facts are uncontroverted and are dispositive of Plaintiff's claims:

- Larios was working on a ladder at a height of approximately 23 to 26 feet. See Testimony of Edward R. Brill, PE (Plaintiff's Expert)
- Contrary to OSHA law, the particular ladder used was an uninsulated aluminum ladder. No witness has testified that they witnessed Larios receive an electrical shock.
- Larios did not make direct contact with the primary power line.
- Given Larios' height and wingspan and the type of chain saw he was using, it was not physically possible for the chain saw to reach the primary conductor.
- No service issues, outages, or other problems with the subject power line or circuit were reported to DESC.

- After this incident, DESC pulled the fuse from the circuit and found it intact.
- Due to his lack of training with electrical equipment, Larios would be characterized as an “unqualified worker” as defined by applicable OSHA law and the National Electric Safety Code (“NESC”).
- “Unqualified workers,” like Larios, are required to stay at least ten (10’) feet away from energized electrical equipment, including overhead power lines, pursuant to OSHA law and other standards.
- This “10-foot rule” includes both the worker’s body parts and any conductive mechanism handled by the worker that would extend the worker’s reach.
- Larios was working, with a chain saw, within ten feet (10’) of the power line. See SCOSHA witness testimony and that of Plaintiff’s Expert; see *also* Compl., ¶12; OSHA Citation No. 1, Item 001.
- Unless a worker can confirm with the utility that a power line is de-energized, OSHA and the NESC require that the worker assume the line to be energized and potentially dangerous. See Plaintiff’s Expert testimony.
- DESC was not notified by PENSCO, Edisto Sales, Stevens, Stevens Irrigation, or any other person or entity that Larios would be working within ten (10’) feet of the subject power line.
- No person or entity requested that DESC de-energize or insulate the subject power line prior to Larios working within the vicinity of it.

- Even if Larios did receive an electrical shock (other than by coming into direct contact with the primary power line), such occurrence could only occur if Larios violated the OSHA work rules applicable to him.

Based on these uncontroverted facts as presented at trial, together with the legal analysis set forth below, DESC respectfully submits that it is entitled to a directed verdict as to Plaintiff's claims.

Legal Standards

A. Directed Verdict

South Carolina Rule of Civil Procedure 50 states as follows with respect to a Motion for Directed Verdict:

Motion for Directed Verdict: When Made: Effect. When upon a trial the case presents only questions of law the judge may direct a verdict. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Rule 50(a), SCRPC. The standard for summary judgment "mirrors the standard for a directed verdict under Rule 50(a)." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

B. Summary Judgment

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRPC. Summary judgment is, therefore, appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Id.*; *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 746 S.E.2d 35, 37–38 (2013). More specifically,

the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an *element essential* to the party’s case, and on which that party will bear the burden of proof at trial. In such a situation, *there can be no genuine issue as to any material fact*, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily *renders all other facts immaterial*.

Baughman, 306 S.C. at 116, 410 S.E.2d at 545–46 (emphasis added) (internal quotation marks and citation omitted).

“[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). “It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine.” *Durkin v. Hansen*, 313 S.C. 343, 346, 437 S.E.2d 550, 552 (Ct. App. 1993). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

Argument and Authorities

DESC’s Motion should be granted and a verdict entered in DESC’s favor, as the evidence, even when taken in the light most favorable to Plaintiff, does not establish a genuine issue of material fact. Specifically, this Court should grant DESC’s Motion because: (1) DESC owed no duty to Larios; (2) DESC’s alleged negligence was not the proximate cause of Larios’ injuries, but, instead, were caused by the intervening,

superseding negligence of Larios, Stevens, or both; (3) Larios assumed the risk and was overwhelmingly negligent relative to DESC; and (4) there is no evidence before the Court to support Plaintiff's claim for punitive damages.

1. DESC IS ENTITLED TO A DIRECTED VERDICT BECAUSE NO DUTY EXISTED.

For DESC to be liable for negligence, Plaintiff must prove, by a preponderance of evidence, three elements: "(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damage proximately resulting from the breach of duty." *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003). "If the plaintiff fails to prove any one of these elements, the action will fail." *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 720 (Ct App. 1996).

"The determination of the existence of a duty is solely the responsibility of the [C]ourt[, and w]hether the law recognizes a particular duty is an issue of law to be decided by the Court. *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011) (quoting *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 587 S.E.2d 711, 714 (2003)). "If there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law." *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006) (citation omitted).

In addition to the fact that DESC had no affirmative duty to act under general principles of South Carolina common law, *Wyatt v. Fowler*, 326 S.C. 97, 101, 484 S.E.2d 590, 592 (1997), no duty exists here based upon Larios' undisclosed and unforeseeable actions.

A. Larios' Undisclosed Actions

As an “electric company maintaining high voltage wires on or over private premises,” DESC is only “required to use commensurate care to see that no injury comes to persons ***rightfully in proximity to them, and who are guilty of no wrong.***” *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 95–96, 28 S.E.2d 545 (1943) (emphasis added).

In the instant case, Larios was not “rightfully in proximity” to the subject power line of DESC, given the uncontroverted facts as presented at trial:

- Larios was an “unqualified worker” who, based upon applicable OSHA and NESC law, should not have come within ten (10’) feet of the subject power line, whether by virtue of his body parts or any conductive mechanism handled by him. See Testimony of Plaintiff’s Expert Edward R. Brill, PE.
- DESC was not notified by Larios, any of the other Defendants, or any other person or entity that Larios would be working within ten (10’) feet of the power line. *Id.*
- Neither Larios nor any other person or entity requested that DESC de-energize or insulate the subject power line prior to Larios working within the vicinity of it. *Id.*

Based upon these uncontroverted facts, Larios was a ***trespasser*** as to DESC’s power line. See, e.g., *Snow v. City of Columbia*, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991) (“The unwarrantable entry on land in the peaceable possession of another is a trespass The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, . . . he commits a trespass by the very act of breaking the enclosure.” (citations omitted)); *Hawkins v. City*

of *Greenville*, 358 S.C. 280, 296, 594 S.E.2d 557, 565 (Ct. App. 2004) (“Trespass is any intentional invasion of [a party’s] interest in the exclusive possession of [its] property.” (quotation omitted)).

B. Larios’ Unforeseeable Actions

Moreover, a party has no duty of care as to unforeseeable plaintiffs. See, e.g., *Dorrell v. S.C. Dep’t of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) (“This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs.”); *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (“The key inquiry is foreseeability . . .”).

Here, DESC had no duty to protect Larios from his unforeseeable act of trimming palm fronds within ten (10’) feet of its power line, contrary to OSHA and NESC law, without first giving DESC notice. See OSHA witness testimony and citations; see also Testimony of Plaintiff’s Expert Edward R. Brill, PE. “[T]he law does not require a person who maintains a high-voltage electric wire . . . to anticipate at his peril every possible circumstance under which some person might make contact with this wire.” *Foreman v. Atl. Land Corp.*, 271 S.C. 130, 134, 245 S.E.2d 609, 611 (1978) (quoting *Hall v. Lorain-Medina Rural Elec. Co-op, Inc.*, 148 N.E.2d 232, 236 (Ohio Ct. App. 1957)).

Because Larios’ injury “[was] not reasonably foreseeable in the exercise of due care, there is no liability.” *Foreman*, 271 S.C. at 133, 245 S.E.2d at 611 (citations omitted) (“A power company is entitled to anticipate the exercise of due care by those working in the vicinity of the lines.”). Just as in *Burns v. Carolina Power & Light Co.*, 193 F.2d 525 (4th Cir. 1951), DESC “had no knowledge, information or reason to believe

that [Larios or other unqualified workers] would [work in violation of OSHA and NESC law] *without bothering to look to see where they were working or what would be the result.*" 193 F.2d at 529 (emphasis added).

Given that DESC owed no duty to Larios, "all other facts [are] immaterial," and DESC is entitled to judgment as a matter of law. *Baughman*, 306 S.C. at 116, 410 S.E.2d at 545–46; *see also Cole v. Boy Scouts of Am.*, 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011) ("Absent a legally recognized duty, the defendant in a negligence action is entitled to a judgment as a matter of law." (citation omitted)). Coupled with the fact that Larios negligently violated a number of OSHA requirements through his work near the electric line coupled with Stevens' negligence in failing to enforce the OSHA requirements and ensure the safety of its workers, it is inescapable that DESC is entitled to a directed verdict.

2. DESC IS ENTITLED TO DIRECTED VERDICT BECAUSE DESC DID NOT PROXIMATELY CAUSE LARIOS' INJURIES; INSTEAD, SUCH INJURIES WERE CAUSED BY THE INTERVENING, SUPERSEDING NEGLIGENCE OF LARIOS, STEVENS, OR BOTH.

Negligence is not actionable unless it is a proximate cause of the injury. *Hanselmann v. McCardle*, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980) (quotations omitted). Proximate cause requires proof of both causation in fact and legal cause. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Id.* (quoting *Whitlaw v. Kroger Co.*, 306 S.C. 51, 54, 410 S.E.2d 251, 253 (1991)). "Legal cause is proved by establishing foreseeability." *Id.* "Foreseeability is determined by looking to the natural and probable

consequences” of the complained of act. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) (citation omitted).

“[W]hen the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause.” *Locklear v. Se. Stages, Inc.*, 193 S.C. 309, 8 S.E.2d 321, 325 (1940); see also *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968) (same). While proximate cause is usually a question for the jury, the question may be decided as a matter of law when the facts are such that they will support only one reasonable inference. See *Trivelas v. S.C. Dept. of Transp.*, 348 S.C. 125, 136-37, 558 S.E.2d 271, 276-77 (2001).

The case of *Steele v. Lynches River Elec. Co-op., Inc.*, 259 S.C. 239, 191 S.E.2d 253 (1972) is instructive. In *Steele*, the plaintiff was injured after climbing and standing on top of a nearby barbed wire fence and attempting to cut a section from the electric wires left hanging from a transformer on defendant's transmission poles. *Id.*, 259 S.C. at 242, 191 S.E.2d at 254. Viewing the evidence in the light most favorable to the plaintiff, the South Carolina Supreme Court found that it simply showed he was injured due solely to his own actions, and that there was no evidence that the wires posed any danger to one merely passing by. *Id.* at 244, 191 S.E.2d at 255. The Court held that the plaintiff was

charged with knowledge that contact with a wire charged with electric current is attended with danger. Under the circumstances, the fact that [he] may not have known that the electric wires were actually charged with current does not relieve him of the responsibility for intentionally coming in contact with the wire. The wire which he intentionally caught was hanging from an electric transmission line. This fact was open and apparent, and

gave warning of the likelihood that the wires were charged with current. In spite of this fact, respondent stood on top of the fence and caught hold of the wire. His purposeful action in so doing . . . barred him of recovery.

Id.

Here, in addition to the unforeseeability issue discussed above, the causation in fact lies with Larios, Stevens, or both. That is, “but for” Larios’ violation of the OSHA laws applicable to him, including but not limited to working in violation of the 10-foot rule and failing to notify DESC before starting such work, his injuries would not have occurred. See SCOSHA testimony and citations; see *also* Testimony of Plaintiff’s Expert Edward R. Brill, PE. Stated differently, Larios’ injuries resulted from his own negligence.

Furthermore, “but for” Stevens’ and Stevens Irrigation’s failure to train their employees, including Larios, and provide such employees with a safe working environment, Larios’ injuries would not have occurred. See OSHA testimony and citations (OSHA “Serious” citations issued against Stevens Irrigation for those exact failures); see *also* Testimony of Plaintiff’s Expert Edward R. Brill, PE.; Compl., ¶10 (referencing the employment relationship existing between Stevens Irrigation and Larios).

Plaintiff’s expert, Edward R. Brill, PE, has testified in deposition and at trial and despite admitting that he had not seen and/or analyzed the following evidence: the chainsaw, the ladder, the tree, any tree branches or palm fronds, Larios’ body, Larios’ shoes, Larios’ clothing, including his shirts, Brill concocted two (2) opinions of causation of an alleged electric shock which startled Larios and caused his fall. Without scientific evidence to support his opinions Brill thinks that a “non-lethal” and “unique shock” happened when either Larios moved a palm frond or seed pod into the energized

primary OR a cut palm frond or seed pod dropped into the energized primary causing the current. Brill could not determine which of the two (2) theories was the actual cause of the incident at issue in this litigation. Because (1) Brill's opinions rely on insufficient facts or data³, (2) his opinions rest on unreliable principles and methods, and (3) Brill did not reliably apply the methodology to the facts, Brill's opinions do not meet the standards for reliability and admissibility pursuant to Rules 401, 402, 403, 702, and 703, SCRE and should be excluded from consideration by the jury. DESC filed a separate Motion to Exclude this testimony on September 26, 2019 and it and the arguments contained therein are incorporated herein by reference.

The negligent, unforeseeable acts and omissions of Larios and Stevens are the direct and intervening and superseding acts that resulted in Larios' injuries. At best, the acts of DESC are merely a remote cause of such injuries. As such, DESC is entitled to judgment as a matter of law.

3. DESC IS NOT LIABLE BASED ON LARIOS' OVERWHELMING NEGLIGENCE, AS WELL AS HIS PRIMARY ASSUMPTION OF RISK.

A. Larios' Primary Assumption of Risk

"Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity." *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011). In other words, primary implied assumption of the risk is another way of saying the "plaintiff has failed to establish a

³ Brill admitted at trial that two sources of evidence he considered when determining that the accident was an electric shock event—Deputy Coroner Marion Whaley's findings that the chainsaw made direct contact with the overhead primary and that the aluminum ladder was the path of the electric current to Mr. Larios—were demonstrably false. Furthermore, Brill admitted in his deposition and at trial that he could not testify to a reasonable degree of certainty that the only alleged possible indicia of electrical shock, the circular mark on Mr. Larios' abdomen, was related to electrical current.

prima facie case of negligence by failing to establish that a duty exists.” *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 247, 612 S.E.2d 462, 464 (Ct. App. 2005) (citations omitted); see also *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 38, 637 S.E.2d 560, 562–63 (2006) (holding the risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey and, therefore, there was no duty to protect the spectator); *Cole*, 397 S.C. at 252–53, 725 S.E.2d at 478–79 (affirming grant of summary judgment against father who was injured while playing softball because the risk of the harm that befell him was inherent in the game); *Rudzinski v. BB*, No. 0:09-1819-JFA, 2010 WL 2723105, *2 (D.S.C. July 9, 2010) (summary judgment was properly granted in favor of a defendant under primary implied assumption of the risk where plaintiff was struck in the face with a golf club while playing golf with another person since the risk of being hit by a fellow golfer swinging his club at high speed is an inherent and inescapable risk posed by golfing).

Our Supreme Court has further held:

An employee assumes all of the ordinary risks of his employment; that is to say, he assumes the risk of all dangers ordinarily incident to that employment. He does not, however, assume the risk of extraordinary dangers or dangers caused by the negligence of the employer or its agents and servants, unless those dangers are known to him and appreciated by him, or by the exercise of ordinary care would become known to him and appreciated by him, whether ordinary, extraordinary or however caused. We deem it unnecessary to cite authority for the foregoing statement of the law in this state regarding assumption of risk by an employee.

Blalock v. Graniteville Mfg. Co., 183 S.C. 247, 190 S.E. 709, 712 (1937). “Numerous decisions by [our Supreme Court] support and sustain the proposition that when an injured employee . . . has suffered injury from his own delict in failing to use due care to

discover, correct or avoid the thing or condition which caused his injury, he cannot recover.” *Bellamy v. Hardee*, 242 S.C. 71, 78–79, 129 S.E.2d 905, 909 (1963) (citations omitted).

The danger Larios encountered on the date of his injury was the precise danger he should have expected. He knew (or should have known) not to work within proximity to overhead power lines with a conductive object, yet, inexplicably, did so. See *Foreman*, 271 S.C. at 133, 245 S.E.2d at 611 (citations omitted) (“A power company is entitled to anticipate the exercise of due care by those working in the vicinity of the lines.”). Larios assumed the risk. As such, DESC is entitled to a directed verdict on all claims asserted by Plaintiff. *Nedrow v. Pruitt*, 336 S.C. 668, 678 n.6, 521 S.E.2d 755, 760 n.6 (Ct. App. 1999) (While traditional assumption of the risk as an affirmative defense was subsumed by comparative negligence legislation, “primary implied assumption of risk remain[ed] unaffected.”)

B. Larios’ Overwhelming Negligence Bars Plaintiff’s Claims

Under South Carolina’s doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). While the comparison of fault between a plaintiff and defendant is typically a question for the jury, if the sole reasonable inference that may be drawn from the evidence is that the plaintiff’s negligence exceeded fifty (50%) percent, the Court may determine judgment as a matter of law in favor of the defendant. *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 712–13 (2000). “If the evidence as a whole is susceptible to only one

reasonable inference, no jury issue is created.” *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

While the affirmative defense of assumption of the risk (or “secondary implied assumption of the risk”) was eliminated as an absolute bar to recovery in 1998 in South Carolina, it is still a viable defense within the comparative negligence scheme. *Davenport v. Cotton Hope*, 325 S.C. 507, 482 S.E.2d 569, 574 (Ct. App. 1997) (Assumption of the risk is “to be treated as another facet of comparative negligence rather than as an absolute bar to recovery.”). In other words, while simply meeting the elements of the affirmative defense no longer bars recovery, the assumption of the risk defense is still a factor to consider and method of determining whether a plaintiff was more than fifty (50%) percent negligent in causing his injuries.

“Secondary implied assumption of risk, as exists in the instant case, arises when the plaintiff knowingly encounters a risk created by the defendant’s negligence. It is a true defense because it is asserted only after the plaintiff establishes a *prima facie* case of negligence against the defendant.” *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003) (“Secondary implied assumption of the risk may involve either reasonable or unreasonable conduct on the part of the plaintiff.”).

“Under South Carolina jurisprudence, where evidence of the plaintiff’s greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury.” *Singleton v. Sherer*, 377 S.C. 185, 207, 659 S.E.2d 196, 207 (Ct. App. 2008) (finding that “[t]he trial court did not err in barring [plaintiff’s] claim under the assumption of risk doctrine because

[plaintiff] was more than fifty percent at fault in causing his injuries”); see also *Bass v. Gopal, Inc.*, 384 S.C. 238, 247, 680 S.E.2d 917, 922 (Ct. App. 2009), *aff'd*, 395 S.C. 129, 716 S.E.2d 910 (2011) (holding that the plaintiff was more than fifty percent negligent as a matter of law where “the only reasonable inference that may be drawn from the evidence is that [plaintiff’s] negligence in stepping outside of his room and confronting the assailant exceeded any possible innkeeper negligence”); *Bloom v. Ravoira*, 339 S.C. 417, 424, 529 S.E.2d 710, 714 (2000) (holding that any factual issues existing as to defendant’s fault in operating his vehicle could not alter “the inescapable conclusion” that the plaintiff disregarded known risks in failing to cross the street in a safe, reasonable manner).

Multiple, factually comparable cases have been dismissed by various courts for these very reasons. See, e.g., *Priest v. Brown*, 302 S.C. 405, 410, 396 S.E.2d 638, 640–41 (Ct. App. 1990) (barring a police officer’s claim against a driver who knocked a power line where the officer, who was charged with knowledge of the dangers imposed by electrically charged wires, nonetheless attempted to remove the line from the road, thereby causing his own injuries); *Clayton v. Autoquip Corp.*, 91 F.3d 129, 1996 WL 383923 *1 (4th Cir. 1996) (finding that where an experienced mechanic circumvented the safety device, defied printed warnings, and ignored the specific admonition of a co-worker, he assumed the risk as a matter of law); *Greene v. Consol. Freightways Corp. of Del.*, 2 F. App’x 299, 302 (4th Cir. 2001) (barring a police officer’s claim for injuries sustained after an initial emergency situation was secured based on the officer’s assumption of the risk in entering the cab of a tractor-trailer, pulling the

driver out of the truck, and using his own body to shield the driver from hitting the ground).

Based on the application of the above-described law to the uncontroverted facts of this case, one (1) singular, dispositive conclusion is inescapable: Larios had (or should have had) knowledge of the dangers of working near energized power lines, yet he nonetheless purposefully undertook a course of conduct that was grossly reckless and caused his own injuries. See Testimony of Plaintiff's Expert Brill. It was Larios' unlawful, unforeseeable, and unreasonable act of working within ten (10') feet of DESC's power line (without notice to DESC) that resulted in his injuries. Simply put, his own negligence is overwhelmingly greater than fifty (50%) percent. As a result, Plaintiff's claims should be barred by Larios' overwhelming comparative negligence as a matter of law.

4. FINALLY, DESC IS ENTITLED TO DIRECTED VERDICT AS TO PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES

"A plaintiff is entitled to recover punitive damages if the act complained of is determined to be willful, wanton or reckless." *Camp v. Components, Inc.*, 285 S.C. 443, 444, 330 S.E.2d 315, 316 (Ct. App. 1985). A jury may award punitive damages even "when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights." *Id.* (quoting *Hicks v. McCandlish*, 221 S.C. 410, 415–16, 70 S.E.2d 629, 631 (1952)). However, so long as no more than one inference is created from the evidence presented, a jury issue is not created, and the trial court is proper in directing a verdict. *Huffines Co. v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005).

For the reasons stated above, there is only inference as to Plaintiff's claims for punitive damages in this – that Plaintiff has presented no evidence in this case of willful, wanton or reckless conduct on behalf of DESC with respect to any of its activities. On the contrary, the uncontested testimony presented to the Court is that DESC's overhead power line was compliant with industry standards and that there is no evidence that anyone, much less Mr. Larios or his employer, notified DESC of the tree trimming activities on the date in question.

Notwithstanding his flawed causation analysis detailed above and in DESC's motion to exclude his testimony, at best Plaintiff's expert Brill has only provided testimony to support a negligence theory against DESC by opining that DESC violated national standards, such as NESC and ANSI, with regard to tree trimming standards. DESC vehemently denies those claims. Nevertheless, even assuming *arguendo* that such claims were properly made, this is not evidence to support a punitive damages claim. *Elledge v. Richland/Lexington School Dist. Five*, 341 S.C. 473, 478-79, 534 S.E.2d 289, 291 (Ct. App. 2000); citing *Sawyer v. Dreis & Krump Mfg. Co.*, 67 N.Y.2d 328, 502 N.Y.S.2d 696, 493 N.E.2d 920, 925 (1986) (national standards were properly admitted and could be considered by the jury as some evidence of negligence but they were not conclusive on the subject of negligence and the jury should have been so instructed); *Jorgensen v. Horton*, 206 N.W.2d 100, 103 (Iowa 1973) ("Violation of standards in such [private safety] codes is evidence on the issue of negligence but not negligence *per se*.")

Again, after full discovery and trial testimony there is no evidence to support Plaintiff's claims for punitive damages and, as a result, DESC is entitled to directed verdict as to those claims.

Conclusion

For the reasons set forth above, DESC is entitled to a directed verdict because, as a matter of law, DESC had no duty to Larios; DESC did not proximately cause Larios' injuries; and DESC is not liable based on the evidence of Larios' overwhelming negligence and Larios' primary assumption of risk. DESC further respectfully requests that this Court grant its Motion and award it such further relief, both general and special, legal or equitable, to which it may be entitled.

Signature Block on Next Page

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

s/ Steven J. Pugh

Steven J. Pugh (SC Bar #14341)

spugh@richardsonplowden.com

R. Wilder Harte (SC Bar #101228)

wharte@richardsonplowden.com

Megan C. White (SC Bar #101895)

mwhite@richardsonplowden.com

**ATTORNEYS FOR DEFENDANT SOUTH
CAROLINA ELECTRIC & GAS COMPANY,
N/K/A DOMINION ENERGY SOUTH CAROLINA**

September 26, 2019

STATE OF SOUTH CAROLINA)
 COUNTY OF COLLETON)
 Tiffany N. Provence, as Special)
 Administrator for the Estate of Jose Refugio)
 Licona Larios,)
 Plaintiff,)
 vs.)
 Dominion Energy South Carolina f/k/a)
 South Carolina Electric & Gas Company,)
 Defendant.)

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO. 2017-CP-15-0423

VERDICT FORM

COLLETON COUNTY
 COURT
 2019 SEP 30 AM 9:11
 FROM THE CLERK OF THE COURT
 BRUNNEN & LEE

We, the jury, unanimously find:

(1) Did Plaintiff prove, by a preponderance of the evidence, that the Defendant SCE&G/Dominion Energy breached its duty of care and, if so, was that breach a proximate cause of Jose Larios' injuries and death?

YES X NO _____

If your answer to Question 1 is NO, simply sign the verdict form and end your deliberations. If your answer to Question 1 is YES, please proceed to Question 2.

(2) Did Defendant SCE&G/Dominion Energy prove, by a preponderance of the evidence, that Jose Larios was negligent and that his negligence was the proximate cause of his injuries and death?

YES X NO _____

If you answered NO to Question 2, then proceed to Question 4. If you answered YES to Question 2, please answer Question 3.

(3) What are Jose Larios' and Defendant SCE&G/Dominion Energy's respective percentages of fault, as proven by the preponderance of the evidence? These percentages must add up to 100%.

Defendant SCE&G/Dominion Energy: 90 %
 Jose Larios: 10 %

Please proceed to Question 4.

(4) Please state the total amount of damages for the Estate of Jose Larios for any conscious pain and suffering he experienced prior to his death.

10,000,000.00 Dollars

Please proceed to Question 5.

(5) Please state the total amount of damages for the wrongful death of Jose Larios including grief, sorrow, mental shock, suffering, and the loss of his companionship.

11,000,000.00 Dollars

Please proceed to Question 6.

(6) Do you find that Defendant SCE&G/Dominion Energy acted in a willful, wanton, or reckless manner.

YES _____

NO X

PLEASE SIGN AND DATE THE VERDICT FORM

9/27/19
DATE



CANDICE McALHANEY, FOREPERSON

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON)	
)	
Tiffany N. Provence, as Special	)	Civil Action No. 2017-CP-15-00423
Administrator for the Estate of Jose)	
Refugio Licono Larios,)	
)	
Plaintiff,)	
)	
v.	)	DEFENDANT SOUTH CAROLINA
	)	ELECTRIC & GAS COMPANY N/K/A
	)	DOMINION ENERGY SOUTH CAROLINA,
South Carolina Electric & Gas	)	INC.'S MOTION FOR JUDGMENT
Company; PENSCO Trust Company	)	NOTWITHSTANDING THE VERDICT; IN
LLC; and Edisto Sales & Rentals	)	THE ALTERNATIVE, FOR A NEW TRIAL;
Realty, LLC,	)	AND FOR SANCTIONS
)	
Defendants.)	
)	

Pursuant to Rules 50(b), 59(a), and 37 of the South Carolina Rules of Civil Procedure, Defendant South Carolina Electric & Gas Company n/k/a Dominion Energy South Carolina, Inc. (“DESC”), by and through its undersigned counsel, hereby moves this Court for a judgment notwithstanding the jury’s verdict (“JNOV”); in the alternative, for a new trial; and for sanctions against Plaintiff (the “Motion”).

As a matter of law, DESC is entitled to JNOV because Plaintiff did not introduce evidence that would allow the finder of fact to find in favor of Plaintiff. Specifically, as more fully discussed in the contemporaneously filed Memorandum of Law in Support of the Motion, judgment in favor of DESC notwithstanding the jury’s verdict is appropriate. But, at a minimum, DESC is entitled to a new trial. Additionally, DESC is entitled to sanctions against Plaintiff for abuse of the discovery process.

JUDGMENT NOTWITHSTANDING THE VERDICT

First, Plaintiff failed to establish that DESC owed a duty to Jose Refugio Licona Larios ("Mr. Larios") in view of the fact that he was unlawfully and negligently in proximity to DESC's properly designed, constructed, and energized line and, thus, Mr. Larios was a trespasser to whom DESC had no duty.

Second, in any event, DESC did not proximately cause Mr. Larios' injuries, which were instead proximately caused by the intervening and superseding negligence of Mr. Larios, his employer, other Defendant(s), or a combination thereof.

Third, DESC is not liable based on the evidence of Mr. Larios' overwhelming negligence and Mr. Larios' primary assumption of risk. Therefore, DESC is entitled to a directed verdict as to all of Plaintiff's claims.

NEW TRIAL

Alternatively, there were a number of errors and issues that warrant the granting of a new trial.

First, the verdict was against the great weight of the evidence, necessitating that this Court exercise its authority as the thirteenth juror to direct a new trial.

Second, less than one week before trial, DESC received voluminous medical records regarding Mr. Larios despite numerous and repeated specific discovery requests to Plaintiff regarding Mr. Larios' medical history and prior serious injuries, yet the Chief Administrative Judge and subsequently the trial court inexplicably refused to grant a continuance. To compound the prejudice against DESC, the records were ruled inadmissible at trial, even though the trial court charged the jury on Mr. Larios' life expectancy.

Third, the trial court did not allow introduction of the OSHA Report, but it allowed the Coroner's Report to be admitted into evidence and even allowed Plaintiff's counsel to redact part of the Coroner's Report AFTER it was admitted into evidence.

Fourth, the trial court improperly admitted into evidence testimony from Plaintiff's experts Dr. S. Erin Presnell and Edward R. Brill, P.E., even though neither of the experts provided testimony admissible under the South Carolina Rules of Evidence.

Fifth, the trial court improperly charged the jury as to punitive damages, yet refused to charge trespass or assumption of the risk even though the evidence warranted those charges, thus making it impossible for the jury to judge the illegality of Mr. Larios' conduct.

Sixth, the trial court improperly denied the Defendants' Joint Motion for Jury View of the Premises.

Seventh, after the trial, it was discovered that there was a juror who failed to disclose pertinent information in response to a specific *voir dire* question.

SANCTIONS

In addition to being entitled to JNOV or, in the alternative, a new trial, DESC is also entitled to sanctions for the above-mentioned discovery abuse perpetrated by Plaintiff, inclusive of Plaintiff's deliberate failure to locate and produce responsive information and documents regarding Mr. Larios' relevant and significant medical history and a prior tree trimming incident and injuries resulting therefrom (occurring shortly before his fatal fall underlying this litigation), despite numerous and repeated specific discovery requests on point.

WHEREFORE, for the reasons stated herein and in the accompanying memorandum of law, which is incorporated as though set forth fully herein, DESC is entitled to JNOV or, in the alternative, a new trial. Additionally, DESC is entitled to sanctions for Plaintiff's abuse of the discovery process. As such, DESC requests that this Court grant its Motion and award it such further relief, both general and special, legal or equitable, to which it may be entitled.

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

s/ Megan C. White

Steven J. Pugh (SC Bar #14341)

spugh@richardsonplowden.com

Megan C. White (SC Bar #101895)

mwhite@richardsonplowden.com

**ATTORNEYS FOR DEFENDANT SOUTH
CAROLINA ELECTRIC & GAS COMPANY,
N/K/A DOMINION ENERGY
SOUTH CAROLINA, INC.**

October 7, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON)	
)	
Tiffany N. Provence, as Special	)	Civil Action No. 2017-CP-15-00423
Administrator for the Estate of Jose)	
Refugio Licono Larios,)	
)	
Plaintiff,)	
)	
v.)	
)	
South Carolina Electric & Gas	)	DEFENDANT SOUTH CAROLINA
Company; PENSCO Trust Company	)	ELECTRIC & GAS COMPANY N/K/A
LLC; and Edisto Sales & Rentals	)	DOMINION ENERGY SOUTH CAROLINA,
Realty, LLC,	)	INC.'S MEMORANDUM OF LAW IN
	)	SUPPORT OF ITS MOTION FOR
	)	JUDGMENT NOTWITHSTANDING THE
Defendants.	)	VERDICT; IN THE ALTERNATIVE, FOR A
	)	NEW TRIAL; AND FOR SANCTIONS

Introduction and Prayer for Relief

Since its origins as the Charleston Gas Light Company in 1846, Defendant South Carolina Electric & Gas Company (“SCE&G”) has proudly provided the citizens of South Carolina with safe and reliable electric distribution service. After more than two years of near-daily negative newspaper and television media reports of multi-billion-dollar lawsuits, legislative actions, criminal investigations, and regulatory proceedings related to its parent company’s abandonment of construction of two nuclear power plant reactors, SCE&G’s parent company was acquired by Dominion Energy, Inc. in January 2019. Following this acquisition, SCE&G was renamed Dominion Energy South Carolina, Inc. (“DESC”). Despite these often-vitriolic media reports about the purported misdeeds of its parent company and former executives, the men and women of SCE&G continued their daily work of delivering safe and reliable service to their customers.

SCE&G's, now DESC's, provision of electric service to its customers is highly regulated by the South Carolina Public Service Commission (the "SC PSC"), and DESC employs thousands of South Carolinians whose dedicated work is to design, build, operate, and maintain a safe and reliable distribution system. A DESC internal policy, reviewed and approved by the SC PSC, known as the Distribution Vegetation Management Plan, provides guidance to DESC employees and contractors as to the maintenance of vegetation along DESC overhead power lines on a 5-year cycle in a proactive effort to prevent vegetation from growing into, damaging equipment, and disrupting service from its 18,000 miles of distribution lines.

On November 29, 2015, Jose Refugio Licona Larios ("Mr. Larios") died while he was illegally and negligently working in violation of numerous state and federal laws. Mr. Larios fell 26' from an aluminum ladder while utilizing a chainsaw to trim a palm tree in a private backyard and died approximately 30 minutes later from blunt force trauma from his fall.

The jury's verdict of \$21,000,000.00 and 90% fault allocation to DESC requires exceptional scrutiny where the single, negligence theory of liability against DESC¹ was that Mr. Larios' death was caused by DESC's failure to know that this specific palm tree, one of millions located along its 18,000 miles of distribution lines, located in a private backyard, had allegedly grown a frond or seed pod capable of being manipulated by

¹ In addition to DESC, Plaintiff also maintained claims against Mr. Larios' employer—William J. Stevens and/or Stevens Irrigation and Landscaping—for negligence *per se*, negligence, and gross negligence for failure to provide a place of employment free of hazards, including the hazards of direct or indirect contact with energized power lines. Plaintiff also maintained negligence and premises liability claims against Defendants PENSCO Trust Company LLC; Edisto Sales & Rentals Realty, LLC; and DLL Operating Co., Inc. The wrongful death and survival claims were applicable to all Defendants. See *generally*, Compl.

someone (Mr. Larios) working (without notice to DESC) in the tree, such that the frond or seed pod could reach within ten (10') feet of DESC's energized line—a power line Mr. Larios had no legal right to be within ten (10') feet of on the day of his tragic death. Such a verdict, rendered without any credible evidence that electric shock contributed to or otherwise caused Mr. Larios' death; no evidence that DESC violated any applicable SC PSC rule or law; and not a single dollar of actual damages being introduced into evidence, cannot be sustained as a matter of law for the multiple reasons stated below.

DESC submits this Memorandum in Support of its Motion for Judgment Notwithstanding the Verdict (“JNOV”) pursuant to Rule 50(b), SCRCP; in the alternative, for a New Trial pursuant to Rule 59(a), SCRCP; and for Sanctions pursuant to Rule 37, SCRCP (the “Motion”).²

As a matter of law, DESC is entitled to JNOV because Plaintiff did not introduce evidence that would allow the finder of fact to find in favor of Plaintiff. Specifically, Plaintiff failed to establish that DESC owed a legal duty to Mr. Larios in view of the fact that he was illegally and negligently in proximity to DESC's properly designed, constructed, and energized line and, thus, was a trespasser to whom DESC had no duty; in any event, DESC did not proximately cause Mr. Larios' injuries, which were instead proximately caused by the intervening and superseding negligence of Mr. Larios, his employer, other Defendant(s), or a combination thereof; and DESC is not liable based on the evidence of Mr. Larios' overwhelming negligence and Mr. Larios' primary assumption of risk. Therefore, DESC is entitled to a directed verdict as to all of Plaintiff's claims.

² DESC's Motion is filed contemporaneously with this Memorandum of Law. On September 27, 2019, the Court gave the parties 10 days to file post-trial motions.

Alternatively, there were a number of errors and issues that warrant the granting of a new trial. Less than one week before trial began, DESC received in excess of 640 pages of medical records and electronic copies of MRI and CT scans regarding a Mr. Larios' prior tree trimming incident, which occurred a short time before the fall that caused his death and which resulted in multiple skull fractures and traumatic brain injury and necessitated emergency surgery and hospitalization in a "Surgical Trauma ICU." Throughout the two years this case was litigated, DESC made numerous and repeated discovery requests to Plaintiff regarding Mr. Larios' medical history, wrote follow-up letters to Plaintiff's counsel, and, yet, this prior injury and medical records were not disclosed (this failure also supports an award of sanctions). Despite Plaintiff's troubling "oversight," at best, or concealment of Mr. Larios' serious prior injury, the trial Court inexplicably refused to grant a continuance, depriving DESC of any meaningful opportunity to review this evidence and consider its potential use at trial.

To make matters worse, the trial court improperly:

- prohibited introduction of the OSHA Report, but it allowed the Coroner's Report to be admitted into evidence and even allowed Plaintiff's counsel to redact part of the Coroner's Report AFTER it was admitted into evidence;
- admitted into evidence testimony from Plaintiff's experts Dr. S. Erin Presnell ("Presnell") and Edward R. Brill, P.E. ("Brill"), even though neither of the experts provided testimony admissible under the South Carolina Rules of Evidence;
- charged the jury as to punitive damages, yet refused to charge trespass or assumption of the risk even though the evidence warranted those charges, thus making it impossible for the jury to judge the illegality of Mr. Larios' conduct;

- charged the jury regarding a life expectancy of 37.39 years for Mr. Larios, yet refused to admit the above-mentioned medical records (which indicated not only that Mr. Larios had suffered multiple skull fractures and traumatic brain injury, necessitating emergency surgery and hospitalization in a “Surgical Trauma ICU,” but also that Mr. Larios had Type 2 diabetes, a prior back surgery, and potential chronic alcohol abuse) into evidence; and
- denied DESC’s motion for jury view of premises, where the relative location of the electric lines in its right of way was necessary to support any finding of liability against DESC.

The substantial and unfair prejudice to DESC did not stop there, as after the trial, it was discovered that a juror failed to disclose pertinent information in response to a specific *voir dire* question fundamental to the issues presented by this litigation.

Background and Discovery History

Plaintiff Tiffany N. Provence, as Special Administrator for the Estate of Mr. Larios (“Plaintiff”) filed this wrongful death and survival action against Defendants DESC; PENSCO Trust Company, LLC (“PENSCO”); Edisto Sales & Rentals Realty, LLC (“Edisto Sales”); William J. Stevens (“Stevens”); and Stevens Irrigation and Landscaping, LLC (“Stevens Irrigation”) (Stevens and Stevens Irrigation are hereinafter collectively referred to as “Stevens” unless otherwise noted),³ for injuries and damages sustained as a result of the death of Mr. Larios.

³ On July 29, 2019, Plaintiff unilaterally dismissed Defendants Stevens and Stevens Irrigation pursuant to Rule 41(a)(1)(A), SCRCP. On August 8, 2019, DESC filed its Motion for Leave to File Third-Party Complaint against both Stevens and Stevens Irrigation. That Motion was denied by the Honorable Carmen T. Mullen on September

According to the Complaint, this case arises out of a November 29, 2015 incident in which Mr. Larios was trimming a palm tree in the backyard of private property in Edisto Beach, South Carolina. See Compl. ¶1. He was using a chainsaw while elevated approximately twenty-six (26) feet on an aluminum ladder when he fell. *Id.* at ¶12. Plaintiff alleges that Mr. Larios' fall occurred when the chainsaw he was operating contacted an energized DESC powerline that was hidden. *Id.*

The palm tree Mr. Larios was trimming was located on property owned by PENSCO and marketed for short-term vacation rentals by Edisto Sales. *Id.* at ¶¶15–16. Stevens was hired by PENSCO to perform periodic landscape services at this property. *Id.* at ¶31. At the time this incident occurred, Mr. Larios was working for Stevens. *Id.* at ¶9. Accordingly to Plaintiff's Complaint, Stevens failed to: provide a place of employment that is free of recognized hazards which may cause death or serious physical harm to its employees; comply with applicable occupational safety and health rules and regulations promulgated under South Carolina law; establish or implement a safety program; train employees how to work from a ladder and/or near power lines or properly use any type of equipment; require employees to wear personal protective equipment; inspect the work site in question; supervise its employees while working; correct an unreasonably dangerous condition; warn of the unreasonably dangerous condition; or provide appropriate tools for the job. See Compl. ¶¶18–21.

The incident was investigated by the Edisto Beach Police Department, Colleton County Coroner's Office, South Carolina Occupational Safety and Health Administration ("OSHA"), and DESC. See OSHA Investigation Report, relevant portions were attached

6, 2019. DESC filed a Motion for Reconsideration on September 16, 2019, which, upon information and belief, was denied, via Form 4 Order, on September 17, 2019.

as Exhibit 1 to the Memorandum of Law in Support of DESC's Motion for Summary Judgment ("DESC Summ. J. Memo."), filed August 20, 2019.

As a result of Mr. Larios' conduct in this incident, his employer, Stevens, was cited by OSHA for violating S.C. Code Ann. § 41-15-210 and related regulations, for failing to furnish a place of employment free of recognized hazards, among other reasons. The citations state as follows in pertinent part (collectively, the "OSHA Citations"):

1. **Citation 01—Item 001 (Serious): "Employer knew or should have known that employees trimming trees in close proximity (within 10 feet) to energized power lines were exposed to the hazard of contact with energized lines."**
2. Citation 01—Item 002 (Serious): "Employer knew or should have known that employees trimming trees from a Louisville ladder in excess of approximately twenty three feet were exposed to the hazard of falling off the ladder while using a chainsaw."
3. Citation 01—Item 004 (Serious): "**Employer did not assess the workplace to determine the hazards to employees of trimming trees** and which personal protective equipment (PPE) such as, but not limited to eye and face protection, head protection, foot protection, and hand protection would be required for trimming trees at the 3402 Myrtle Street job site."
4. Citation 02—Item 001a (Serious): "Employer did not provide leg protection constructed with cut-resistant material, such as ballistic nylon, to cover the full length of the thigh to the top of the boot on each leg to protect against contact with a moving chain saw for one employee using a chain saw at the 3402 Myrtle Street job site."
5. Citation 02—Item 001b (Serious): "Eye and face protection from flying particles was not used by two Landscapers operating a STIHL MS 170 chain saw to trim trees at 3402 Myrtle Street job site."
6. Citation 02—Item 001c (Serious): Protective helmet was not worn by one Landscaper working under trees that were being trimmed at 3402 Myrtle Street job site."

Pl.'s Mot. in Limine No. 2, Ex. B (emphasis added). Thus, the OSHA investigator issued to Stevens two (2) "Serious" citations, containing multiple "Items," one of which found that Stevens knew or should have known that Mr. Larios and other employees "trimming trees in close proximity (within 10 feet) to energized power lines were exposed to the hazard of contact with energized lines." See OSHA Citation No. 01, Item 001, which was previously filed as Exhibit 2 to DESC's Summ. J. Memo. Stevens was also cited for failing to assess the workplace to determine the hazards its employees would be exposed to while trimming trees. See OSHA Citation 01 Item 004, which was previously filed as Exhibit 3 to DESC's Summ. J. Memo.

Importantly, DESC was not cited by OSHA or criticized or disciplined by any other regulatory or administrative body as a result of this incident.

After being served with Plaintiff's Complaint, the parties engaged in extensive written discovery, the exchange of documents, and multiple depositions, including Mr. Larios' brother, Gaspar Licona, with whom he had lived. Specific to DESC's discovery requests (defining "Mr. Larios" as "Decedent"):

- **Interrogatory No. 14** of DESC's First Interrogatories to Plaintiff inquired whether:

Decedent had ever been injured trimming trees or performing other landscaping work, other than the incident that is the subject of this action. If so, please describe the accident/incident, inclusive of the date, Decedent's employer's at the time, the injuries, and any subsequent claims or compensation that arose from said accident/incident.

Plaintiff responded:

Plaintiff is not in possession of the information responsive to this interrogatory as Decedent is deceased. To the best of Plaintiff's knowledge, no.

- **Interrogatory No. 10** inquired whether Plaintiff is, aware of any similar incidents involving Decedent? If so, please identify the date, location and parties involved in each similar incident.

Plaintiff responded,

Plaintiff is not aware of any similar incidents involving the Decedent.

- **Request No. 7** of DESC's First Requests for Production to Plaintiff requested:

[a]ll medical, billing and office records of each health care provider who examined and/or treated Decedent for injuries or ailments during the ten (10) years prior to his death.

Plaintiff did not produce any documents referencing this prior incident.

- **Request No. 25** sought:

[a]ll documents relating to any prior injuries Decedent sustained while working for Stevens or any other company performing landscaping work.

Plaintiff responded,

Plaintiff is not in possession of any documents responsive to this request.

On April 24, 2018, DESC corresponded with Plaintiff's counsel, pursuant to Rules 11 and 26, SCRCP, in an attempt to advise and confer regarding the deficiencies of Plaintiff's discovery responses. DESC advised that such "responses" were insufficient and requested that Plaintiff supplement with the relevant, requested information. DESC did not receive any response to this correspondence. On September 11, 2019, DESC sent another letter specifically detailing Plaintiff's failure to provide adequate responses. Again, Plaintiff has failed to provide the requested information. Copies of DESC's April

24, 2018 and September 11, 2019 correspondence to Plaintiff were collectively attached as Exhibit 2 to Edisto Sales and DESC's Joint Motion for Continuance, filed on September 13, 2019 (the "Joint Motion," which is incorporated herein by reference).

Similarly, Defendant PENSCO served interrogatories upon Plaintiff and requested the names and addresses of health care providers who treated Mr. Larios in the five years prior to his passing. Plaintiff responded:

Other than the medical providers identified in Plaintiff's Answer to Interrogatory No. 5, Plaintiff is not in possession of any information in response to this interrogatory.

A copy of Plaintiff's Answers to PENSCO's Interrogatories were attached as Exhibit 3 to the Joint Motion.

Also, when Mr. Larios' brother, Gaspar Licona, was asked during his August 20, 2019 deposition about Mr. Larios' health before his fatal fall, the brother answered: "He was fine. He was a big man and strong." (Dep. of Gaspar Licona ¶¶ 17:19–22, August 20, 2019) (hereinafter "Gaspar Dep.," relevant portions were attached as Exhibit 4 to the Joint Motion).

Despite these discovery efforts, Defendants became aware (from Plaintiff's own trial witness) less than two weeks before the September 23, 2019 trial of the case that Mr. Larios was involved in another tree trimming incident—resulting in multiple skull fractures and traumatic brain injury and necessitated emergency surgery and hospitalization in a Medical University of South Carolina ("MUSC") "Surgical Trauma ICU"—shortly before his fatal fall on November 29, 2015.⁴ Immediately upon learning of

⁴ It is both noteworthy and unbelievable that Mr. Licona—who resided with his brother, Mr. Larios, during the time of the prior injury and up to the day of Mr. Larios' death and who was in contact with Mr. Larios' treating physicians at MUSC—failed to

this previously undisclosed injury, Defendant PENSCO issued numerous subpoenas on September 11, 2019 to obtain records concerning this incident.

On September 13, 2019, Defendants DESC and Edisto Sales filed the Joint Motion (which, again, is incorporated herein by reference) seeking a continuance. An off-the-record telephone conference with counsel for the parties and the Honorable Carmen T. Mullen, Fourteenth Circuit Chief Administrative Judge, was held that same day (at which time Defendant PENSCO verbally joined in the Joint Motion). Despite Plaintiff's assertion that the prior injury was "not serious and irrelevant," Judge Mullen issued an order expediting the production of documents responsive to PENSCO's subpoena from MUSC regarding Mr. Larios' prior head injury.⁵

Voluminous medical records and films were provided to the parties by MUSC after 1:00 p.m. on Tuesday, September 17, 2019. The records consisted of over 640 pages and were accompanied by numerous film images. The records confirmed that Mr. Larios was hospitalized in the MUSC Surgical Trauma ICU for five days after suffering a traumatic brain injury on July 23, 2015, less than four months prior to the incident in question. Prior to this point, Plaintiff, in spite of Defendants' specific discovery requests, incorrectly and misleadingly asserted that Mr. Larios was a healthy, forty-one year old male with no previous tree trimming related injuries or medical history.

mention during his deposition that Mr. Larios had been in the prior incident, had suffered multiple skull fractures and traumatic brain injury, and had a previous medical history of diabetes and back surgery. Again, when asked about Mr. Larios' health, his brother testified during his deposition: "He was fine. He was a big man and strong." Mr. Licon generally repeated this same testimony at trial, yet DESC was precluded from seeking to impeach him with the previously undisclosed medical records, as the Court had already ruled they were inadmissible.

⁵ The Court's Order was signed on September 14, 2019, but was not filed until September 26, 2019.

On September 17th, after less than two hours of receipt of the records, and without the benefit of expert analysis, counsel of record provided correspondence to Judge Mullen outlining their respective positions on the medical records. The emails to Judge Mullen are collectively attached as **Exhibit A**. Following Plaintiff's counsel's request that the Joint Motion be denied, counsel for the Defendants noted that even upon cursory review of the records, Mr. Larios was struck by a 3' in diameter limb that fell 40' causing at least two skull fractures and massive bleeding. Furthermore, Mr. Larios' injuries were noted as "TBI" (meaning traumatic brain injury), which required a five day stay in the Surgical Trauma ICU at MUSC and follow-up care to be obtained. Finally, the medical records noted that Mr. Larios had a prior back surgery and also had a previously unknown medical condition, Type 2 diabetes, which clearly may have affected his balance, orientation, and vision on the date of the incident at issue in this lawsuit. Defendants reiterated to the Court that all of these previously undisclosed matters raised substantial questions about Plaintiff's claims, including causation and damages, and, therefore, a continuance of the trial should be granted to permit the requisite additional discovery to proceed. See **Exhibit A**.

After accepting additional memorandum of law on the Joint Motion (Defendants Memorandum of Law in Support of Joint Motion for Continuance was filed with the Clerk of Court on September 18, 2019), Judge Mullen's law clerk notified counsel via email on September 18, 2019, that Judge Mullen would respectfully deny the Joint Motion without providing any basis for her decision. A Form 4 Order denying the motion, also without listing grounds for the same, was not filed with the Clerk of Court until September 26, 2019.

At the trial of the matter, presiding Judge Thomas A. Russo denied admission of the MUSC medical records into evidence without specific grounds (even though Judge Russo ultimately charged the jury on a life expectancy of 37.39 years for Mr. Larios), although the Court noted that there was no evidence before him linking the prior injury to the fall at issue in the litigation. That is precisely why DESC contends that the continuance should have been granted by Judge Mullen so that additional discovery could be conducted regarding the previously undisclosed tree trimming incident, underlying diabetic condition, and traumatic brain injury.⁶

The case was tried during the term beginning September 23, 2019.⁷ On Thursday, September 26, 2019, Plaintiff Tiffany N. Provence (“Provence”) testified.⁸ After objections to some of her testimony, counsel for DESC was allowed to ask Provence questions about the prior discovery requests and medical records in question, outside of the presence of the jury. When asked what actions she took as Special Administrator of Mr. Larios’ Estate in response to the above-referenced discovery requests for prior tree trimming incidents and medical records, Provence testified that she did nothing because that was not in her scope of responsibility.

⁶ Of note, Judge Russo also heard arguments on the Motion for Continuance, and Plaintiff’s counsel argued that Judge Mullen had determined the medical records were “not relevant.” While Judge Russo deferred to Judge Mullen in that she had made a decision regarding the continuance, it is demonstrably incorrect to assert that Judge Mullen made any determination regarding the relevance of the medical records. See Judge’s Form 4 Order denying motion, without grounds, dated September 26, 2019.

⁷ Defendants PENSICO and Edisto Sales resolved their claims with Plaintiff on Tuesday, September 24, 2019 and were excused from the case.

⁸ DESC has requested an expedited trial transcript and will, at the Court’s request, supply references to the official trial transcript when it becomes available.

In sum, these events that transpired regarding discovery on and trial of Plaintiff's claims were the epitome of "trial by ambush." Without question, DESC was substantially and unfairly prejudiced.

Uncontroverted Dispositive Facts

The following facts are uncontroverted and are dispositive of Plaintiff's claims:

- Plaintiff alleges that Mr. Larios was a well-educated lawyer in Mexico.
- On November 29, 2015, Mr. Larios was working as an untrained, unqualified tree trimmer/landscaper.
- Mr. Larios was working on an aluminum ladder at a height of approximately 23 to 26 feet. See Testimony of Brill (Plaintiff's Expert).⁹
- In violation of OSHA law, the ladder Mr. Larios used was an uninsulated (conductive) aluminum ladder. See *id.*¹⁰
- No witness has testified that they witnessed Mr. Larios receive an electrical shock. *Id.*¹¹
- Mr. Larios did not make direct contact with the energized primary. *Id.*¹²

⁹ See Dep. of Brill 49:19–20 (June 14, 2019) [hereinafter "Brill Dep."]. Relevant portions were attached as Exhibit 4 to DESC's Summ. J. Memo and are incorporated herein by reference. DESC has requested an expedited trial transcript and will, at the Court's request, supply references to the official trial transcript when it becomes available. That being said, DESC generally notes that trial testimony was consistent with that of the deposition testimony noted in this memorandum.

¹⁰ See *also* Brill Dep. 105:25–106:11.

¹¹ See *also* Brill Dep. 50:13–17.

¹² See *also* Brill Dep. 50:18–20.

- Given Mr. Larios' height and wingspan and the type of chainsaw he was using, it was not physically possible for the chainsaw to reach the energized primary. *Id.*¹³
- There were no electric service issues, outages, or other problems with the subject DESC power line or circuit. *Id.*¹⁴
- After this incident, DESC pulled the fuse from the circuit and found it intact, further indicating no contact with the energized primary. *Id.*¹⁵
- There was no electronic (SCADA) data which reflected any contact with the energized primary on the date of Mr. Larios' fall.
- Mr. Larios was not a trained arborist or utility line clearance tree trimmer.
- Due to his lack of training with electrical equipment, Mr. Larios was an "unqualified worker" as defined by applicable OSHA law and the National Electric Safety Code ("NESC"). *Id.*¹⁶
- OSHA's "General Duty Clause" applied to Mr. Larios. This law provides:
 - B. Each employee shall comply with occupational safety and health rules and regulations promulgated under Chapter 15 of Title 41, Code of Laws, State of South Carolina, 1976, as amended; and, all employers' rules and regulations designed to protect him from recognized hazards for which there is no state occupational safety and health rule or regulation covering such situations.

S.C. Code Ann. Regs. 71-112.

¹³ See *also* Brill Dep. 51:01–04.

¹⁴ See *also* Brill Dep. 59:02–08.

¹⁵ See *also* Brill Dep. 59:09–15.

¹⁶ See *also* Brill Dep. 80:8–12.

- “Unqualified workers,” like Mr. Larios, are required to stay at least ten (10’) feet away from energized electrical equipment, including DESC’s overhead power lines, pursuant to OSHA law and other standards. *Id.*¹⁷
- This “10-foot rule” includes both the worker’s body parts and any conductive mechanism handled by the worker that would extend the worker’s reach. *Id.*¹⁸
- On November 29, 2015, Mr. Larios was working, with a chainsaw, within ten feet (10’) of the energized line.¹⁹
- There is no exception to the OSHA ten foot rule which provides that it does not apply to “hidden” power lines. Instead, the OSHA law requires workers such as Mr. Larios, and his employer, Stevens, to thoroughly assess their intended work area for any hazards and govern their actions accordingly.
- DESC was not notified by Mr. Larios, Stevens, Stevens Irrigation, PENSCO, Edisto Sales, or any other person or entity that Mr. Larios would be working within ten (10’) feet of the subject power line. *Id.*²⁰
- No person or entity requested that DESC de-energize or insulate the subject power line prior to Mr. Larios working within the vicinity of it. *Id.*²¹

¹⁷ See *also* Brill Dep. 81:12–19.

¹⁸ See *also* Brill Dep. 80:20–24.

¹⁹ See *also* Brill Dep. 96:9–13; see *also* Comp., ¶12; Ex. 2 to DESC’s Summ. J. Memo, OSHA Citation No. 1, Item 001.

²⁰ See *also* Brill Dep. 75:06–11.

²¹ See *also* Brill Dep. 75:12–15.

- No person or entity requested that DESC perform any tree trimming with regard to this particular overhead line.
- Even if Mr. Larios did receive an electric shock (other than by coming into direct contact with the primary power line), such occurrence could only occur if Mr. Larios violated the OSHA work rules applicable to him and his work. *Id.*²²

Argument and Authorities

1. DESC is entitled to JNOV.

Pursuant to Rule 50(b), SCRCP, a court may grant a motion for JNOV if “no reasonable jury could have reached the challenged verdict.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (internal quotation marks and citation omitted). The motion for JNOV is a renewal of the directed verdict motion. *Id.*, 399 S.C. at 331, 732 S.E.2d at 171. The trial court must “view[] the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” *Id.*, 399 S.C. at 331–32, 732 S.E.2d at 171. Based on the evidence identified above, no reasonable jury could have reached the verdict rendered, as the evidence, even when taken in the light most favorable to Plaintiff, does not support the jury’s verdict. As a result, DESC is entitled to judgment as a matter of law, and DESC’s Motion should be granted and JNOV entered in DESC’s favor.

Specifically, this Court should grant DESC’s Motion because: (1) DESC owed no legal duty to Mr. Larios; (2) DESC’s alleged negligence was not the proximate cause of Mr. Larios’ injuries, which were, instead, caused by the intervening, superseding

²² See *also* Brill Dep. 133:12–134:1.

negligence of Mr. Larios, Stevens, other Defendant(s), or a combination thereof; and (3) Mr. Larios assumed the risk and was overwhelmingly negligent relative to DESC.

A. *DESC is entitled to JNOV because no legal duty existed.*

For DESC to be liable for negligence, Plaintiff was required to prove, by a preponderance of evidence, three elements: “(1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damage proximately resulting from the breach of duty.” *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003). “If the plaintiff fails to prove any one of these elements, the action will fail.” *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 720 (Ct App. 1996).

“The determination of the **existence of a duty is solely the responsibility of the [C]ourt**[, and w]hether the law recognizes a particular duty is an issue of law to be decided by the Court. *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011) (emphasis added) (quoting *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 587 S.E.2d 711, 714 (2003)). “If there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law.” *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006) (citation omitted).

In addition to the fact that DESC had no affirmative duty to act under general principles of South Carolina common law, *Wyatt v. Fowler*, 326 S.C. 97, 101, 484 S.E.2d 590, 592 (1997), no legal duty exists here based upon Mr. Larios’ illegal and unforeseeable actions.

i. **Mr. Larios' undisclosed and illegal actions.**

As an “electric company maintaining high voltage wires on or over private premises,” DESC is only “required to use commensurate care to see that no injury comes to persons ***rightfully in proximity to them, and who are guilty of no wrong.***” *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 95–96, 28 S.E.2d 545 (1943) (emphasis added).

In the instant case, Mr. Larios was not “rightfully in proximity” or “guilty of no wrong” as to the DESC power line, given the above-listed uncontroverted facts as presented at trial, including:

- Mr. Larios was an “unqualified worker” who, based upon the OSHA laws that applied to his work, was not permitted to come within ten (10’) feet of the subject power line, whether by virtue of his body parts or any conductive mechanism handled by him. See Testimony of Plaintiff’s Expert Brill; see *also*, Brill Dep., 78:17–79:21; 80:20–24; 81:12–19; 91:14–18.
- DESC was not notified by any person or entity—including Mr. Larios, his employer, or any of the other Defendants—that Mr. Larios would be working within ten (10’) feet of the energized primary. *Id.*
- Neither Mr. Larios nor any other person or entity requested that DESC de-energize or insulate the subject power line prior to Mr. Larios illegally working within the vicinity of it. *Id.* Brill Dep., 75:06–15.

Based upon these uncontroverted facts, Mr. Larios was a ***trespasser*** as to DESC’s power line properly constructed in its right of way. See, e.g., *Snow v. City of*

Columbia, 305 S.C. 544, 552, 409 S.E.2d 797, 802 (Ct. App. 1991) (“The unwarrantable entry on land in the peaceable possession of another is a trespass The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, . . . he commits a trespass by the very act of breaking the enclosure.” (citations omitted)); *Hawkins v. City of Greenville*, 358 S.C. 280, 296, 594 S.E.2d 557, 565 (Ct. App. 2004) (“Trespass is any intentional invasion of [a party’s] interest in the exclusive possession of [its] property.” (quotation omitted)). Because Mr. Larios was a trespasser, DESC owed him no duty except the duty not to do him willful or wanton injury. *Estate of Adair v. L-J, Inc.*, 372 S.C. 154, 160, 641 S.E.2d 63, 66 (Ct. App. 2007) *citing* *Nettles v. Your Ice Co.*, 191 S.C. 429, 436, 4 S.E.2d 797, 799 (1939). There is no evidence that DESC had any such willful or wanton conduct.

ii. **Mr. Larios’ unforeseeable actions.**

Moreover, a party has no duty of care as to unforeseeable plaintiffs. See, e.g., *Dorrell v. S.C. Dep’t of Transp.*, 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) (“This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiffs.”); *Terlinde v. Neely*, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (“The key inquiry is foreseeability . . .”).

Here, DESC had no duty to protect Mr. Larios from his own illegal and negligent conduct. DESC had no duty to protect Mr. Larios from his unforeseeable act of trimming palm fronds or seed pods capable of being manipulated by him to be within ten (10’) feet of its energized primary, contrary to OSHA law, and certainly not without first giving DESC required notice. See OSHA Citations; see also Testimony of Plaintiff’s

Expert Edward R. Brill, P.E.²³ “[T]he law does not require a person who maintains a high-voltage electric wire . . . to anticipate at his peril every possible circumstance under which some person might make contact with this wire.” *Foreman v. Atl. Land Corp.*, 271 S.C. 130, 134, 245 S.E.2d 609, 611 (1978) (quoting *Hall v. Lorain-Medina Rural Elec. Co-op, Inc.*, 148 N.E.2d 232, 236 (Ohio Ct. App. 1957)). As the Court held in *Foreman*, South Carolina law does not require DESC to foresee every possible circumstance where a person’s illegal and negligent conduct, committed in proximity to any one of the millions of trees located near any section of its 18,000 miles of distribution lines, could conceivably cause injury. *Id.*

Because Mr. Larios’ injury “[was] not reasonably foreseeable in the exercise of due care, there is no liability.” *Foreman*, 271 S.C. at 133, 245 S.E.2d at 611 (citations omitted) (“A power company is entitled to anticipate the exercise of due care by those working in the vicinity of the lines.”). Just as in *Burns v. Carolina Power & Light Co.*, 193 F.2d 525 (4th Cir. 1951), DESC “had no knowledge, information or reason to believe that [Mr. Larios or other unqualified workers] would [work in violation of OSHA law] **without bothering to look to see where they were working or what would be the result.**” 193 F.2d at 529 (emphasis added).

Given that DESC owed no duty to Mr. Larios, “all other facts [are] immaterial,” and DESC is entitled to judgment as a matter of law. *Baughman*, 306 S.C. at 116, 410 S.E.2d at 545–46; see also *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011) (“Absent a legally recognized duty, the defendant in a negligence action is entitled to a judgment as a matter of law.” (citation omitted)).

²³ See Brill Dep. 96:9–13, 75:06–15.

Mr. Larios's death was the tragic result of his own multiple, negligent violations of OSHA requirements specifically applicable to the type of work he was attempting to perform, and to Stevens' negligence in failing to enforce these OSHA requirements to ensure the safety of their workers. DESC had no notice that Mr. Larios was illegally and negligently working near its power lines; consequently, DESC is entitled to a directed verdict.

B. *DESC is entitled to JNOV because DESC did not proximately cause Mr. Larios' injuries; instead, such injuries were caused by the intervening, superseding negligence of Mr. Larios, Stevens, PENSCO, or a combination thereof.*

Negligence is not actionable unless it is a proximate cause of the injury. *Hanselmann v. McCardle*, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980) (quotations omitted). Proximate cause requires proof of both causation in fact and legal cause. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Id.* (quoting *Whitlaw v. Kroger Co.*, 306 S.C. 51, 54, 410 S.E.2d 251, 253 (1991)). "Legal cause is proved by establishing foreseeability." *Id.* "Foreseeability is determined by looking to the natural and probable consequences" of the complained of act. *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) (citation omitted).

"[W]hen the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Locklear v. Se. Stages, Inc.*, 193 S.C. 309, 8 S.E.2d 321, 325 (1940); see also *Stone v. Bethea*, 251 S.C. 157, 161, 161

S.E.2d 171, 173 (1968) (same). While proximate cause is usually a question for the jury, the question may be decided as a matter of law when the facts are such that they will support only one reasonable inference. See *Trivelas v. S.C. Dept. of Transp.*, 348 S.C. 125, 136–37, 558 S.E.2d 271, 276–77 (2001).

The case of *Steele v. Lynches River Elec. Co-op., Inc.*, 259 S.C. 239, 191 S.E.2d 253 (1972) is instructive. In *Steele*, the plaintiff was injured after climbing and standing on top of a nearby barbed wire fence and attempting to cut a section from the electric wires left hanging from a transformer on defendant's transmission poles. *Id.*, 259 S.C. at 242, 191 S.E.2d at 254. Viewing the evidence in the light most favorable to the plaintiff, the South Carolina Supreme Court found that it simply showed he was injured due solely to his own actions, and that there was no evidence that the wires posed any danger to one merely passing by. *Id.* at 244, 191 S.E.2d at 255. The Court held that the plaintiff was

charged with knowledge that contact with a wire charged with electric current is attended with danger. Under the circumstances, the fact that [he] may not have known that the electric wires were actually charged with current does not relieve him of the responsibility for intentionally coming in contact with the wire. The wire which he intentionally caught was hanging from an electric transmission line. This fact was open and apparent, and gave warning of the likelihood that the wires were charged with current. In spite of this fact, respondent stood on top of the fence and caught hold of the wire. His purposeful action in so doing . . . barred him of recovery.

Id.

Here, in addition to the foreseeability issue discussed above, the causation in fact lies with Mr. Larios, Stevens, or both. That is, “but for” Mr. Larios’ violation of the OSHA laws applicable to him – including 1) his own failure to properly assess his intended work area; 2) his own failure to recognize DESC’s overhead lines were

present; 3) his subsequent work in violation of the OSHA ten-foot rule and failing to notify DESC before starting such work – his injuries would not have occurred. See OSHA Citations; see *also* Testimony of Plaintiff’s Expert Brill.²⁴ Stated plainly, Mr. Larios’ injuries resulted from his own illegal conduct and negligence.

Furthermore, “but for” Stevens’ failure to train their employees, including Mr. Larios, and provide such employees with a safe working environment, Mr. Larios’ injuries would not have occurred. See OSHA Citations (OSHA “Serious” citations issued against Stevens for those exact failures); see *also* Testimony of Plaintiff’s Expert Brill; Compl., ¶10 (referencing the employment relationship existing between Stevens and Mr. Larios).²⁵

Finally, “but for” PENSCO’s failure to ensure that Stevens had qualified and trained workers, including Mr. Larios, and PENSCO’s additional failure to warn them of the DESC overhead lines properly constructed and existing in the right of way behind its property, Mr. Larios’ injuries would not have occurred. Even Plaintiff’s expert, Brill, conceded that DESC had no duty to warn Mr. Larios (or anyone) of the overhead lines.

These negligent, unforeseeable illegal acts and omissions of Mr. Larios, Stevens, and/or PENSCO are the direct and intervening and superseding acts that resulted in Mr. Larios’ injuries. At best, the acts of DESC are merely a remote cause of such injuries. As such, DESC is entitled to judgment as a matter of law.

²⁴ See *also* Brill Dep. 133:12–134:1.

²⁵ See *also* Brill Dep. 83:7–85:3 (noting duties owed by Stevens to Larios).

C. ***DESC is not liable based on Mr. Larios' overwhelming negligence, as well as his primary assumption of risk, and thus is entitled to JNOV.***

i. ***Mr. Larios' primary assumption of risk.***

“Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity.” *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011). In other words, primary implied assumption of the risk is another way of saying the “plaintiff has failed to establish a prima facie case of negligence by failing to establish that a duty exists.” *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 247, 612 S.E.2d 462, 464 (Ct. App. 2005) (citations omitted); see also *Hurst v. E. Coast Hockey League, Inc.*, 371 S.C. 33, 38, 637 S.E.2d 560, 562–63 (2006) (holding the risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey and, therefore, there was no duty to protect the spectator); *Cole*, 397 S.C. at 252–53, 725 S.E.2d at 478–79 (affirming grant of summary judgment against father who was injured while playing softball because the risk of the harm that befell him was inherent in the game); *Rudzinski v. BB*, No. 0:09-1819-JFA, 2010 WL 2723105, *2 (D.S.C. July 9, 2010) (summary judgment was properly granted in favor of a defendant under primary implied assumption of the risk where plaintiff was struck in the face with a golf club while playing golf with another person since the risk of being hit by a fellow golfer swinging his club at high speed is an inherent and inescapable risk posed by golfing).

Our Supreme Court has further held:

An employee assumes all of the ordinary risks of his employment; that is to say, he assumes the risk of all dangers ordinarily incident to that employment. He does not, however, assume the risk of

extraordinary dangers or dangers caused by the negligence of the employer or its agents and servants, unless those dangers are known to him and appreciated by him, or by the exercise of ordinary care would become known to him and appreciated by him, whether ordinary, extraordinary or however caused. We deem it unnecessary to cite authority for the foregoing statement of the law in this state regarding assumption of risk by an employee.

Blalock v. Graniteville Mfg. Co., 183 S.C. 247, 190 S.E. 709, 712 (1937). “Numerous decisions by [our Supreme Court] support and sustain the proposition that when an injured employee . . . has suffered injury from his own delict in failing to use due care to discover, correct or avoid the thing or condition which caused his injury, he cannot recover.” *Bellamy v. Hardee*, 242 S.C. 71, 78–79, 129 S.E.2d 905, 909 (1963) (citations omitted).

The South Carolina Supreme Court has long held and repeatedly confirmed that when an injured employee has assumed the responsibility of inspection, selection, maintenance, and/or adjustment of machinery, and that employee has suffered injury from his own delict in failing to use due care to discover, correct or avoid the thing or condition which caused his injury, he cannot recover. *Id.* (citing *Jones v. Postal Tel. Cable Co.*, 91 S.C. 273, 74 S.E. 492; *Keys v. Winnsboro Granite Co.*, 72 S.C. 97, 51 S.E. 549; *Green v. Catawba Power Co.*, 77 S.C. 426, 58 S.E. 147; *Quick v. Millfort Mill Co.*, 78 S.C. 472, 59 S.E. 365). The danger Mr. Larios encountered on the date of his injury was the precise danger he should have expected. He knew, or should have known, not to work within ten (10’) feet of overhead power lines with a conductive object as required by state law and common sense, yet inexplicably did just that. See *Foreman*, 271 S.C. at 133, 245 S.E.2d at 611 (citations omitted) (“A power company is

entitled to anticipate the exercise of due care by those working in the vicinity of the lines.”).

As an “electric company maintaining high voltage wires on or over private premises,” DESC is only “required to use commensurate care to see that no injury comes to persons ***rightfully in proximity to them, and who are guilty of no wrong.***” *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 95–96, 28 S.E. 2d 545 (1943) (emphasis added). Mr. Larios himself chose to ***use*** an aluminum ladder and chainsaw. Mr. Larios himself chose ***where*** to position his ladder. And, Mr. Larios himself chose ***how*** to do his work, climbing to the top rungs of a 32’ ladder holding a chainsaw. Mr. Larios would not have fallen from the ladder and died had he simply complied with the OSHA safety laws in place to protect him from the very risk he voluntarily assumed. As such, DESC is entitled to a directed verdict on all claims asserted by Plaintiff. *Nedrow v. Pruitt*, 336 S.C. 668, 678 n.6, 521 S.E.2d 755, 760 n.6 (Ct. App. 1999) (holding that, although traditional assumption of the risk as an affirmative defense was subsumed by comparative negligence legislation, “primary implied assumption of risk remain[ed] unaffected”).

ii. **Mr. Larios’ overwhelming negligence bars Plaintiff’s claims.**

Under South Carolina’s doctrine of comparative negligence, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). While the comparison of fault between a plaintiff and defendant is typically a question for the jury, if the sole reasonable inference that may be drawn from the evidence is that the plaintiff’s negligence exceeded 50%, the Court may determine judgment as a matter of

law in favor of the defendant. *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712–13 (2000). “If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created.” *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

While the affirmative defense of assumption of the risk (or “secondary implied assumption of the risk”) was eliminated as an absolute bar to recovery in 1998 in South Carolina, it is still a viable defense within the comparative negligence scheme. *Davenport v. Cotton Hope*, 325 S.C. 507, 482 S.E.2d 569, 574 (Ct. App. 1997) (Assumption of the risk is “to be treated as another facet of comparative negligence rather than as an absolute bar to recovery.”). In other words, while simply meeting the elements of the affirmative defense no longer bars recovery, the assumption of the risk defense is still a factor to consider and method of determining whether a plaintiff was more than fifty (50%) percent negligent in causing his injuries.

“Secondary implied assumption of risk, as exists in the instant case, arises when the plaintiff knowingly encounters a risk created by the defendant’s negligence. It is a true defense because it is asserted only after the plaintiff establishes a *prima facie* case of negligence against the defendant.” *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003) (“Secondary implied assumption of the risk may involve either reasonable or unreasonable conduct on the part of the plaintiff.”).

“Under South Carolina jurisprudence, where evidence of the plaintiff’s greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury.” *Singleton v. Sherer*, 377

S.C. 185, 207, 659 S.E.2d 196, 207 (Ct. App. 2008) (finding that “[t]he trial court did not err in barring [plaintiff’s] claim under the assumption of risk doctrine because [plaintiff] was more than fifty percent at fault in causing his injuries”); see also *Bass v. Gopal, Inc.*, 384 S.C. 238, 247, 680 S.E.2d 917, 922 (Ct. App. 2009), *aff’d*, 395 S.C. 129, 716 S.E.2d 910 (2011) (holding that the plaintiff was more than fifty percent negligent as a matter of law where “the only reasonable inference that may be drawn from the evidence is that [plaintiff’s] negligence in stepping outside of his room and confronting the assailant exceeded any possible innkeeper negligence”); *Bloom v. Ravoira*, 339 S.C. 417, 424, 529 S.E.2d 710, 714 (2000) (holding that any factual issues existing as to defendant’s fault in operating his vehicle could not alter “the inescapable conclusion” that the plaintiff disregarded known risks in failing to cross the street in a safe, reasonable manner).

Multiple, factually comparable cases have been dismissed by various courts for these very reasons. See, e.g., *Priest v. Brown*, 302 S.C. 405, 410, 396 S.E.2d 638, 640–41 (Ct. App. 1990) (barring a police officer’s claim against a driver who knocked down a power line where the officer, who was charged with knowledge of the dangers imposed by electrically charged wires, nonetheless attempted to remove the line from the road, thereby causing his own injuries); *Clayton v. Autoquip Corp.*, 91 F.3d 129, 1996 WL 383923 at *1 (4th Cir. 1996) (finding that where an experienced mechanic circumvented the safety device, defied printed warnings, and ignored the specific admonition of a co-worker, he assumed the risk as a matter of law); *Greene v. Consol. Freightways Corp. of Del.*, 2 F. App’x 299, 302 (4th Cir. 2001) (barring a police officer’s claim for injuries sustained after an initial emergency situation was secured

based on the officer's assumption of the risk in entering the cab of a tractor-trailer, pulling the driver out of the truck, and using his own body to shield the driver from hitting the ground).

Based on the application of the above-described law to the uncontroverted facts of this case, one (1) singular, dispositive conclusion is inescapable: Mr. Larios, a college educated and trained lawyer in his country of origin before coming the United States, had (or should have had) knowledge of the dangers of working near DESC's energized primary, yet he nonetheless purposefully undertook a course of conduct that was grossly reckless and caused his own injuries. See Testimony of Plaintiff's Expert Brill.²⁶ It was Mr. Larios' illegal, unforeseeable, and unreasonable act of working within ten (10') feet of DESC's energized primary (without notice to DESC)—while on an uninsulated ladder at a height of approximately 23 to 26 feet—that resulted in his injuries. Simply put, his own negligence is overwhelmingly greater than fifty (50%) percent. As a result, Plaintiff's claims should be barred by Mr. Larios' overwhelming comparative negligence as a matter of law.

D. Summary.

For the reasons set forth above, DESC is entitled to JNOV because, as a matter of law, DESC had no duty to Mr. Larios; DESC did not proximately cause Mr. Larios' injuries; and DESC is not liable based on the evidence of Mr. Larios' overwhelming illegal conduct and negligence, and his primary assumption of risk.

²⁶ See also Brill Dep. 76:19–77:03 (noting requirement that all power lines are to be assumed to be energized and potentially dangerous, unless confirmation of de-energized is sought and obtained from the utility, which did not occur here).

2. Alternatively, DESC is entitled to a new trial.

When adjudicating a motion for JNOV, the trial court has the discretion to grant a new trial. Rule 50(b), SCRCP. But, the trial court also may grant a new trial “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State.” Rule 59(a)(1), SCRCP. One of these reasons is the sufficiency of the evidence. *See, e.g., Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (internal quotation marks and citation omitted) (“South Carolina’s thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts.”). Another reason is matters of law to which objections were made during the trial. *See, e.g., S. Ry. Co. v. Coltex, Inc.*, 285 S.C. 213, 216, 329 S.E.2d 736, 738 (1985) (trial court may grant new trial only with respect to errors of law raised during the trial).

A. DESC is entitled to a new trial because the evidence is insufficient to support the verdict.

“The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict.” *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). As the thirteenth juror, the trial court may weigh the evidence as a juror and is not required to view it in the light most favorable to the non-moving party. *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003). Rather, the trial court should evaluate whether the fair preponderance of the evidence supports the verdict. *Id.* In fact, the trial court is not required to state the reasons for granting a new trial as the thirteenth juror. *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267. As long as there is

conflicting evidence, a trial judge's grant of a new trial will not be disturbed. *Lane v. Gilbert Const. Co., Ltd.*, 383 S.C. 590, 597–98, 681 S.E.2d 879, 883 (2009).

For the same reasons stated above and in DESC's separate Motion for New Trial *Nisi Remittitur* and, Alternatively, New Trial Absolute, the trial court should exercise its position as the thirteenth juror and order a new trial because the verdict totaling \$21,000,000.00 – *twenty one million dollars* – is not supported by a fair preponderance of the evidence. There is absolutely no evidence to support a verdict of that size against DESC in this matter, and virtually no credible or admissible testimony to establish the nature and extent of any economic or non-economic damages that Mr. Larios' legal survivors and beneficiaries may have suffered. At trial, Plaintiff introduced no evidence – *not one single dollar* – of any actual monetary damages. There was no evidence of any lost wage claim. No evidence of any lost future income. Not a single medical expense or bill was presented to the jury for consideration; not even evidence of a funeral bill. Plaintiff made only vague, nonspecific references to Mr. Larios' alleged remittances to Mexico to assist with his parents' medical expenses, yet failed to introduce any documentation to support this claim (e.g., no dollar amounts, frequency of the payments, or even the parents' identities or location in Mexico was introduced).²⁷

²⁷ The verdict in this case is excessive and unsupported by the evidence, and undoubtedly was a result of Plaintiff's counsel's improper closing argument that repeatedly asked the jurors, "What's a life worth?" and "Would anyone take \$20 million to sacrifice their son?" The verdict had to be influenced by counsel's improper argument because there was no evidence or testimony that would have informed the jury's deliberations with respect to pecuniary loss. *Branham v. Ford Motor Co.*, 390 S.C. 203, 234, 701 S.E.2d 5, 21 (2010) (internal citation omitted) ("It is improper for counsel to make a closing argument to the jury . . . calculated to arouse passion or prejudice."); *see also Dunn v. U.S.*, 307 F.2d 883, 885–86 (5th Cir. 1962) ("It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; *or to make unwarranted inferences or*

Similarly, there was no evidence or testimony that would allow the jury to assess the nature or intensity of the pain suffered by Mr. Larios or his level of consciousness after his fall from the ladder and before his death was pronounced less than 30 minutes later in the ambulance on the way to the hospital. There was no medical expert testimony regarding the nature, level, and extent of pain and suffering that Mr. Larios likely suffered. At most, the evidence also established that, Mr. Larios survived 30 minutes after he fell, but he was only conscious for an extremely short period of time.

In short, there is no evidence to support the \$21,000,000.00 verdict returned by the jury. The verdict is unconscionable and against the fair preponderance of the evidence, necessitating that this Court exercise its authority as the thirteenth juror to direct a new trial. See *Trivelas v. South Carolina Dept. of Transp.*, 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004) (affirming grant of new trial absolute pursuant to thirteenth juror doctrine in a motor vehicle case); see also *South Carolina Dept. of Highways and Public Transp. v. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (1980) (granting new trial absolute in condemnation case on the basis that the verdict was contrary to the fair preponderance of the evidence); *Ex parte Travelers Home and Marine Insurance Co. v. Stringfellow*, 427 S.C. 238, 830 S.E.2d 718 (Ct. App. 2019) (granting new trial in motor vehicle case where verdict was against the fair preponderance of the evidence); *Sorin*

insinuations calculated to prejudice the defendant." (emphasis added)). Here, this line of rhetorical questioning did just that; it made unwarranted inferences and insinuations calculated to inflame, arouse passion, and prejudice DESC. Importantly, no contemporaneous objection by DESC was required in this instance. See, e.g., *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) ("[E]ven in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice."); *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998) (noting that failure to make a contemporaneous objection is excused where challenged argument constitutes abuse of a party or witness).

Equipment Co., Inc. v. The Firm, Inc., 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996) (granting new trial absolute in action for breach of contract based on the thirteenth juror doctrine). Because the damages awarded in this case are contrary to a fair preponderance of the evidence, the trial court should direct a new trial as the thirteenth juror.

B. DESC is entitled to a new trial because the trial court denied its request for a continuance based on the eleventh-hour receipt of Mr. Larios’ medical records—despite numerous discovery requests for such records—and then refused to admit such medical records into evidence, even though the Court charged the jury on Mr. Larios’ life expectancy.

Generally, the decision whether to grant a continuance is within the sound discretion of the trial judge. *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007). However, the trial court should grant a continuance for one party’s failure to comply with the Rules of Civil Procedure if the other party was harmed by that failure. See, e.g., *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“McCall must show he was somehow harmed by having been denied a continuance.”); see also *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (holding that failure to grant a continuance was harmless error where moving party did not establish prejudice based on the other party’s failure to comply with the technical requirements of the Rules of Civil Procedure). And the refusal to grant a continuance to afford a defendant with sufficient time to obtain transcripts has been found to be an abuse of discretion where “the lack of such a transcript prejudiced his ability to effectively cross-examine the witnesses against him.” *State v. McMillian*, 349 S.C. 17, 24, 561 S.E.2d 602, 605–06 (2002).

So it is here. As noted above, throughout the more than two years this case was litigated, DESC requested information regarding any prior injuries or medical conditions

Mr. Larios had that would bear on his work the day he fell. DESC specifically sought production of medical records related to any prior tree trimming related injuries. Less than *ten days* before trial began, DESC learned not from Plaintiff or her counsel, but rather from one of Plaintiff's own trial witnesses, that Mr. Larios had received extensive emergency and in-patient ICU medical treatment at MUSC for traumatic brain injuries suffered as a result of a prior tree trimming incident a mere four months prior to the subject fall causing his death.

Plaintiff flouted her discovery obligations and simply did not obtain or provide the records or disclose their existence, claiming it was not her responsibility to do so. Upon learning of this prior injury, DESC and its co-Defendants immediately brought Plaintiff's inexcusable omissions and the corresponding medical records from her prior discovery responses to the Court's attention and sought a continuance to obtain and review these records.

Inexplicably, the Court refused to grant the continuance insisting that the trial must go forward. The Judge herself then reached out via email to MUSC²⁸ asking that the records be immediately produced, and issued a subpoena directing the immediate production of such records. See attached email from the Hon. Carmen Mullen to Annette Drachman, September 16, 2019, included with **Exhibit A**. In the face of this judicial involvement, DESC had no opportunity to confirm that MUSC followed its own procedures in gathering all records responsive to its discovery request; had no opportunity to confirm that all individual doctors' groups or other providers at MUSC having responsive records had also received and responded to DESC's request; and

²⁸ Numerous subpoena *duces tecum* were issued – only MUSC was ordered to produce records by Judge Mullen.

had no meaningful opportunity to review and obtain needed expert testimony as to the more than 640 pages of records and CDs of related films that were ultimately produced less than one week before trial.

The late produced medical records disclosed for the first time that Mr. Larios had, in July of 2015, suffered a serious on-the-job injury when a large tree limb he cut fell on his head, fracturing his skull in multiple places. Mr. Larios' injuries were so severe that he ended up in the "Surgical Trauma ICU" and lost significant time from work. The records also revealed previously unknown health conditions—diabetes and a prior back surgery—that may have affected Mr. Larios during the accident at issue in the litigation. But, because of the volume of records provided by MUSC coupled with the late receipt of the records and the trial setting, DESC was unable to conduct further discovery regarding the impact of that prior incident and serious injuries on the causation of the incident in question, as well as the true extent of Mr. Larios' injuries, further treatment, and any other records that were improperly not produced, or to retain an expert witness to testify regarding such matters, all acts that DESC could and would have taken if the trial court had granted a continuance. DESC also could have used the evidence to cross-examine or impeach Plaintiff and her witnesses. Yet, it was denied the opportunity to do so via a continuance of the trial—one necessitated by the actions of Plaintiff's counsel—and this denial harmed DESC's ability to fully develop and present an adequate defense and challenge to Plaintiff's case. *Cf. McMillian*, 349 S.C. at 24, 561 S.E.2d at 605–06.

The prejudice to DESC related to these medical records—which were deemed inadmissible at trial—continued into the Court's jury charges, as the Court charged the

jury on a life expectancy for Mr. Larios of 37.39 years. Clearly, these medical records are relevant and highly probative of Mr. Larios' true life expectancy.

In short, DESC suffered extreme prejudice from Plaintiff's conscious disregard and failure to comply with substantive—not technical—requirements of the South Carolina Rules of Civil Procedure. The failure to grant a continuance and ruling not to admit the medical records into evidence were prejudicial and an abuse of discretion, warranting a new trial.

C. DESC is entitled to a new trial because the trial court did not allow it to introduce the OSHA Report—only the citations—even though it allowed Plaintiff to introduce the Coroner's Report and also allowed Plaintiff to redact portions of the Coroner's Report AFTER it had been introduced into evidence.

Subsequent to Mr. Larios' death, South Carolina OSHA conducted an investigation of Stevens. OSHA was very critical of Stevens' work practices in its final report ("OSHA Report"). As fully delineated in the "Background and Discovery History" section of this memorandum, *supra*, Stevens was cited for several alleged violations of S.C. Code Ann. § 41-15-210 and the pertinent regulations. The trial court allowed admission of the OSHA Citations, but denied DESC's request to introduce the full OSHA Report.

The trial court abused its discretion in refusing DESC's request to admit the OSHA Report or testimony relating to the report. The OSHA Report was admissible under South Carolina Rule of Evidence 803(8), which states as follows in pertinent part:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . .; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible.

There is no dispute that the OSHA Report is a “[r]ecord[], report[], [or] statement[] . . . in any form, of public offices or agencies, setting forth . . . matters observed by duty imposed by law as to which matters there was a duty to report.” Rule 803(8), SCRE; see, e.g., S.C. Code Ann. § 41-15-260 (Commissioner may conduct inspections “when such comes under the jurisdiction of the Commissioner to enforce the occupational health and safety provisions” of Title 41); S.C. Code Ann. § 41-15-280 (Commissioner of Labor may “issue a citation to the employer”).

Thus, the OSHA Report was admissible, and it certainly was relevant.²⁹ OSHA standards—and the citations of Stevens for violating those standards and the OSHA Report underlying and supporting the issuance of those citations—are relevant to and probative of Stevens’ negligence as well as Mr. Larios’ contributory negligence.

In its Answer, DESC denied responsibility for Mr. Larios’ death with a full range of affirmative defenses, including comparative negligence, trespass, and assumption of risk, and also has claimed that third parties—*i.e.*, Stevens—are at fault for Mr. Larios’ death. In other words, SCE&G contends that Stevens’ negligence caused or contributed to Mr. Larios’s death based on their violation of OSHA standards as well as other negligent acts and misconduct. Consequently, the OSHA standards, generally, and the OSHA Report, specifically, establish the standard of care with respect to determining Stevens’ and Mr. Larios’ negligence. *Tommy L. Griffin Plumbing & Heating Co. v.*

²⁹ Plaintiff’s counsel certainly thought so as in closing argument he wondered aloud to the jury why DESC had not called OSHA officials to testify at the trial because they are an “independent” entity. This mention of OSHA in closing was particularly interesting in light of the Court’s ruling that the report was inadmissible and the OSHA Citations were admitted by consent. DESC had an OSHA representative appear for trial (in response to DESC’s subpoena); however, there was no reason for the witness to be called as the Court had already excluded the OSHA Report.

Jordan, Jones & Goulding, Inc., 351 S.C. 459, 475, 570 S.E.2d 197, 205 (Ct. App. 2002) (rejecting argument that “OSHA requirements . . . do not require expert testimony” and holding that “[e]xpert testimony respecting the standard of care for the professional engineering industry for such a situation is necessary to determine whether [the defendant] behaved negligently”); see also *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 205, 544 S.E.2d 38, 43 (Ct. App. 2001), *aff’d*, 354 S.C. 161, 580 S.E.2d 440 (2003) (noting that the plaintiff “presented evidence regarding standards from [OSHA] and ADA”). While the OSHA Citations were admitted, the OSHA Report helps give necessary context to those citations.

Despite the relevance of the OSHA Report to explain the basis for the OSHA Citations and to allow DESC to fully explain to the jury the nature and extent of the negligence of Mr. Larios and his employer, Stevens, the Court refused to allow the OSHA Report into evidence. Yet, in a wholly incongruous decision, the Court allowed, over DESC’s timely objection, the Coroner’s Report into evidence even though the Coroner *actually testified* at trial. This disparate treatment was improper and highly prejudicial to DESC. Causing even more prejudice to DESC was the trial court’s action in allowing Plaintiff’s counsel to redact portions of the Coroner’s Report **AFTER** it had been introduced into evidence. Those redactions, made subsequent to the report’s entire admission by Plaintiff’s counsel, omitted the Coroner’s detailing of the presence of empty beer cans in the back of the Stevens’ truck that Mr. Larios and his co-worker used, and full beers in a cooler in the truck. If the Coroner’s Report was rightly admitted into evidence (DESC submits that it was not), then the jury should have been allowed to

review the report in its entirety, drawing its own reasonable inferences from all of the facts observed by the Coroner.

At the least, the trial court could have redacted portions of the OSHA Report that it thought would be unduly prejudicial. This is what the trial court ostensibly did with the Coroner's Report. However, when DESC sought admission of the OSHA Report, instead of allowing redactions as it did with the Coroner's Report, the trial court instead precluded admission of the *entire* report despite the obvious and self-evident prejudice to DESC from the refusal to admit that OSHA Report. A new trial should be granted.

D. DESC is entitled to a new trial because the trial court did not strike or preclude certain expert testimony from the case.

In order to testify as an expert, a witness must first qualify herself by knowledge, skill, experience, training, or education. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (citing Rule 702, SCRE³⁰). The admissibility of expert opinions rests with the trial court. See *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. Expert testimony receives additional scrutiny relative to other evidentiary decisions. *Id.* The South Carolina Supreme Court has repeatedly stressed the "affirmative and meaningful gatekeeper function on the trial judge" imposed by Rule 702. *Jamison v. Morris*, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009). The trial court must make three key preliminary findings, which are fundamental to Rule 702, before the jury may consider expert testimony. See *Watson*, 389 S.C. at 446, 699 S.E.2d at 175.

First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury and requires an expert to explain the matter to the jury. *Id.* (citing *State v. Douglas*, 380 S.C. 498, 676 S.E.2d 606 (2009) (holding that the witness was

³⁰ The South Carolina rule is identical to the federal rule.

improperly qualified as a forensic interviewing expert where the nature of the testimony was based upon personal observations and discussions)). Next, the trial court must find that the proffered expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175 (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175 (citing *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)). The final inquiry—reliability—is the central feature of the analysis. *Id.*

Expert testimony is not admissible unless it satisfies all three requirements. See *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. Therefore, the trial court may admit the evidence and allow it for jury consideration **only** after the trial court finds the testimony is necessary to assist the jury in solving a factual dispute, the expert is qualified in the subject area, and the testimony is reliable. See *id.*, 389 S.C. at 446–47 (citing *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (observing that the “familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not admissibility’ may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence”)).

The reliability of **scientific evidence** must be evaluated pursuant to the factors laid out by the South Carolina Supreme Court in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). Under *Council*, the court must consider the following: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure

reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” *Graves v. CAS Med. Sys.*, 401 S.C. 63, 74, 735 S.E.2d 650, 656 (2012) (citing *Council*, 335 S.C. at 14, 515 S.E.2d at 514).

As noted above, Rule 702 imposes an “affirmative and meaningful gatekeeper function on the trial judge.” *Jamison*, 385 S.C. at 228, 684 S.E.2d at 175. In doing so, the Court has aptly noted that, because of the “expert” label, expert witness testimony carries with it the potential for a jury to afford that testimony undue weight in its deliberations. See *Watson*, 389 S.C. at 449, 699 S.E.2d at 176 (2010). For this reason, the trial court must be a cautious gatekeeper role when determining whether to qualify a witness as an expert, and the admission of expert testimony receives harsher scrutiny than other evidentiary decisions. See *id.*

i. **The “electrical shock” opinion rendered by Dr. Erin Presnell was baseless, inappropriate and should have been stricken from the record.**

In her final report, Presnell opines that: (a) Mr. Larios died as a result of blunt force trauma resulting from his fall from a height of 25’; and (b) electrical shock contributed to this fall. See Autopsy Final Report, p. 2 of 5, which was attached as Exhibit D to DESC’s Motion to Exclude Certain Opinions of Dr. S. Erin Presnell and Memorandum of Law in Support Thereof, filed on September 20, 2019 (“Presnell Mot.”).

The “electrical shock” opinion is derived from exactly two (2) sources:

- (1) unreliable and demonstrably incorrect information she received from the Coroner’s Office; and
- (2) a mark on Mr. Larios’ abdomen.

As a result, Presnell’s “electrical shock” opinion was unreliable, irrelevant, inadmissible, and substantially and unfairly prejudicial and should have been excluded. It should be noted that DESC did not seek to exclude Presnell’s testimony entirely, as she has the

requisite training and experience to provide certain testimony and opinions related to her personal observations from the autopsy she performed. However, Presnell's supplemental observation that "electrical shock was a contributing factor to Mr. Larios' death" was based on unreliable, unverified, and inaccurate information. Allowing this particular, unsupportable testimony to be presented at trial confused and misled the jury and resulted in substantial unfair prejudice to DESC.

a. **Presnell received unreliable and incorrect information from the Colleton County Coroner's Office.**

Richard Carter ("Carter") is the Chief Deputy Coroner for Colleton County, South Carolina. Deposition of Carter, 04:12–13, January 23, 2018 (hereinafter "Carter Dep.") (relevant portions were attached as Exhibit E to DESC's Presnell Mot.). "When the deputy coroners go out on a call, with me or without me, if they have a problem, they bring it to me." *Id.* at 05:17–19. In the instant case, Carter did not go to the scene of the incident; instead, he went to the Colleton County Medical Center after being notified of Mr. Larios' death. *Id.* at 05:19–23. Instead, Carter telephoned Deputy Coroner Marion Whaley ("Whaley") and instructed him to go to the property in question to investigate and secure the scene. *Id.* at 06:01–09.

Carter testified that, while at the Colleton County Medical Center, no medical staff mentioned that Mr. Larios had potentially sustained an electrical shock. *Id.* at 18:15–19. Instead, it was Carter who first suggested to Presnell that electricity may have contributed to Mr. Larios' fall. The background testimony on Carter's "awareness" (obtained via Whaley) is as follows:

So [Whaley] calls me back and he says, '**Look, there's an electrical wire in that tree.**' I said, 'Okay. We're getting somewhere now.' And [Whaley] says, '**But I don't know if that's what caused him to fall.**'"

Carter Dep. 10:15–17 (emphasis added). Importantly, the “electrical wire” mentioned was the non-energized neutral, not the energized primary which was several feet higher than the wire Whaley told Carter about.³¹

After performing the autopsy, Presnell telephoned Carter with her results, which did not reference or suggest that electrical contact played any role in Mr. Larios’ fall and death. Carter Dep., 18:23–19:06. In fact, according to Carter, Presnell did not see any entrance or exit wounds. Carter Dep., 10:20–11:09. During this telephone call, Carter informed Presnell that Whaley (not Carter) had observed an “electrical wire in the vicinity of the tree.” *Id.* Furthermore, Carter erroneously told Presnell that: “it was likely that the chainsaw contacted an overhead power wire, and that there was rubber-like material from the deceased’s shoes on one of the ladder rungs.” Presnell Dep. 11:19–12:03; 13:18–14:01. Both of these statements are also demonstrably incorrect.

Besides the general vicinity of the palm tree to the DESC neutral line, the only physical “evidence” from the Coroner’s Office that could potentially indicate electricity played any role in Mr. Larios’ death was: (1) alleged burned rubber from the soles of Mr. Larios’ shoes on one rung of the aluminum ladder; and (2) Whaley being told by Mr. Larios’ brother and/or his co-worker days later that there may be an “arc burn” on the

³¹ There is no evidence in this case that the “power line” (i.e., the primary) was in contact with any vegetation of the palm tree. In fact, the uncontroverted testimony is that vegetation of the palm tree was in the vicinity of the neutral line and that it was physically impossible for Mr. Larios to have contacted the energized primary line, as it was several feet higher than the neutral and out of Mr. Larios’ reach at the time. See Brill Dep. 50:21–51:04 (“From the pictures I’ve seen and the size of Mr. Larios and the type of chainsaw he was using, I don’t believe that that chainsaw would be able to reach to the primary conductor.”). Whaley also testified that he had no evidence that the chainsaw made direct contact with the power line. See Whaley Dep. 23:12–17; 81:21–82:02 (relevant portions were attached as Exhibit F to DESC’s Presnell Mot.).

chainsaw.³² In short, the chainsaw is missing and the ladder has never been tested to determine whether the substance on the ladder rung was in fact from rubber from Mr. Larios' boots. Deposition of Marion Whaley, 58:14–18, January 23, 2018 (hereinafter, "Whaley Dep.") (relevant portions were attached as Exhibit F to DESC's Presnell Mot.). Specifically, Whaley testified as follows:

- Q: Okay. And as I understand it, there was melted rubber on the steps of the ladder, is that correct? [Mr. Pugh: Objection to the form.]
- A: **Whether that's – I can't say that that's melted rubber. I don't know. I'm not – I'm not sure that that's what it was.**

Whaley Dep. 09:10–16 (emphasis added).

Whaley never saw Mr. Larios' body nor his clothing or shoes, and no one told him that there were burn marks on any of them. *Id.* at 42:03–18. Likewise, no testing or analysis was conducted on the chainsaw to determine if it was, in fact, an arc burn. *Id.* at 58:10–13. As discussed below, Presnell testified that Mr. Larios had no burns on his hands or feet. Presnell Dep., 44:04–06. Plaintiff's expert, Brill, does not believe any electricity flowed through Mr. Larios to the ladder, "I don't believe the ladder was the path of shock in this case." Brill Dep., 55:19–22; *see also*, 68:1–2. Therefore, the untested ladder and missing chainsaw lend no support to Plaintiff's electrical shock theory or Presnell's testimony in this regard.

³² The chainsaw was released by Whaley to Mr. Larios' employer Stevens, without any testing or analysis done to it. Whaley Dep., 08:02–18. When he was interviewed by OSHA, Stevens told the investigator that the chainsaw was being used by another one of his crews after this incident. Then several days later, Mr. Larios' brother brought what was purportedly the same chainsaw to the Colleton County Coroner's Office. *Id.* It was held as evidence until October 2016, when an unknown individual removed it from the evidence room to assist with the clean-up following Hurricane Matthew. *Id.* at 05:18–06:03. The chainsaw is still missing, and was never made available for inspection or testing by DESC or any of the other Defendants.

b. **The mark on Mr. Larios' abdomen is not indicative of an electrical burn.**

After receiving the unverified and incorrect information above from Carter, Presnell performed a subsequent, visual examination of Mr. Larios' body and only then identified a mark on his abdomen. Presnell Dep., 14:20–21. Presnell made no mention in her preliminary report of this mark potentially being an electrical burn. In fact, she testified that, “It just didn’t have the classic electrocution look.” *Id.* at 33:25. Presnell further described the mark as lacking “the white rim around it and certainly not a crater associated with [electrical contact].” *Id.* at 34:03–05. Mr. Larios had no classic entry and exit wounds (*Id.* at 34:11) and no classic-appearing contact site. *Id.* at 34:14–15. Simply put, “if he [Mr. Larios] was just found deceased on the ground, I wouldn’t say, aha, that’s an electrical injury.” *Id.* at 34:06–08. Presnell testified at trial that when she performed Mr. Larios’ autopsy and viewed his internal organs, she saw no internal injuries consistent with an electric shock or burn.

The previously unnoticed and unremarkable area on Mr. Larios’ abdomen is the only anatomic anomaly supporting Presnell’s supplemental opinion that electrical contact may have contributed to Mr. Larios’ fall. Presnell relied exclusively on the Coroner’s Office for information, passed along on a second-hand basis by Carter, regarding potential electrical contact:

Our normal practice is to rely on whatever the coroner will provide us. Um, you, I mean, he gave us the information that there’s evidence of the chainsaw contacting electrical lines; and then that there’s the shoe debris on the rungs, coupled with his presentation of a shout out and this mark on his abdomen, was sufficient for me to conclude that he had an electrical component—there was an electrical component involved in the fall.

Presnell Dep. 20:18–21:02. Throughout her testimony, Presnell concedes the unusual and inconsistent nature of this mark compared to other electrical contact wounds she

has seen—particularly those involving contact with a high voltage power line. She repeatedly qualified her testimony as “final conclusion is ‘*may*,’ [e.g., corroboration that Mr. Larios had come into contact with an electrical wire] based on the information that there was the potential electrical source.” Presnell Dep. 15:09–11. She further testified as follows:

[Larios’ counsel, Mr. Applegate]

Q: Okay. As I understand your comments just a moment ago, your testimony was that this was consistent with an electrical contact. **I’m going to ask you a further question, can you give that opinion to a reasonable degree of medical certainty?**

A: **I don’t know what that means.**³³

Q: Okay.

A: I mean, it’s my opinion that that is an electrical contact. **Take away the complete circumstances and that maybe he’s decomposing a little, and perhaps that would not be – that might be something that we see with something besides an electrical contact. I mean, you know, is it 51 percent? I’m pretty confident it is, because I just – you know, just concluded that it was contributory to the cause of death, and that it was likely – it likely was electrical contact in light of the circumstances and the scenario.**

Presnell Dep. 16:09–17:02 (emphasis added). In other words, “take away” the misinformation Dr. Presnell received from Carter, indirectly via Whaley, and she has no confidence to any admissible degree of certainty that electrical contact played any role in Mr. Larios’ fall.

Clearly, Presnell’s opinion was influenced by the erroneous information she received from Carter (again, relaying baseless hearsay from Whaley). Neither Carter

³³ By the time she was presented as an expert at trial for Plaintiff, she had apparently familiarized herself with this requisite standard for expert testimony.

nor Whaley are physicians, and they have no medical training with regard to the etiology of alleged electrical contact injuries. More importantly, it was physically impossible for Mr. Larios to contact the energized primary, they never saw Mr. Larios' body, they never tested the "substance" on the ladder rung, and they never had the mark on the chainsaw analyzed before it went missing. Thus, there is no credible basis for Presnell's supplemental "electrical shock" opinion and her testimony misled the jury, and DESC was substantially and unfairly prejudiced.

- ii. **DESC is entitled to a new trial because the testimony of Edward R. Brill, P.E. was improperly admitted into evidence, which allowed the jury to reach a verdict based on Brill's subjected beliefs and unsupported speculation, not derived from a reliable methodology.**

Brill's opinions were not reliable because they are based on his subjective belief, speculation, and critical assumptions that he has failed to support with physical and scientific evidence. He admitted a number of problems with his analysis that wholly undermine the reliability of his opinions, rendering those opinions speculative, irrelevant, and wholly unhelpful to the trier of fact. In short, Brill could not opine on the cause of Mr. Larios' fall to a reasonable degree of scientific certainty. Brill's opinions should, therefore, be excluded as failing to satisfy the reliability requirements of *State v. Council* and its progeny.

Although it generally is true that a challenge to a putative expert's reliability generally goes to weight and not admissibility, the South Carolina Supreme Court has held that "this 'familiar evidentiary mantra' may not be invoked until the circuit court has vetted its reliability in the first instance and deemed the testimony admissible." *Graves v. CAS Med. Sys.*, 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012) (citation omitted). To be reliable, "[a]n expert's methodology must be consistent with the 'methods and

procedures of science' rather than being founded on 'subjective belief or unsupported speculation.'" *Id.* In other words, the trial court is required to do more than simply perform a cursory evaluation of the expert's resume'.

Brill's opinions fail under each of these prongs. First, Brill did not rely on sufficient facts and scientific data in forming his opinions because insufficient physical evidence remained after the incident. Second, Brill did not rely on a reliable methodology because his opinions were based on his own rank speculation. Lastly, Brill failed to apply a reliable methodology to the facts. As such, Brill's opinions are not based on sufficiently reliable scientific evidence but just his own *ipse dixit*. See *Gen. Elec. Co. v. Joinder*, 522 U.S. 136, 146 (1997) ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion that is connected to existing data only by the *ipse dixit* of the expert."). Such opinions are not helpful to the jury as the trier of fact, but rather are grossly misleading, and the Court should exclude them.

As noted above, Brill himself conceded that he did not rely upon sufficient facts and scientific data in conducting his purported expert analysis in this case. Specifically, Brill freely concedes that he failed to examine the most critical evidence in this matter, and had none of the following:³⁴

- Vertical measurements between the primary and the earthen ground; See Brill Dep. 19–22.
- Vertical measurements between the neutral and the earthen ground; *Id.*
- Horizontal and/or lateral and diagonal measurements between the primary and the tree trunk; *Id.*

³⁴ Brill confirmed most of these statements at trial.

- Horizontal and/or lateral and diagonal measurements between the neutral and the tree trunk; *Id.*
- Horizontal and/or lateral and diagonal measurements between the primary and any palm branch, palm frond, or seed pod existing on the date of the incident; *Id.*
- Horizontal and/or lateral and diagonal measurements between the neutral and any palm branch, palm frond, or seed pod existing on the date of the incident; *Id.*
- Any measurements from the OSHA Report; *Id.* at 24.
- The chainsaw in use by Mr. Larios on the date of the incident; *Id.* at 32.
- The aluminum ladder in use by Mr. Larios on the date of the incident; *Id.* at 33–34.
- The clothing and shoes worn by Mr. Larios on the date of the incident; *Id.* at 34.
- The tree being trimmed by Mr. Larios at the time of his fall; *Id.* at 34.
- Any seed pods or palm fronds that may have made contact with the primary or the neutral on the date of incident; *Id.* at 35.

Furthermore, Brill conceded at trial that:

- Mr. Larios violated the OSHA 10' Rule and therefore “contributed” to his fall;
- The missing chainsaw did not contact the primary;
- The “discoloration” on the 3rd rung of the ladder did not come from Mr. Larios’ shoes;
- There is no evidence of service calls or outages on this power line; and
- The DESC neutral was not energized.

Brill further confirmed that he had:

- No measurements of anything involved in his two different shock theories;

- No idea what Mr. Larios was cutting or where it was located on the tree;
- No idea whether Mr. Larios cut a frond or seed pod and dropped it into the energized primary;
- No idea whether Mr. Larios moved a frond or seed pod into the energized primary; and
- No sequence of how Mr. Larios was allegedly shocked—he opined that electricity may have entered Mr. Larios’ right hand or maybe his left hand

In short, Brill has not examined even one piece of the necessary physical evidence implicated by his theory that Mr. Larios received some “nonlethal shock” causing him to be startled and fall. Brill has many questions and no scientifically reliable answers. Brill has not scientifically validated a single element of this theory. Consequently, this testimony should be rejected as not sufficiently scientifically reliable.

Simply put, Brill did not use a reliable methodology because his opinions are based on speculation rather than a scientific methodology, and he did not rule out alternative causes such as Mr. Larios simply fell from the ladder. *Graves*, 401 S.C. at 74, 735 S.E.2d at 655; *see also U.S. v. Hutchinson*, 253 Fed. Appx. 883, 885 (11th Cir. 2007) (holding expert testimony is unreliable and inadmissible when it is based on “subjective belief or unsupported speculation”).

In fact, Brill’s similar opinions in another matter were disqualified by a highly esteemed federal district court judge a mere one week before this trial, leading to a grant of summary judgment in favor of the defendants. In *Nat’l Sur. Corp. v. Ga. Power Co.*, No. 2:17-CV-68-RWS, 2019 WL 4394403 (N.D. Ga. Sept. 12, 2019), the defendants moved to exclude Brill’s expert opinions when he opined as to the causation

of a barn fire. *Id.* at *1. In describing Brill's opinions on behalf of plaintiff and defendants motion to exclude the same, the district court stated:

Brill's qualifications are undisputed, but Defendant challenges the reliability and helpfulness of his testimony. Specifically, Defendant takes issue with Brill's opinion that "the probable cause of the fire is due to an electrical malfunction at the Georgia Power electric meter that was damaged when the meter was removed and reinstalled multiple times by Georgia Power prior to the fire." (internal citation omitted) According to Defendant, the opinion is unreliable because it is speculative and is too big a leap to cover the gap between the physical evidence available and Brill's conclusion and therefore would not assist the trier of fact in understanding the evidence. The Court agrees.

Id. at *5.

The district court went on to describe the core of defendants' arguments against Brill's opinions: "Defendant challenges the reliability of Brill's opinions in three ways: 1) Brill did not rely on sufficient facts and data; 2) Brill could not rule out alternative causes; and 3) Brill's theory of causation rests on critical assumptions he did not support with data." *Nat'l Sur. Corp.*, 2019 WL 4394403, at *6. Specifically, Brill opined that the fire was caused by a malfunction in the electric meter despite the fact that little evidence, including key components of the meter, survived the fire. *Id.* But, as explained by the district court, Brill "concede[d], arcing in the meter does not rule out the possibility that the arcing was the result of the meter being attacked by the fire." *Id.* "More specifically, because one of the connections from the meter "wasn't recovered from the scene, [Brill] wasn't able to determine if it was potentially damaged or the source of the original failure." *Id.* After noting the court's job as "gatekeeper . . . to ensure situations with such little evidence do not lead to final expert conclusions based on speculation" the court concluded that Brill did not "bridge the gap between the data and the opinion proffered."

Id.

So it is here. Just as in *Nat'l Sur. Corp.*, Brill did not observe or consider key evidence in this matter. Furthermore, he cannot even state with any degree of certainty how he believes Mr. Larios received an electrical shock; he states only that he believes there was a **possibility** for such a “unique shock event” to occur. See Brill Dep. 61:5–12; 107:5–108:1; see *also* trial testimony. But, Brill did not do any testing to see if his theory is possible. In short, Brill connects his opinions to this case only by *ipse dixit* and not by reliable scientific evidence or analysis that has been or can be tested. Therefore, like in *Nat'l Sur. Corp.*, Brill’s testimony is unhelpful to the trier of fact and should be excluded as both unreliable and prejudicial.

E. DESC is entitled to a new trial because the trial court did not charge trespass or assumption of the risk, even though the evidence supported a trial on both of those charges.

“Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence.” *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct.App.2000). “A trial court’s refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal.” *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). But if a trial court does not give a charge “contain[ing] controlling legal principles . . . confined to the pleadings and supported by the evidence,” the court commits reversible error. *Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 302, 395 S.E.2d 740, 741 (Ct. App. 1990) (holding that failure to give a general charge on circumstantial evidence and two other charges supported by the evidence was reversible error when payment was the issue and the evidence was circumstantial).

i. **The trial court failed to charge on the law of trespass.**

In this case, DESC was prejudiced from the trial court's refusal to instruct the jury on trespass because there was evidence to support the assertion that Mr. Larios was a trespasser with respect to DESC's electric line. That is, he was working within ten feet of DESC's distribution line based on the evidence as well as the OSHA Citations (and unadmitted OSHA Report). Because he had no right to be within ten (10') feet of proximity to the power lines within DESC's easement, a jury could reasonably find that he was a trespasser. See *Foreman v. Atl. Land Corp.*, 271 S.C. 130, 133, 245 S.E.2d 609, 610 (1978) ("SCE&G was entitled to anticipate the exercise of due care by those working in the vicinity of the lines. It was not reasonably foreseeable that workmen would needlessly place and load a flatbed truck directly under a power line. There was no necessity for the crane to be operated beneath the line."); *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545, 549 (1943) (noting that an easement holder has "all such rights as are incident or necessary to its reasonable and proper enjoyment").

Consequently, because there was evidence to support the assertion that Mr. Larios was a trespasser as to DESC's electric distribution line, DESC was entitled to a jury instruction regarding the law of trespass. *Burns v. S.C. Comm'n for Blind*, 323 S.C. 77, 78–80, 448 S.E.2d 589, 590–91 (Ct. App. 1994) (holding that failure to give charge that the Commission was not an "insurer of the safety of its clients" was reversible error because clients were akin to invitees and instruction was necessary for jury to understand the applicable legal framework); *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (holding that failure to give spoliation charge was prejudicial because there was missing evidence and, thus, "it was

crucial to Appellant's case that the jury know it could draw a negative inference from the Hospital's failure to produce those important pieces of evidence”).

The Court's failure to give that instruction was prejudicial because the jury had no context in which to evaluate Mr. Larios' actions and, more specifically, the propriety of his actions in placing himself within ten feet of DESC's electric line, in contravention of OSHA safety laws. *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000) (“[W]hen general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.”). The propriety of Mr. Larios' proximity to the electric line was a central issue in this case. *Cf. Horry Cnty. v. Laychur*, 315 S.C. 364, 369, 434 S.E.2d 259, 262 (1993) (holding that improper charge on law of dedication in which trial court discussed owner's acquisition instead of acquiescence in the property use was prejudicial error requiring reversal because acquiescence is a crucial issue in determining dedication).

In sum, because the jury was not given the proper legal framework by which to judge the case, the jury might have concluded that Mr. Larios was working in a place where he was authorized to be. *Cf. Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 106–07, 313 S.E.2d 649, 651 (Ct. App. 1984) (holding that failure to give instruction regarding “the issue of a parent corporation's liability for a subsidiary's contract” was reversible error because “the jury might well have concluded that a parent corporation is always liable on its subsidiary's contracts”). Accordingly, the jury should have been instructed on the law of trespass as required by the facts of the case and the applicable law. The failure to give the requested instruction was prejudicial error requiring a new trial.

ii. **The trial court failed to charge on assumption of the risk.**

Additionally, the jury should have been instructed on assumption of the risk. As discussed above, there was evidence by which the jury could have found and considered that Mr. Larios assumed the risk of working within ten feet of DESC's electric distribution line. Yet the trial court refused to give an instruction on assumption of the risk even though the facts of the case and the applicable law supported DESC's argument that Mr. Larios had assumed the risk. See *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 352–53, 683 S.E.2d 818, 822–23 (Ct. App. 2009), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012) (holding that failure to give requested charge on the intervening negligence of third persons was reversible error because charge was warranted by the evidence and, “given the jury's verdict and the amount of damages at issue, . . . the trial court's refusal to instruct the jury could have impacted the jury's verdict, thereby proving prejudice”). By not giving the requested instruction, the trial court failed to provide the jury with the proper legal framework for evaluating Mr. Larios' conduct. See *Ross*, 340 S.C. at 437, 532 S.E.2d at 617 (holding that failing to charge on burden of proof for comparative negligence was prejudicial). The failure to give the requested assumption of the risk instruction therefore was prejudicial error.

The error in failing to give these instructions was compounded by the trial court's decision to charge the jury on punitive damages even though there was no evidence that anything DESC did was “willful, wanton, or in reckless disregard of the rights of another.” *Cartee v. Lesley*, 290 S.C. 333, 337, 350 S.E.2d 388, 390 (1986). The charge must be considered as a whole, *Ellison v. Simmons*, 238 S.C. 364, 373, 120 S.E.2d 209, 213 (1961), and an erroneous charge may be intensified by the “hurtful effects” of

further charges. *Payne v. Cohen*, 168 S.C. 459, 167 S.E. 665, 667 (1933). Instruction of irrelevant or inapplicable principles of law is clearly error that has the potential of confusing the jury. *Dunsil v. E.M. Jones Chevrolet Co., Inc.*, 268 S.C. 291, 296, 233 S.E.2d 101, 103 (1977). “[I]t is reversible to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial.” *Wright v. Harris*, 228 S.C. 144, 148, 89 S.E.2d 97, 98 (1955).

By failing to charge trespass and assumption of the risk but charging punitive damages, the jury was left with the impression that the only real question for the jury was the degree of DESC’s culpability. This conclusion is supported by the fact that, during deliberations, the jury asked to be recharged on punitive damages. Thus, the decision to charge the jury on punitive damages coupled with the failure to charge trespass and assumption of the risk established a legal framework for the jury that suggested Mr. Larios was in a place he had a right to be and that DESC had acted wrongfully

F. DESC is entitled to a new trial because a juror knowingly failed to answer a question in *voir dire* inquiring as to whether the juror knew anyone who had been injured by an electrical shock and the juror’s friend in fact had been injured by an electrical shock.

South Carolina law guarantees litigants the right to an impartial jury. *Alston v. Black River Elec. Co-op.*, 345 S.C. 323, 326, 548 S.E.2d 858, 859 (2001) (citing S.C. Code Ann. § 14-7-1050 (Supp. 2000)). “[I]t is fundamental that each party is entitled to a trial by an impartial jury.” *Id.* at 329, 548 S.E.2d at 861 (citing S.C. Const. art. I, § 14; S.C. Code Ann. § 14-7-1050 (Supp. 2000)). And, as our Supreme Court has recognized, “trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information.” *State v. Kelly*, 331 S.C. 132, 145, 502 S.E.2d 99, 106

(1998). “Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge.” *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001).

A new trial is required when a juror intentionally conceals information during *voir dire*. *Id.* at 588, 550 S.E.2d at 284. A juror who intentionally conceals information is presumptively biased. *State v. Tucker*, 423 S.C. 403, 411, 815 S.E.2d 467, 471 (S.C. Ct. App. 2018) (citing *Woods*, 345 S.C. at 588, 550 S.E.2d at 284). The question of whether a new trial is required is a two-step inquiry. First, the court must determine if “the juror intentionally concealed the information during *voir dire*,” and if the answer to the first inquiry is yes, the court must then “determine if the information concealed would have supported a challenge for cause or would have been a material factor in the use of respondent's peremptory challenges.” *State v. Sparkman*, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (S.C. 2004) (citing *Woods*, 345 S.C. at 588–90, 550 S.E.2d at 284–85).

[I]ntentional concealment occurs when the question presented to the jury during *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Woods, 345 S.C. at 588, 550 S.E.2d at 284. Where a juror, without justification fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. *Id.* at 587–88, 550 S.E. 2d at 284.

A new trial is warranted here because the juror's failure to disclose her relationship with a person who has been the subject of an electric shock event limited the Defendant's ability to challenge the juror for cause or to intelligently exercise its right to a peremptory challenge. See Affidavit of Megan C. White, attached as **Exhibit B**. The juror was presented with a straightforward question – "Do you know anyone who has been injured by an electrical shock or been electrocuted?"³⁵ *Id.* This question is clear and reasonably comprehensible. Nothing about it is ambiguous. Despite a friend having been involved in an electric shock event, the juror remained silent when asked this question. Further, the subject of this question is of such great significance to this case, that the juror's failure was unreasonable. The subject of electric shock is, in fact, **the** ultimate issue in this case, where the Defendant is an electric company and the claim was premised on an allegation that Mr. Larios was shocked causing his fall from the ladder. The juror's failure to disclose a relationship to a person who had been involved in an electric shock event was unreasonable and without justification. Even if the juror did not remember the event until after the trial began, the relationship was remembered at some point before the jury began its deliberations, but was never disclosed to the Court, which supports a claim of intentional concealment.

Moreover, if a juror appears biased in a cause, that juror must be placed aside as to the trial of that cause. S.C. Code Ann. § 14-7-1020. As discussed above, the juror's concealment here is presumptively biased and subject to being stricken for cause. An affirmative answer to this specific *voir dire* question also would have altered the DESC's decision as to whether to exercise its right to a peremptory challenge of this juror, as

³⁵ Question Number 16 from DESC's Requested *Voir Dire*.

any bias stemming from this concealed relationship was significant to the ultimately issue in this matter. At the very least, DESC's ability to further inquire as to any biases the juror may have stemming from this relationship was severely hampered by the failure to truthfully answer the question presented. As such, the juror's failure to disclose this important information significantly impacted DESC's ability to exercise its rights to challenge her.

The juror's concealment of this critical information cannot be explained or excused by any suggestion about not knowing how to handle the late-breaking memory. This concealment is especially egregious when juxtaposed with the conduct of another juror who, after being empaneled but prior to opening statements, disclosed to the Court that he recalled overnight that his son had worked in the tree trimming business. The Court questioned that juror and determined that although the son no longer worked in that business and the juror stated he could be fair and impartial, the Court felt it best that the juror be dismissed for cause. In light of the juror's concealment of this pertinent information and the resulting prejudice to the DESC's ability to challenge the juror for cause or to intelligently exercise its right to a peremptory challenge, as evidenced by the Court's dismissal of another juror on a similar issue, a new trial is warranted.

G. DESC is entitled to a new trial because the Court improperly denied Defendants' Joint Motion for Jury View of Premises.

Pursuant to S.C. Code Ann. § 14-7-1320, "[t]he jury in any case may, at the request of either party, be taken to view the place or premises in question or any property, matter or thing relating to the controversy between the parties when it appears to the court that such view is necessary to a just decision." A viewing of the premises is not regarded as the taking of evidence. *Jacks v. Townsend*, 228 S.C. 26, 28, 88 S.E.2d

776, 778 (1955) (citing *Baroody v. Anderson*, 195 S.C. 422, 11 S.E.2d 860, 862 (1940)). **“The purpose [of the viewing] is to throw light upon the testimony in the record, and to enable the jury to understand the evidence already taken in the court room.”** *Baroody*, 195 S.C. at 422, 11 S.E.2d at 862 (emphasis added); see also *Cleland v. Atl. Coast Line R. Co.*, 245 S.C. 478, 484–85, 141 S.E.2d 339, 342 (1965) (“The desirability of inspection by the trial jury of the scene of the accident goes to the requirement of the promotion of the ends of justice.”). A motion for the jury to view the premises in controversy is addressed to the discretion of the trial judge. *City of Columbia v. Jennings*, 288 S.C. 79, 81, 339 S.E.2d 534, 535 (Ct. App. 1986); see also, generally, *Culpeper v. Neff*, 204 Va. 800, 806, 134 S.E.2d 315, 320 (Va. 1964) (affirming trial court’s grant of motion to view where there was no prejudice or unfair inferences created by the view; the view permitted the jury to determine the important questions related to the premises, including whether the condition was open and obvious as to inform the plaintiff of danger; and the observation of the physical condition could have aided the jury in applying the evidence heard in open court).

Here, a view of the premises *and* the electric lines in question (i.e., both the energized primary and the un-energized neutral) were absolutely necessary for a just decision.

Leading up to trial, Plaintiff argued that the energized line was a hidden, latent defect camouflaged by the palm trees. (Pl.’s Memo. in Opp. to Mots. for Summ. J., pp.2, 5, 21, 25, 27). In response, amongst other defenses, DESC contended that the allegedly dangerous condition was open and obvious and that Mr. Larios was comparatively negligent, assumed the risk, and was a trespasser with respect to

DESC's property and right of way. (DESC Answer ¶¶ 21, 24; DESC Memo. in Support of Summ. J., pp. 14-17).

At trial, conflicting testimony was presented regarding these issues, and, in large part, the trial became a "battle of the photographs," where the angle, depth, zoom, and lighting of any specific photograph controlled the conclusions and inferences capable of being derived therefrom. For example, there were numerous photographs introduced that showed that the overhead lines were open and obvious. Allowing a site visit would have enabled the jury to more fully understand the issues and the nature of the evidence and Mr. Larios' proximity to the lines for the accident to have occurred in the manner in which Plaintiff described.

In sum, the condition of the premises and the relative height and location of the primary and neutral power lines in question (which have not changed) were essential to DESC's defenses. In particular, the paramount question of whether a complete, 360 degree view of the premises would have revealed the existence and proximity of the power lines was a question that could not be answered without a jury view of the premises.³⁶ The testimony and photographic evidence presented were insufficient to properly inform the jury regarding the condition of the premises. As such, Defendants'

³⁶ Though the subject tree that Mr. Larios was trimming at the time of his fall had been removed, the overhead lines in DESC's right of way have not moved and the numerous other trees on the premises have not been removed. Therefore, the removal of the single tree does not impact the relevance and probative value of viewing the premises. See *Snider v. Jennings*, 161 N.W.2d 594, 595 (Mich. App. 1968) (holding no error in granting motion to view where jury heard testimony prior to visit that defendant had subsequently installed a board in such a manner so as to prevent small children from getting behind the dryer).

Joint Motion for Jury View of Premises should have been granted for the “ends of justice.” Accordingly, DESC is entitled to a new trial.

Conclusion

For the foregoing reasons, DESC is entitled to JNOV or, in the alternative, a new trial. Additionally, DESC is entitled to sanctions for Plaintiff’s abuse of the discovery process. As such, DESC requests that this Court grant its Motion and award it such further relief, both general and special, legal or equitable, to which it may be entitled.

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

s/ Megan C. White
Steven J. Pugh (SC Bar #14341)
spugh@richardsonplowden.com
Megan C. White (SC Bar #101895)
mwhite@richardsonplowden.com

**ATTORNEYS FOR DEFENDANT SOUTH
CAROLINA ELECTRIC & GAS COMPANY,
N/K/A DOMINION ENERGY
SOUTH CAROLINA, INC.**

October 7, 2019

Argument and Analysis

1. **Because the jury's awards of damages were unduly liberal, DESC is entitled to a new trial *nisi remittitur*.**

"[W]hen the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by the granting of a new trial *nisi remittitur*." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000) ("The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive."). If the verdict is merely excessive—not grossly excessive and motivated by passion, caprice, prejudice, or another improper influence—the grant of a new trial *nisi remittitur* is the appropriate remedy. *Id.*

It is beyond question that the jury's damages awards in this case were "unduly liberal." After four days of trial, the jury rendered two verdicts in approximately four hours, which time period included deliberations on a potential finding of Plaintiff's entitlement to punitive damages. The first verdict was for Plaintiff's survival action in the amount of \$10 million. The second verdict was for Plaintiff's wrongful death claim in the amount of \$11 million. Yet, there was no evidence of any verifiable monetary damages introduced by Plaintiffs, such as funeral bills, wage statements, tax returns, medical bills, counseling bills, or anything of the like. In short, there was no monetary benchmark to establish any amount of damages or loss. The absence of this evidence—or any evidence of monetary harm—demonstrates that the jury's awards of damages were the product of an unduly liberal, baseless, and carefree approach to awarding damages to Plaintiff. It was not the product of a careful evaluation of the actual harm suffered based on the evidence of record.

DESC respectfully submits that this Court should exercise its discretion and grant this Motion. The exercise of this discretion is an opportunity for this Court to ensure a just, reasoned, and equitable result in this matter.

A. *The jury's award of \$10 million for Plaintiff's survival action was excessive and unjustified.*

Damages for Mr. Larios' pain and suffering as part of the survival action were limited to his conscious pain and suffering. *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 214, 734 S.E.2d 142, 143 (2012); *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). Where a plaintiff fails to meet her burden of showing evidence that the deceased was conscious after the accident, she will not be entitled to recover for conscious pain and suffering. *Camp v. Petroleum Carrier Corp.*, 204 S.C. 133, 28 S.E.2d 683 (1944) (evidence failed to show collision victim was conscious of pain and suffering where one witness heard the decedent groan and the other saw no signs of life). Damages for subconscious pain and suffering, or for "pre-impact fear", are not recoverable. *Brooks v. U.S.*, 273 F. Supp. 619 (D.S.C. 1967); *Rutland*, 400 S.C. at 215, 734 S.E.2d at 143.² Further, a defendant is entitled to judgment on a survival claim as a matter of law "where there is no evidence of conscious pain and suffering." *Stevens v. Allen*, 342 S.C. 47, 57, 536 S.E.2d 663, 665 (2000).

There was no evidence presented to the jury that would allow it to assess Mr. Larios' conscious pain and suffering, let alone quantify it to the extent of \$10 million. While pain and suffering could be inferred by the jury, there was no evidence or

² In *Rutland*, the Supreme Court of South Carolina declined to decide the issue of whether pre-impact fear is an element of damages in any survival action, letting stand the Court of Appeals' decision "concluding that South Carolina does not recognize pre-impact fear as an element of damages." *Id.* at 215, 734 S.E.2d at 144.

testimony that would allow the jury to assess the nature or intensity of Mr. Larios' pain or level of consciousness. No witness provided any testimony regarding Mr. Larios' conscious suffering or pain at the time of the event. Conversely, the only person who witnessed Mr. Larios' fall and subsequent actions, Pedro Abraham, testified that, when he went to Mr. Larios immediately after the fall, Mr. Larios "lifted his head, and [Mr. Abraham] asked him if he was okay, and [Mr. Larios] said he was fine." Dep. of Pedro Abraham 12:2-5. Mr. Abraham further testified that he briefly left Mr. Larios to call 911³ but, upon his return, Mr. Larios was not responding anymore. *Id.* 12:6-10. That is the sum total of the evidence that Plaintiff proffered to support a verdict for pain and suffering.

No other witness observed Mr. Larios before he became unresponsive and subsequently died on the way to the hospital. Plaintiff did not proffer the testimony of the 911 caller, Shannon Hudson, or any first responders or medical personnel, presumably because they would confirm (as reflected in their records) that Mr. Larios was unresponsive and passed away without exhibiting any indicia of conscious pain and suffering. Simply put, there was no testimony regarding actual pain suffered by Mr. Larios, and there was no medical expert testimony regarding the nature, level, and extent of pain and suffering that Mr. Larios likely suffered. And, the evidence that was presented to the jury regarding Mr. Larios' death showed that he lost consciousness within minutes of his fall⁴ and died on the way to the hospital shortly afterwards.

³ Records reflect that the 911 call was received at 9:50 a.m. on November 29, 2015. At 9:54 a.m., the Edisto Beach Fire Department responded to the scene and found Mr. Larios unresponsive and without a pulse.

⁴ The testimony and evidence reflects that, as a result of his fall, Mr. Larios sustained: bilateral fractures of ribs 1 through 7; fractures of lumbar vertebrae L1 to L4;

Thus, at most, Mr. Larios survived for 30 minutes. His period of consciousness after he fell was a matter of minutes. Because there was no evidence of any monetary damages with respect to the survival action, see *Welch*, 342 S.C at 303–04, 536 S.E.2d at 420–21, the jury indisputably awarded plaintiff \$10 million for pain and suffering, which amounts to \$333,333.33 per minute, irrespective of the absolute lack of evidence of conscious pain and suffering. By any definition, that award is grossly excessive, especially in view of all the necessary evidence that is lacking in this case.

While it is uncontroverted that Mr. Larios had no “classic” wounds or signs of electrical shock [e.g., no indication of entry/exit wounds and no internal injuries caused by electricity], a brief review of electrocution damage awards in survival actions may be instructive because the jury award is also clearly excessive when compared to those other survival actions:

- In *Holmes v. Black River Electric Co-op, Inc.*, the jury awarded plaintiff \$350,000 in actual damages after he was electrocuted when his fishing line came in contact with a live wire. 274 S.C. 252, 255, 262 S.E.2d 875, 877 (1980). The trial judge reduced the verdict to \$265,000. *Id.* at 256, 262 S.E.2d at 877.
- In *Haskins v. Fairfield Elec. Co-op*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984), after plaintiff’s husband was electrocuted while working at defendant’s substation, the jury award of \$30,000 in damages for plaintiff’s pain and suffering was affirmed.

aortic lacerations; liver lacerations; bilateral kidney lacerations; and multiple hemorrhages with significant internal bleeding.

The survival action damages awarded in this case also exceed those in other reported non-electrocution cases as well:

- In *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000), the jury awarded \$310,000 for an eight-year-old girl who survived for two days after being struck by a pickup truck.
- In *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), a jury awarded \$1,000,000 for a misdiagnosed breast cancer patient who suffered for more than a year after her terminal diagnosis and who underwent a mastectomy, chemotherapy, and radiation treatments, and ultimately became bedridden due to pain, before dying.
- In *Boyle v. U.S.*, 948 F. Supp. 2d 577, 583 (D.S.C. 2012), the jury awarded \$250,000 for a man who died after suffering from five months of prolonged organ failure and incapacitation, and who was hospitalized for more than a month.

In sum, the jury's verdict in Plaintiff's survival action indisputably was the product of an unduly liberal and non-evaluative approach by the jury. Plaintiff established no evidentiary foundation as a benchmark to support the award of \$10 million for pain and suffering. And, it is unlikely that Mr. Larios' extremely brief, at best, period of conscious pain and suffering was worth only one million less than the verdict in the wrongful death action. DESC is entitled to a new trial *nisi remittitur* as to Plaintiff's survival action.

B. *The jury's award of \$11 million for Plaintiff's wrongful death action was excessive and unjustified.*

"In a wrongful death case, the issue of damages is not directed toward the value of the human life that was lost, but rather the damages sustained by the beneficiaries as

a result of the death.” *Welch*, 342 S.C. at 304, 536 S.E.2d at 421. The damages that would have been recoverable include pecuniary loss; mental shock and suffering; wounded feelings; grief and sorrow; loss of companionship; and the loss of the decedent’s society, including the “loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries.” *Id.* “In determining the amount of the damages to be awarded in an action under the statute for wrongful death, the question is not one of the value of the human life, but is rather the damages sustained by the beneficiaries (here, the father and mother) from the death of the deceased.” *Zorn v. Crawford*, 252 S.C. 127, 136–37, 165 S.E.2d 640, 645 (1969).

The jury’s award of \$11 million for wrongful death is excessive and unsupported by the evidence, and undoubtedly was a result of Plaintiff’s counsel’s improper closing argument that repeatedly asked the jurors, “What’s a life worth?” and “Would anyone take \$20 million to sacrifice their son?”⁵ The verdict had to be influenced by counsel’s argument because there was no evidence or testimony that would have informed the jury’s deliberations with respect to pecuniary loss.

⁵ “It is improper for counsel to make a closing argument to the jury . . . calculated to arouse passion or prejudice.” *Branham v. Ford Motor Co.*, 390 S.C. 203, 234, 701 S.E.2d 5, 21 (2010) (internal citation omitted); see also *Dunn v. U.S.*, 307 F.2d 883, 885–86 (5th Cir. 1962) (“It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant.” (emphasis added)). Here, this line of rhetorical questioning did just that; it made unwarranted inferences and insinuations calculated to inflame, arouse passion, and prejudice DESC. Importantly, no contemporaneous objection by DESC was required in this instance. See, e.g., *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (“[E]ven in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice.”); *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 259, 509 S.E.2d 269, 272 (1998) (noting that failure to make a contemporaneous objection is excused where challenged argument constitutes abuse of a party or witness).

For example, there was no evidence regarding the amount, source, or frequency of Mr. Larios' earnings, his living expenses, or his support of others. Likewise, there was no economist testimony reducing any "gross" figures to net income or present-day value. And, there was no testimony regarding Mr. Larios work life expectancy, earning capacity, or any other recognized measures of economic loss.

Instead, Plaintiff made only vague, nonspecific references to Mr. Larios' alleged remittances to Mexico to assist with his parents' medical expenses, yet failed to introduce any documentation to support this claim (e.g., no dollar amounts, frequency of the payments, or even the parents' identities or location in Mexico was introduced). Similarly, there was merely generic testimony that Mr. Larios helped buy a house and shared household expenses with his brother, Gaspar Licon, but there was no evidence or documentation of the purchase price of the house or its value, other than testimony from one witness who said that he paid for 50% of the house; yet, the "owner" of the house is somehow Mr. Larios' teenage niece. Likewise, there was no evidence of household expenses (e.g., taxes, insurance, etc.), or the amount or frequency of Mr. Larios' alleged contribution to the expenses.

Thus, there was no evidence by which the jury reasonably could assess a pecuniary loss as a result of Mr. Larios' death. More importantly, the absence of any evidence regarding pecuniary damages deprived the jury of a benchmark with respect to the survivor's damages. The jury was invited by Plaintiff to wildly speculate and it did

so, liberally awarding \$11 million in damages without any demonstrable or reasonable basis.⁶

Moreover, there was virtually no evidence or testimony that would have informed the jury's deliberations with respect to the survivors' mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, or the loss of decedent's society. *Zorn*, 252 S.C. at 137, 165 S.E.2d at 645 (holding that, because there was no evidence of pecuniary loss, "the only elements of damage which may be considered in this case are such mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of intestate's society as the beneficiaries may have sustained as the result of the death of the intestate" (internal quotation marks omitted)). And, although the elements of shock, wounded feelings, grief, and loss of companionship and society admittedly are non-economic in nature, and the existence may be inferable by the jury, there was no benchmark upon which the jury could evaluate the nature or extent of the non-economic loss suffered by the survivors.

The only family member that testified was Mr. Larios' brother, Gaspar Licon, and he provided only minimal testimony about the shock, grief, and loss of companionship, certainly no reasonable basis to support an \$11 million verdict. He provided no testimony as to the alleged amount of Mr. Larios' financial contributions to others. There was no evidence or testimony regarding the time the parents in Mexico spent with Mr. Larios or his involvement in their affairs while he had been living in the

⁶ Further evidencing the lack of any demonstrable or reasonable basis is the incongruous award of \$10 million for pain and suffering for a period of at most 30 *minutes* and award of \$11 million for wrongful death where the jury was charged on Mr. Larios' life expectancy set at 37.39 *years*.

United States for more than a decade before his death. There is no evidence in the record that Mr. Larios ever returned to Mexico to visit his family, or vice versa; instead, Mr. Licona simply testified that he came to the United States in 2000 and that his brother, Mr. Larios, came in 2003 or 2004. Furthermore, it is uncontroverted that Mr. Larios had never married and had no children, which is yet another issue demonstrating that the jury was unduly liberal. See *Nelson v. Charleston & W. C. Ry. Co.*, 231 S.C. 351, 363, 98 S.E.2d 798, 803 (1957) (granting new trial absolute in action brought by siblings on basis award of \$35,000, reduced by trial court to \$29,000,⁷ was excessive where brother testified about loss of sister because any suffering from loss of companionship of a sibling is not the same as the loss of a child).

In other matters involving wrongful death as a result of electrocution, the damage awards have been significantly lower⁸:

- In *Gathers by and through Hutchinson v. DESC*, 311 S.C. 81, 427 S.E.2d 687 (Ct. App. 1993), a 1993 jury award of \$100,000 was affirmed (approximately \$179,285.81 in 2019 dollars⁹), where a homeowner was electrocuted after coming in contact with an electrically charged water pipe in his home.

⁷ Found at <<https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=29%2C000.00&year1=195701&year2=201908>>.

⁸ In fact, in the 1958 case of *Elliott v. Black River Elec. Co-op.*, 233 S.C. 233, 104 S.E.2d 357 (1958), the South Carolina Supreme Court cautioned against the “growing tendency in recent years toward verdicts in death cases which, although not manifestly the result of passion, prejudice or other improper motive, are nevertheless so large as to indicate, even in an inflated economy, undue liberality on the part of the jury” and further noted that such trend “has given this court much concern.” 233 S.C. at 264, 104 S.E.2d at 373.

⁹ Found at <<https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=100000&year1=199302&year2=201908>>.

- In *Estate of Toney v. Progress Energy et al.*, 2009 WL 6045475 (S.C. Cir. 2009), it was reported that a jury awarded decedent's estate \$3,500,000 in compensatory damages for wrongful death as the result of death by electrocution.¹⁰

But, even outside of electrocution cases, the wrongful death award of \$11 million in this case is excessive.

- In *Zorn*, 252 S.C. at 138, 165 S.E.2d at 646 (1969), an award of \$250,000 (approximately \$1,791,606.15 in 2019 dollars¹¹) for the loss of a child for the non-economic aspects of a wrongful death claim was reversed as excessive.
- In *Rutland v. South Carolina Dept. of Transportation*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), a Jury awarded \$300,000 for wrongful death following a fatal car accident.
- In another wrongful death action following a car accident, a jury awarded \$1,500,000.00 for estate, \$745,000 for surviving motorist, and \$645,000 for passenger. *Giannini v. South Carolina Dept. of Transp.*, 378 S.C. 573, 664 S.E.2d 450 (2008) (wrongful death - \$1.5 million; survival - \$745,000).
- A jury awarded \$3 million for wrongful death in a railroad crossing case. *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005).

¹⁰ The case was settled and, thus, there is no reported appellate decision for this case. The jury also awarded punitive damages in the case, which is not at issue here.

¹¹ Found at <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=250000&year1=196902&year2=201908>.

- Another jury awarded \$500,000 for wrongful death in a products liability action. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003).
- In a wrongful death action against DOT, the jury awarded \$730,000. *Pike v. South Carolina Dept. of Transp.*, 343 S.C. 224, 540 S.E.2d 87 (2000).

As a result, DESC is entitled to a new trial *nisi remittitur*.

2. In the alternative, DESC should be granted a new trial absolute.

The trial court “must set aside a verdict only when it is ***shockingly disproportionate to the injuries suffered*** and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.” *Welch*, 342 S.C. at 302, 536 S.E.2d at 420 (emphasis added). A new trial is warranted if the verdict is “so grossly excessive as to clearly indicate the influence of an improper motive on the jury.” *Id.* The decision to grant a new trial absolute is committed to the trial court’s discretion and will not ordinarily be disturbed on appeal. *Id.*

The damages verdicts in this case are “grossly excessive” and “shockingly disproportionate to the injuries suffered,” so much so that there can be no doubt that the verdicts were the result of passion, caprice, prejudice, or some other improper and non-evidentiary consideration. Among other influences is the improper closing argument of Plaintiff’s counsel, in which he repeatedly and wrongfully asked, “What’s a life worth?” and “Would anyone take \$20 million to sacrifice their son?”¹² As discussed above, there is no evidentiary basis for awarding a total of \$21 million in damages in this case and certainly no evidentiary benchmark to justify the award of damages at that level. There is no evidence to support an award of \$10 million for his brief survival period, and there

¹² This improper line of rhetorical “questioning” and the resulting prejudice suffered by DESC is described in fn.5, above,

is no evidence to support an award of \$11 million for wrongful death. It is inescapable that the jury's decision to award that amount of damages originated in passion, caprice, prejudice, or another improper motive, including but not limited to an effort to answer the question, "What's a life worth?"

As noted above, the verdict amounts also are well in excess of the damage amounts awarded in other survival and wrongful death cases in this State. And, the South Carolina Supreme Court has approved the trial court's grant of a new trial absolute in situations such as this. See *Nelson*, 231 S.C. at 363, 98 S.E.2d at 803 (1957) (ordering new trial absolute for award of damages in the amount of \$35,000, reduced to \$29,000 by the trial court, which equates to \$270,000 in 2019 dollars). For example, in *Brinkley v. South Carolina Dept. of Corrections*, 386 S.C. 182, 687 S.E.2d 54 (2009), the trial judge granted a new trial absolute based on its determination that there was little to no evidence to substantiate an award of damages in the amount of \$600,000 to a prisoner alleging that he was assaulted. The Supreme Court noted the trial court's finding that the inmate "failed to introduce any medical records supporting the testimony of injuries." *Id.* at 186, 687 S.E.2d at 57. The Court also noted that the prisoner did not show signs or symptoms of an assault. *Id.* Based on the evidence and testimony presented at trial, the court determined that the jury award clearly indicated that the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive. *Id.* at 186–87, 687 S.E.2d at 57. The Supreme Court held that the award of \$600,000 based on the actual evidence was "so excessive as to shock the conscience," and that was "particularly true" because the "award could not, and should not, have contained any element of punitive ... damages." *Id.* at 187, 687 S.E.2d at 57.

Brinkley is not unlike this case, where there is no evidence of conscious pain or suffering, yet the jury awarded Plaintiff a total of \$21 million in damages, an award consisting only of actual damages because the jury found that punitive damages were not appropriate. Consequently, a new trial absolute is warranted in this case.

Conclusion

For the reasons set forth above, DESC respectfully submits that it is entitled to a new trial *nisi remittitur* because the verdicts rendered in this case are excessive and unjustified by the evidence. In the alternative, DESC is entitled to a new trial absolute because the verdicts rendered in this case are grossly excessive, unsupported by the evidence, and are the product of passion, caprice, prejudice, or some other improper influence beyond the evidence. DESC further respectfully requests that this Court grant its Motion and award it such further relief, both general and special, legal or equitable, to which it may be entitled.

Respectfully submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

s/ Megan C. White

Steven J. Pugh (SC Bar #14341)
spugh@richardsonplowden.com
Megan C. White (SC Bar #101895)
mwhite@richardsonplowden.com

**ATTORNEYS FOR DEFENDANT SOUTH
CAROLINA ELECTRIC & GAS COMPANY,
N/K/A DOMINION ENERGY
SOUTH CAROLINA, INC.**

October 7, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO. 2017-CP-15-0423
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose Refugio)	
Licona Larios,)	
)	
Plaintiff,	)	PLAINTIFF’S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT’S
vs.	)	MOTIONS FOR JUDGMENT
	)	NOTWITHSTANDING THE VERDICT,
South Carolina Electric & Gas Company;	)	FOR A NEW TRIAL, AND FOR
PENSCO Trust Company LLC; and	)	SANCTIONS
Edisto Sales & Rentals Realty, LLC,)	
)	
Defendants.)	

Plaintiff, Tiffany N. Provence, as the Special Administrator for the Estate of Jose Larios, hereby submits this Memorandum in Opposition to SCE&G’s Motions for Judgment Notwithstanding the Verdict; in the alternative, for a New Trial; and for Sanctions.

SCE&G’s arguments—all of which are now being repeated for the second, third, or fourth time—should be rejected once again by this Court because they are without merit and do not warrant interfering with the result of the trial. In addition, SCE&G’s Motions are peppered with material misrepresentations regarding the events of trial, including about statements by the Court and counsel, the facts in evidence, and rulings made by the Court. For those reasons and the others set forth below, Plaintiff respectfully requests that the Court deny SCE&G’s Motions and allow the jury’s carefully considered verdict to stand.¹

¹ The facts in evidence, which must guide this Court in analyzing SCE&G’s Motions, are more fully discussed in Plaintiff’s Memorandum in Opposition to SCE&G’s Motion for New Trial Absolute and Nisi Remittitur. Plaintiff incorporates those facts in full here, but nevertheless, the specific evidence at trial relevant to each of SCE&G’s arguments is addressed below.

I. SCE&G’S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE DENIED.

The highly deferential standard for reviewing a motion for judgment notwithstanding the verdict (“JNOV”) has been well defined by the South Carolina Supreme Court:

The trial court *must deny* a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. Moreover, a motion for JNOV may be granted *only if no reasonable jury could have reached the challenged verdict*. An appellate court will reverse the trial court’s ruling only if no evidence supports the ruling below. In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.

RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012) (quotations and citations omitted) (emphasis added). When reviewing a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004).

On page 17 of its 63-page memorandum, SCE&G begins a lengthy, nearly identical regurgitation of arguments which the trial court has rejected multiple times already, including at the summary judgment, motion *in limine*, directed verdict, and/or judgment as a matter of law stages of this case. Undeterred, SCE&G now argues that it is entitled to JNOV for three reasons: (1) it owed no duty to Mr. Larios because he was a trespasser and/or his electrical shock was unforeseeable; (2) SCE&G’s negligence was not a proximate cause of Mr. Larios’ injuries and death; and (3) SCE&G cannot be liable because of the “overwhelming” comparative negligence of Mr. Larios. *See* SCE&G’s Mem. in Supp., pp. 17-30. As they were before, all three of these recycled arguments should be rejected by the Court once more because, based on the evidence presented, twelve reasonable jurors could—and did—reach the verdict that SCE&G now seeks to have set aside. For the reasons that follow, SCE&G’s Motion for JNOV must be denied.

- 1. The evidence at trial established that SCE&G owed a duty to the general public, including Mr. Larios, to keep its power lines free and clear of encroaching vegetation to prevent the risk of electrical shock.**

SCE&G's attempts to sidestep its duty in this case are futile in the face of long-standing, well-settled South Carolina law. It is undisputed that a power company like SCE&G "is bound to use due diligence to acquire information and knowledge concerning the condition of its electric wires, and the failure to do so constitutes negligence." *Sanders v. Charleston Consol. Ry. & Lighting Co.*, 159 S.C. 266, 156 S.E. 874, 877 (1931). Stated differently, "[t]hose operating electric wires in streets are required to exercise a very high degree of care in their construction, repair, inspection and maintenance to prevent injury to others." *Weeks v. Carolina Power & Light Co.*, 156 S.C. 158, 153 S.E. 119, 123 (1930).

In addition to the duty of reasonableness imposed by the common law, SCE&G's duty in this case is further demonstrated by its own internal policies, which highlight the company's willing acceptance and acknowledgement of the legal obligation to keep its power lines clear of encroaching vegetation. SCE&G adopts a policy of trimming vegetation near its power lines to a *minimum* clearance of ten feet on either side. Pl.'s Trial Ex. #10, p. 3. The uncontroverted testimony at trial from SCE&G's own employees was that it is SCE&G's responsibility—and no one else's—to provide separation between the overhead power lines behind 3402 Myrtle Street and adjacent vegetation. Trial Tr., 615:12–20 (Rodney Walker direct). Mark Branham, SCE&G's corporate representative, testified at trial that the *number one* reason for this policy is to ensure the safety of the public by reducing the risk of electrical shock that exists when trees encroach upon and contact SCE&G's power lines. *Id.* at 439:21–440:11. SCE&G's duties are further defined by

the industry guidelines and regulations, including the applicable American National Standards Institute (“ANSI”) and National Electrical Safety Code (“NESC”) provisions, both of which were introduced into evidence for the Court and the jury to read, consider, and weigh in their deliberations. *See* Pl.’s Trial Ex. #11 (ANSI A300); Def.’s Trial Ex. #12 (NESC 218).

SCE&G apparently does not dispute that it owes a duty to the public to provide separation between its power lines and nearby vegetation (including palm trees), because it knows it can’t credibly do so. Instead, what SCE&G contends is that its duty to protect the general public from its dangerous power lines excludes Mr. Larios because (a) he was a “trespasser” on SCE&G’s property on the day in question or (b) his actions and subsequent electrical shock were not foreseeable. Both of these arguments are legally unsound and factually unsupported by the evidence at trial.

a. Mr. Larios was not a “trespasser” and there is no evidence in the record to support a finding that he was.

As a threshold matter, SCE&G’s trespasser argument is not based on the evidence admitted at trial and is therefore invalid. For the premises-liability trespasser defense to even possibly apply, SCE&G first had to establish the premises that Mr. Larios allegedly invaded, but SCE&G never established at trial where the physical space of its right-of-way was located. SCE&G never even tried to do so. Without such evidence as to the physical or legal scope of the right-of-way, there is no evidence that Mr. Larios ever even entered SCE&G’s right-of-way. SCE&G is therefore unable to prove that Mr. Larios was a trespasser to the physical space of the right-of-way.

In fact, SCE&G lineman, Rodney Walker, testified at trial that the palmetto tree in which Mr. Larios was working was physically outside of SCE&G’s right-of-way. Trial Tr., 619:07–14. Counsel for SCE&G elicited this testimony in response to Mr. Walker’s admission to

Plaintiff's counsel that nothing had "physically prevented SCE&G from cutting this tree back away from the lines prior to this incident." *Id.* at 618:23–619:02. In short, SCE&G tried to claim at trial that it could not trim the tree because it was not on SCE&G property, and now wants to argue that Mr. Larios's being in that same tree constituted trespass to SCE&G property. This well illustrates the absurdity of the argument itself. Without evidence of the physical boundaries of the alleged real estate (right-of-way), SCE&G cannot prevail on an argument that Mr. Larios crossed any boundary and trespassed onto that real estate.

The notion that Mr. Larios's alleged violation of the OSHA ten-foot rule renders him a trespasser is equally absurd because the ten-foot rule has no logical or legal bearing on this issue. Like other OSHA rules, the ten-foot rule is a federal workplace safety regulation that does not create or affect property rights whatsoever much less dictate the applicable duty of care a defendant otherwise holds in tort. Regardless of whether Mr. Larios's maneuvering a palm frond—which was already extending into SCE&G's supposed right-of-way—might have violated OSHA's ten-foot rule, that act could not constitute a trespass onto SCE&G's right-of-way. At most, Mr. Larios was touching the part of the tree that was in PENSCO/Jackson's property, where he was an invitee.

Additionally, this "trespasser" argument is particularly unavailing given that this trial did not concern premises liability with regard to SCE&G, and Mr. Larios' status on real property is not determinative of any duty of care owed by SCE&G. Consequently, SCE&G has no legitimate defense that Mr. Larios was a trespasser and that SCE&G owed him no duty to protect or warn about the known dangerous condition—the power lines—within the right-of-way. However, even if this defense were viable, SCE&G's claim that Mr. Larios was a "trespasser" as to its power lines ignores the obvious and unavoidable fact that Mr. Larios was an invitee located lawfully on private

property (3402 Myrtle Street) when this incident occurred. SCE&G’s argument lacks merit because there is no evidence in the trial record that Mr. Larios knew that SCE&G’s overhead power lines were located behind this property or that he ever set foot outside of the property. The notion that an individual rightfully working on private property could be a trespasser with respect to personal property or supposed easements that are outside the premises cannot withstand any measure of scrutiny. The argument is factually and conceptually flawed, and SCE&G’s motion for JNOV must be denied on this ground.²

The authority cited by Defendant does not counsel a contrary result. SCE&G relies on *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991), and *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), in both of which the court of appeals discussed the elements of the intentional tort of trespass. *Hawkins* was a property rights case in which a business owner sued the City of Greenville, alleging that it negligently designed its municipal drainage system, thereby causing flooding damage to his business following a rainstorm. *Hawkins*, 358 S.C. at 285, 594 S.E.2d at 560. The Court of Appeals upheld the grant of summary judgment to the City on Hawkins’ claim for trespass against real property, finding that the plaintiff “failed to show any affirmative and intentional act necessary to sustain an action for trespass.” *Id.* at 296. The *Snow* case—another municipal water discharge case brought by a homeowner—likewise resulted in the granting of summary judgment for the City of Columbia, wherein the court roundly rejected the plaintiff’s assertion that “[a] mere unintentional trespass subjects the intruder to liability” *Snow*, 305 S.C. at 552, 409 S.E.2d at 802 (Ct. App. 1991).

² For these same reasons, SCE&G was not entitled to a jury charge regarding Mr. Larios being deemed a trespasser. Plaintiff hereby incorporates these arguments in addition to those set forth below with respect to the right to charge the jury on trespassing.

These cases are lightyears away from providing persuasive, much less dispositive authority, that SCE&G was entitled to judgment as a matter of law because Jose Larios was a trespasser.

b. The electrical shock that Mr. Larios suffered was a known and foreseeable result of SCE&G's failure to maintain separation between its power line and the palm tree Mr. Larios was trimming.

In addition to arguing that Mr. Larios' actions and presence at 3402 Myrtle Street were "illegal" because he was trespassing, SCE&G also argues that it owed no duty to Mr. Larios because his actions were not foreseeable. SCE&G's Mem. in Supp., p. 20-22. More specifically, SCE&G claims that it was not foreseeable that Mr. Larios might be trimming a palm tree within ten feet of its power line. This too flies in the face of SCE&G's own documents and the evidence introduced at trial.

SCE&G's PowerPoint presentation, which sets forth its safety rules regarding tree trimming, minimum required clearances, and mid-cycle inspection and pruning, establishes that Mr. Larios' actions (and subsequent injuries and death) were foreseeable to SCE&G. On page four of its presentation, SCE&G notes that the number one reason for its utility pruning is to ensure public safety and states: "[U]tility vegetation maintenance reduces electrical hazard risk to the public by: Providing separation between wires and vegetation to **eliminate potential electrical shock.**" Pl.'s Trial Ex. #10, p. 4 (emphasis added). The testimony at trial of SCE&G's corporate designee further confirms SCE&G's undisputed awareness of this foreseeable risk:

Q. And, in fact, Mr. Branham, the number one purpose of vegetation management is to protect the public and SCE&G employees and keep them safe; right?

A. Yes. Safety and reliability is extremely important.

Q. Safety is the number one reason, isn't it?

A. And reliability, you know, they both can go hand in hand.

Q. And that's because, Mr. Branham, trees and limbs growing near or into power lines can create a hazard; right?

A. *They can create a hazard.*

Q. Vegetation growing into power lines can threaten the safety of the public, can't it?

A. *It potentially could, yes, sir.*

Trial Tr., 436:09–23.

The fact that SCE&G found it significant enough to draft and deliver a public presentation to the Edisto community regarding the risks and reasons for vegetation management, clearly indicates the foreseeability of the type of electrical shock injury suffered by Mr. Larios. Why would SCE&G inform the public that ensuring separation between vegetation and wires “eliminate[s] [the] potential [for] electric shock” if it didn't think that electric shock was a foreseeable result of *not* providing that necessary separation? This argument by SCE&G turns logic on its head.

In addition, one of the central issues throughout the trial of the case was the visibility of SCE&G's power lines behind 3402 Myrtle Street. The evidence presented at trial concerning the lack of visibility of SCE&G's power lines in this area due to overgrowth of vegetation is yet another reason Mr. Larios' electrical shock and death were foreseeable. Because SCE&G clearly owed a duty to Mr. Larios, its Motion for JNOV should be denied.

2. SCE&G is not entitled to JNOV on the issue of proximate cause because that issue was properly submitted to the jury and the jury was charged with the law on intervening and superseding negligence.

In yet another attempt to invade the province of the jury in determining questions of fact at trial, SCE&G claims it is entitled to JNOV because its negligence was not a proximate cause of Mr. Larios' catastrophic injuries and resulting death.

“It is generally for the jury to say whether the defendant’s negligence was a concurring, proximate cause of the plaintiff’s injuries.” *Id.* (citing *Grooms v. Minute-Maid*, 267 F.2d 541 (4th Cir. 1959)). Indeed, the overriding principle in South Carolina is that proximate cause “is normally a question of fact for determination by the jury” and “[o]nly in rare or exceptional cases may the issue of proximate cause be decided as a matter of law.” *Gause v. Smithers*, 403 S.C. 140, 742 S.E.2d 644 (2013) (quotation marks omitted).

“The touchstone of proximate cause in South Carolina is foreseeability. Foreseeability is determined by looking to the natural and probable consequences of the act complained of. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant’s negligence.” *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). Moreover, proximate cause does not mean “sole cause” and in order to establish negligence, a plaintiff is “required only to prove that the negligence on the part of the defendant was at least one of the proximate, concurring causes of his injury.” *Hughes v. Children's Clinic, P. A.*, 269 S.C. 389, 398–99, 237 S.E.2d 753, 757 (1977).

SCE&G’s reliance on *Steele v. Lynches River Elec. Co-op., Inc.*, 259 S.C. 239, 191 S.E.2d is misplaced. In fact, the quoted excerpt on page 23 of SCE&G’s memorandum makes it abundantly clear that the plaintiff in the *Steele* case ***intentionally grabbed hold of an energized wire*** that was hanging from an electrical transmission line. There was no visibility issue in that case, nor was the plaintiff’s contact with the power line unintentional. Instead, the plaintiff was reaching for the hanging power line for the purpose of cutting out a small section so he could use it to jump-start the ignition of his brother’s car. *Steele*, 259 S.C. at 242, 191 S.E.2d at 254. The court in that case therefore held that the plaintiff’s “*purposeful action*” in reaching out and grabbing a power line barred his own recovery. *Id.* at 244.

Here, throughout trial the jury heard substantial evidence from both sides regarding the proximate cause (or causes) or Mr. Larios' injuries and death. SCE&G presented evidence and argued extensively about the fault of Mr. Larios' employer based on his documented violations of federal and state OSHA regulations. SCE&G also argued its position that the power line that shocked Mr. Larios was "open and obvious" and should have been easily seen by Mr. Larios himself.³ The jury also heard evidence about PENSCO's role in hiring Mr. Larios' employer, and about how Mr. Larios was an "unqualified" worker as defined by OSHA regulations.

After being properly charged on proximate cause, intervening and superseding cause, and the defenses of comparative negligence and employer fault (under *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017)), the jury weighed the competing evidence and determined that both SCE&G ***and*** Mr. Larios proximately caused his death and allocated fault to both parties according to their collective judgment. Recognizing that the issue of proximate cause is "a question of fact for determination by the jury," the Court should deny SCE&G's Motion for JNOV on this basis.

3. SCE&G is not entitled to JNOV on comparative negligence because the jury properly weighed the comparative fault of the parties and issued a just verdict.

SCE&G's third and final argument for why it should be entitled to JNOV is that Mr. Larios' "primary implied assumption of the risk" and "overwhelming negligence" bars his recovery. As discussed below, these issues were properly submitted to the jury and this yet-again recycled argument⁴ should be rejected and SCE&G's Motion for JNOV should be denied.

³ Trial Tr., 88:08 (SCE&G opening) ("If you can photograph it, you can see it.")

⁴ This section of SCE&G's Memorandum in Support of its Motion for JNOV is nearly an exact recitation of pages 12-17 of its Memorandum in Support of its Motion for Summary Judgment (filed Aug. 20, 2019) which was denied by Judge Mullen (including a Motion to Reconsider), as well as pages 14-19 of its Memorandum in Support of its Motion for Directed Verdict, which was

It is well-settled that the “determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn.” *Brown v. Smalls*, 325 S.C. 547, 559, 481 S.E.2d 444, 451 (Ct. App. 1997). As the South Carolina Supreme Court has stated:

Ordinarily, comparison of the plaintiff’s negligence with that of the defendant is a question of fact for the jury to decide. In a comparative negligence case, the trial court should only determine judgment as a matter of law if *the sole reasonable inference* which may be drawn from the evidence is that the plaintiff’s negligence exceeded fifty percent.

Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000); *see also Trivelas v. S.C. Dep’t of Transp.*, 357 S.C. 545, 551, 593 S.E.2d 504, 507 (Ct. App. 2004) (rejecting defendant’s argument that the sole reasonable inference was that the plaintiff was more than fifty percent negligent); *Creech v. South Carolina Wildlife and Marine Res. Dept.*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997) (holding comparison of a plaintiff’s negligence with that of the defendant is a question of fact for the jury to decide).

a. Primary implied assumption of the risk does not apply because Mr. Larios did not assume the risk of contacting an energized power line by trimming a palm tree.

SCE&G’s claims that when Mr. Larios climbed up a ladder to trim a palm tree, he assumed the risk of electrical shock from its power line. SCE&G Mem. in Supp., p. 26. According to SCE&G, the danger of electrical shock is “the precise danger he should have expected,” and therefore his recovery is barred by the doctrine of “primary implied assumption of the risk.”

As an initial matter, assumption of risk has long since been subsumed by South Carolina’s adoption of comparative negligence. “Consequently, assumption of risk no longer served as a complete bar to a negligence claim; rather, the defense was simply another factor to consider in

denied by the trial court at the close of Plaintiff’s case. These are not new arguments, and SCE&G offers no new evidence that would suddenly make them meritorious.

comparing the parties' negligence." *Singleton v. Sherer*, 377 S.C. 185, 206, 659 S.E.2d 196, 207 (Ct. App. 2008). In addition, "[t]he doctrine of assumption of the risk embodies the principle plaintiffs may not recover for injuries received when they *voluntarily* expose themselves to a **known and appreciated danger.**" *Id.* (emphasis added).

Nevertheless, "[p]rimary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are **inherent** in a particular activity." *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011) (emphasis in original). "Inherent" means "involved in the constitution or essential character of something; belonging by nature or habit." *Merriam-Webster Dictionary* (<https://www.merriam-webster.com>); *see also Dictionary.com* (<https://www.dictionary.com/browse/inherent>) ("[E]xisting in someone or something as a **permanent and inseparable element**, quality, or attribute.") (emphasis added).

The cases cited by SCE&G drive this point home and demonstrate the applicability of this doctrine to only those risks that are inherent in a particular activity. For example, the injury sustained in *Cole* resulted from a collision at home plate in a softball game, when the plaintiff (who was playing catcher) was run into by a baserunner trying to score on a base hit. *Cole*, 397 S.C. at 249, 725 S.E.2d at 477. In *Hurst v. East Coast Hockey League*, 371 S.C. 33, 637 S.E.2d 560 (2006), the plaintiff was injured when a hockey puck struck him in the face while he was watching a professional hockey game; the court held that "a flying puck is inherent to the game of hockey" *Hurst*, 371 S.C. at 38, 637 S.E.2d at 562–63.

The same cannot be said about the risk of electrocution or electrical shock while trimming a palm tree. Mr. Larios was hired to trim the palm trees at 3402 Myrtle Street, not to perform "utility trimming" (which, by contrast, involves clearing tree branches and vegetation off and away from power lines). Climbing a ladder to trim trees does not inherently expose one to the risk of

electric shock. There is no evidence that Mr. Larios “voluntarily” or knowingly exposed himself to a “known and appreciated” danger of electrical shock. Furthermore, the jury was permitted to, and did, consider the fault of Mr. Larios within the framework of South Carolina’s comparative negligence scheme, which incorporates assumption of the risk. Based on the evidence they heard and viewed, the jury determined that Mr. Larios was partially responsible for his own injuries and death, as reflected by their verdict.

b. The jury weighed the evidence and reached a verdict that reflects comparative negligence of both parties, and therefore SCE&G’s “overwhelming negligence” argument is without merit.

SCE&G’s final, repeated argument in support of its Motion for JNOV is that Mr. Larios’ “overwhelming negligence” bars his recovery. As addressed above, the issue of comparative negligence was properly submitted to the jury, who determined that both SCE&G and Mr. Larios were partially at fault for his injuries and death.

Besides, the authorities cited by SCE&G as “factually comparable” are far from that. For example, SCE&G cites *Priest v. Brown*, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990), in which a police officer responded to help with a downed power line in the street. Several witnesses warned the officer that the power line was “hot,” but he proceeded to pick up the line to move it, and as a result was electrocuted. The remaining authorities cited by SCE&G, including those which reference “secondary implied assumption of the risk” all involved a plaintiff who *knowingly encountered* a known risk created by the defendant’s negligence. Mr. Larios did not knowingly encounter the risk of electrical shock from a power line, he did not knowingly come within 10-feet of a powerline, and there is no evidence in the record that he (or many of the other investigating witnesses) ever knew that SCE&G’s power line were there.

For the foregoing reasons, SCE&G’s Motion for Judgment Notwithstanding the Verdict should be denied.

II. SCE&G'S MOTION FOR A NEW TRIAL SHOULD BE DENIED.

In addition to seeking JNOV, SCE&G has also invited this Court to set aside the jury's verdict and order a new trial for seven (7) reasons, none of which are meritorious and all of which should be rejected. As detailed below, the jury's careful weighing of the evidence and the trial court's correct application of the law warrant a denial of the drastic post-trial relief SCE&G now seeks.

1. **The Court should decline SCE&G's invitation to "hang" the jury as thirteenth juror because there is no legal or factual justification for doing so and the evidence supports the verdict.**

"The thirteenth juror doctrine entitles a trial court to act as a thirteenth juror when it finds the evidence does not justify the verdict and it may then grant a new trial *based solely on the facts.*" *Curtis v. Blake*, 392 S.C. 494, 504, 709 S.E.2d 79, 84 (Ct. App. 2011) (citing *Youmans v. S.C. Dep't of Transp.*, 380 S.C. 263, 287, 670 S.E.2d 1, 13 (Ct. App. 2008)). In *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (1996), the South Carolina Court of Appeals explained the underpinnings of the thirteenth juror doctrine:

The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). **Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed.** *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983)

Vinson, 324 S.C. at 403–04, 477 S.E.2d at 722–23 (emphasis added). Where there is "any evidence" to support the trial court's decision, the denial of a motion for a new trial under the thirteenth juror doctrine will not be disturbed on appeal. *Haselden v. Davis*, 341 S.C. 486, 506, 534 S.E.2d 295, 306 (Ct. App. 2000), aff'd, 353 S.C. 481, 579 S.E.2d 293 (2003) ("To reverse such a denial, we must find the moving party was entitled to a directed verdict at trial.").

In *Vinson*, the defense verdict reached by the jury was based entirely on negative inferences drawn from testimonial inconsistencies of the plaintiff's two and only witnesses (himself and his treating dentist). The defendant did not call any witnesses or put on any evidence in his case in chief. The Court found that, based merely on the inferences drawn by the jury as a result of cross-examination, there was "sufficient evidence from which the jury could have reached a verdict in favor" of the defendant. The trial court denied the plaintiff's motions for a new trial absolute and nisi additur, refusing to step in as the thirteenth juror, and the Court of Appeals affirmed.

In *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 195 S.E. 638, 641 (1938), an early personal injury case addressing the thirteenth juror doctrine, the South Carolina Supreme Court declined to overturn the trial court's refusal to grant a new trial absolute. *Worrell*, 195 S.E. at 642. The court found that the evidence, "though meager" was sufficient to support the jury's findings and certainly the trial judge's denial of the motion for a new trial absolute. *Id.* at 641 ("In civil actions the law does not require proof to a certainty, but it is enough if the evidence is sufficient to satisfy the mind and conscience of the court and jury of the reasonable probability of the truth of the allegations.").

Unlike the many thirteenth juror cases in South Carolina, which typically involve an evaluation of whether the evidence first supports a finding of liability, and if so, whether a damages award is justified, SCE&G jumps straight to the latter for obvious reasons. SCE&G's allegation that the result of the trial "is not supported by a fair preponderance of the evidence" is nothing more than an inappropriate attempt to impassion the Court to set aside the verdict by focusing on one thing, and one thing only: the *size* of the two damages verdicts. The Court need not look any further than page 32 of SCE&G's memorandum. There, not only does SCE&G materially misrepresent the closing argument of Plaintiff's counsel—by presenting inaccurate statements as

verbatim quotations—but it also repeatedly recites the collective size of the verdicts (without accounting for the jury’s finding of comparative negligence) in an effort to induce the Court into an improper legal analysis. To make matters worse, SCE&G obsessively offers non-sequiturs which have no bearing on the jury’s determination of the *noneconomic damages* in this case (e.g., “Plaintiff introduced no evidence – *not one single dollar* – of any actual monetary damages.”). SCE&G Mem. in Supp., p. 32.

The reality is, at trial, Plaintiff presented substantial evidence to satisfy its burden of proof, first on liability—a topic which SCE&G’s thirteenth juror argument conveniently ignores altogether—and then on damages. On liability, the jury heard evidence regarding SCE&G’s responsibility to provide separation between vegetation and its power lines, and the dire safety risks created when SCE&G fails to do so. Trial Tr., 475:16–476:01 (Branham). There was uncontroverted evidence that SCE&G did *nothing whatsoever*—i.e., exercised no due diligence—to inspect or safeguard the condition of its lines behind 3402 Myrtle Street for a period of nearly three years. *Id.* at 445:20–450:15; 456:15 – 457:09 (Branham). It was conceded by both SCE&G employees who testified at trial that there was nothing that would’ve prevented SCE&G from inspecting or trimming the subject palm tree during that time period. Trial Tr., 450:23–451:09 (Branham); 618:23–619:02 (Walker). The jury also heard the glaring inconsistencies in the arguments of SCE&G’s counsel and the testimony of its own witnesses. These inconsistencies were highlighted when the assertion of SCE&G’s corporate representative that the company has “thousands” of linemen working on and inspecting its lines daily was directly contradicted by the testimony of Rodney Walker, a lineman, who said he never inspects lines for vegetation problems because that is simply not the job of an SCE&G lineman:

Q. Would it surprise you to learn that linemen don’t believe their job is to inspect for vegetation management?

A. [SCE&G]: Yes, that would surprise me. Because they're out in the field and they're working on trees all the time and it's a very common situation.

Trial Tr., 446:14–19 (Branham).

Q. Mr. Walker, there's been some testimony in the case that linemen are out doing all kinds of inspections every day, every night, they're inspecting all the lines. Those are inspectors. But I want to ask you something. You're not tasked with doing inspections for tree trimming or clearance issues, are you?

A. No.

Q. And you don't know anything about SCE&G's utility pruning practices, do you?

A. No, I don't.

Q. And you've never been asked, Mr. Walker, to keep any kind of inspection records or anything else related to vegetation as a lineman, have you?

A. No.

* * *

Q. And you've never done an inspection out there to determine whether SCE&G's lines are in fact clear of vegetation, have you?

A. No, sir.

Q. That's is not the job of a lineman, is it?

A. No, sir.

Id. at 615:25–616:13; 618:17–22 (Walker). Finally, there was evidence presented that had SCE&G inspected and trimmed this palm tree prior to November 29, 2015, Mr. Larios' severe injuries and death would have been prevented. *Id.* at 315:10–16; 316:06–12 (Brill).

With respect to damages, Plaintiff offered equally compelling and unchallenged evidence to satisfy the burden of proof and support the jury's verdict. Importantly, not a single portion of the testimony at trial regarding damages was objected to or challenged by SCE&G on cross-examination. A complete recitation of the damages evidence at trial is set out in Plaintiff's Memorandum in Opposition to SCE&G's Motion for New Trial Absolute or Nisi Remittitur, but restated succinctly here:

- Pedro Abraham testified that he heard Mr. Larios scream out in pain after being shocked, he saw smoke coming off Mr. Larios (and smelled burning), and that after

Mr. Larios was shocked, he observed Mr. Larios drop his head and lose muscular strength in his body, after which he plummeted twenty-five feet to the ground below. Mr. Abraham further testified that he rushed to assist Mr. Larios on the ground, lifted his head and asked Mr. Larios if he was “okay.” Despite responding that he was “fine,” Mr. Abraham realized Mr. Larios was not fine and ran to call for help.

- Dr. Presnell testified to the gruesome nature and extent of the injuries Mr. Larios suffered after his electrical shock and fall. These included an electrical burn on his abdomen, fourteen fractured ribs, four fractured vertebrae in his spine, and the severe laceration of multiple internal organs, including his liver and both kidneys, which caused substantial internal bleeding.
- Edward Brill (and SCE&G’s expert, Eric Jackson) testified, from an electrical engineering perspective, to the various nature and extent of electrical shock injuries from a 13,800-volt power line, like the one suffered by Mr. Larios, which caused him to fall from the ladder.
- Jose’s only brother, Gaspar, testified at length and in detail about the harms and losses to his parents and his family in the wake of Mr. Larios’ wrongful death. This included substantial, uncontroverted evidence of wrongful death damages: pecuniary loss, mental shock, pain, suffering, grief, sorrow, and loss of companionship felt by his family. Gaspar’s testimony painted a vivid picture of the initial shock and suffering upon learning of Jose’s death; the subsequent grief, sorrow, and loss of companionship created by the gaping hole of Jose’s absence; and the compensable future damages as a result of the severe loss to the Larios family.⁵
- Tiffany Provence, the Special Administrator for Mr. Larios’ Estate, likewise testified to the enormous damages suffered by Mr. Larios’ family. In her role as Special Administrator for Mr. Larios’ beneficiaries (his parents) she stated that she observed that Mr. Larios was his parent’s “pride and joy” and was incredibly supportive. Her testimony was that Mr. Larios at times sent his entire paycheck to his parents to help provide for their needs including medical expenses, and that his death was “financially and emotionally devastating to these parents.” She talked about how Mr. Larios’ parents learned of their son’s tragic and sudden death and how the family has been severely impacted by the loss of their son, who “was always putting things on hold to help others.”

⁵ SCE&G’s *ex post facto* attempt to cross-examine Gaspar and undermine his testimony by now questioning the frequency of contact between Mr. Larios and his parents, the number of visits between them, and so forth, is entirely improper. See SCE&G’s Motion for a New Trial *Nisi Remittitur*, pp. 9–10. There is manifest prejudice in SCE&G *voluntarily declining* to cross-examine a witness about these topics at trial, only to raise them for the first time in post-trial arguments, and this tactic should not be permitted by the Court.

- Beverly O'Brien, Mr. Larios' friend and co-worker offered the jury moving testimony about the kind of person that Mr. Larios was to those that knew him. She described him as caring, compassionate, and someone who was constantly working, smiling, and looking out for his family. She described his relentless work ethic. She talked about his endeavors, including studying history and the English language. She explained how the Edisto community rallied around Mr. Larios' family following his death, and donations poured in to support the family at a memorial fundraiser.

In short, the jury reasonably concluded that the liability and damages evidence put on at trial by the Plaintiff substantially outweighed what little contrasting evidence SCE&G offered for the jury to consider (via minimal cross-examination and a mere three case-in-chief witnesses, none of whom addressed damages). The jury weighed and considered this testimony, and any reasonable inferences to be drawn therefrom, and reached a verdict well-supported by the evidence.

In further support of its faulty thirteenth juror argument, SCE&G repeatedly claims that “[t]he verdict *had to be* influenced by counsel’s improper argument because there was no evidence or testimony that would have informed the jury’s deliberations with respect to pecuniary loss.” SCE&G Mem. in Supp., p. 32. First, Plaintiff’s counsel’s arguments were not improper and any such argument by SCE&G has been undeniably waived for failure to contemporaneously object at trial. *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 159, 345 S.E.2d 711, 714 (1986) (“We have held that the 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.”); *see also Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 254, 509 S.E.2d 269, 270 (1998) (clarifying the “narrowness” of the court’s holding in *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994), and explaining that the exception espoused in *Toyota* “excuses the failure to make a contemporaneous objection only where the challenged argument constitutes abuse of a party or witness.”).

Second, this was not a case of mere pecuniary loss, and Plaintiff did not present it to the jury as such. SCE&G’s curious inability to appreciate the full nature of the damages in this case—which are largely noneconomic—is reflected throughout their submissions to the Court.⁶ Third, and finally, it would be improper for this court to simply “infer” that the jury acted out of prejudice or that their verdict “*had to be*” influenced by counsel’s argument. In fact, another state’s appellate court recently considered and rejected this very same argument in a wrongful death case resulting in a \$165 million verdict:

Defendants argue that we may simply “infer” that the jury was improperly influenced by passion or prejudice from the verdict itself and that it is “not necessary to point to trial error as a cause.” However, we disagree that our case law allows us to infer improper passion or prejudice simply because the verdict is large and therefore “speaks for itself as to the existence of passion or prejudice.”

Morga v. Fedex Ground Package System, Inc., 420 P.3d 586, 598 (N.M. Ct. App. 2018) (affirming trial court’s denial of remittitur motion on verdict for \$165 million in damages, *including zero punitive damages*).

2. The Court’s denial of SCE&G’s renewed motion for continuance is not grounds for a new trial.

Rule 40(i)(1), SCRCPP, allows a trial court to grant a motion to continue a case “[i]f good and sufficient cause for continuance is shown.” “The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record. Moreover, the denial of a motion for a continuance on the ground that counsel has not had time to prepare is rarely disturbed on appeal.” *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) (citations omitted).

⁶ SCE&G’s misapprehension of the law on damages in South Carolina is fully addressed in Plaintiff’s Memorandum in Opposition to SCE&G’s Motion for a New Trial Absolute or New Trial *Nisi Remittitur*.

SCE&G's argument that it is entitled to a new trial because of the trial court's denial of its renewed, eve-of-trial motion for continuance is perhaps the most "broken record" argument in SCE&G's entire 63-page memorandum. This futile argument warrants a brief (as possible) history of SCE&G's multiple requests for a continuance.

As a preliminary matter, this case was filed on June 7, 2017. Over the course of the following two years, SCE&G did not take or request a single discovery deposition. The *first and only* deposition noticed by SCE&G throughout the entire life of the case, which was of Plaintiff's expert, occurred on June 14, 2019. Nevertheless, SCE&G's *first* motion for continuance was filed on August 14, 2019, after this case unsurprisingly appeared on Colleton County's August 26, 2019 trial roster. The purported bases for this motion were that there were several outstanding motions that had not yet been ruled upon and that SCE&G had not yet deposed several minor fact witnesses identified in Plaintiff's discovery responses (none of whom Plaintiff called at trial). One week later, on August 21, 2019, Judge Mullen held a hearing on all outstanding motions, including SCE&G's motion for continuance. At that hearing, Judge Mullen granted SCE&G's motion for continuance, based not on the grounds asserted in SCE&G's motion, but instead because of an off-the-record discussion with counsel which revealed a sensitive and personal conflict that SCE&G's counsel had with the August 26th trial date. Shortly after the August 21st hearing, Judge Mullen denied all other outstanding motions (including for summary judgment). Thereafter, this case was subsequently set for a date certain trial beginning on September 23, 2019.

On September 13, 2019, SCE&G (along with the other Defendants at that time) filed its *second* motion for continuance. The basis for this motion was SCE&G's newly discovered information concerning a prior, unrelated injury involving Mr. Larios, following which he was

treated at the Medical University of South Carolina (“MUSC”).⁷ That afternoon, Judge Mullen held a status conference with all counsel by telephone. During the telephone conference, Judge Mullen heard extensive argument from Defendants’ and Plaintiff’s counsel about whether a continuance was warranted in light of the information about Mr. Larios’ prior injury. Rather than ruling on SCE&G’s motion for continuance at that time, Judge Mullen agreed to enter an Order compelling MUSC to produce Mr. Larios’ medical records associated with the prior, unrelated injury. Notably, Judge Mullen rejected SCE&G’s initial proposed order and specifically asked counsel to delete the statement: “these records have been determined to be necessary for the September 23, 2019 trial of this matter.”⁸

Judge Mullen signed her Order compelling the production of the MUSC records on Saturday, September 14th, and on the following Monday, September 16th, she forwarded the signed Order to MUSC’s general counsel to expedite the production process. All parties received the medical records from MUSC on Tuesday, September 17, 2018. Over the course of two days, Judge Mullen reviewed written arguments from counsel regarding the relevance of the records from Mr. Larios’ prior unrelated injury, and whether such new material necessitated further discovery and

⁷ On September 11, 2019, Defendant PENSICO Trust Company, LLC served subpoenas on MUSC, Charleston County Fire Department, Charleston County EMS, Charleston County Sherriff’s Office, Colleton County Fire Department, Colleton County Sherriff’s Office, Colleton County EMS, and Edisto Beach Fire Department seeking records related to Mr. Larios’ prior, unrelated injury.

⁸ On page 13 of its memorandum, SCE&G claims it is “demonstrably incorrect” that Judge Mullen made any determination about the relevance of Mr. Larios’ prior injury as it relates to this wrongful death lawsuit, simply because she entered a Form 4 Order denying SCE&G’s motion. However, this assertion ignores the specific request by Judge Mullen to remove the “determined to be necessary” language from the Order compelling the production of MUSC’s records. It also ignores the fact that Judge Mullen’s ultimate decision to deny SCE&G’s motion for continuance was based on, and made subsequent to, the parties’ extensive arguments *concerning the relevance and probative value* of the prior injury (and associated medical records) on the issues in this case. SCE&G’s hyper-technical view of Judge Mullen’s ruling places form over substance and does not provide a legitimate basis for a new trial.

therefore a continuance of the trial date. In fact, on Wednesday, September 18th, the Defendants submitted a 9-page Memorandum in Support of their Joint Motion for Continuance. Judge Mullen likewise entertained argument by e-mail from Plaintiff’s counsel. Later that day, after considering the arguments of all counsel and reviewing the MUSC records, Judge Mullen, by e-mail, denied SCE&G’s second motion for continuance and instructed the parties to prepare for trial on September 23, 2019.

SCE&G did not stop there. On the first day of trial, Monday, September 23rd, Defendants—including SCE&G—in violation of SCRCP 43(i), continued to make the very same arguments to the Court in favor of the requested continuance:

[Counsel for PENSCO]: We made a motion for continuance -- the Defendants made a motion for continuance, which was denied by an e-mail, but was not formally denied by any Order. We believe that we have the opportunity to raise this motion again today for the simple fact that we want to know more about the circumstances relating to the injury.

09/23/19 Trial Tr., 06:17–22; *see also* Rule 43(i), SCRCP (“Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.”). After hearing the same arguments from Defendants that Judge Mullen heard and rejected, the trial court properly denied Defendants’ renewed motion for continuance.

Yet, here we are again. SCE&G now claims, following a week-long trial of this case on the merits, that it is entitled to a new trial because its motion for continuance was denied by Judge Mullen and again by the trial court. For the first time, and disingenuously in contravention of prior statements by the Defendants, SCE&G now seeks sanctions and has accused Plaintiff (and her counsel) of a “deliberate failure to locate and produce responsive information” in discovery concerning the prior, unrelated injury that Judge Mullen found *did not* warrant any further

discovery.⁹ SCE&G Mem. in Supp., p. 3; *see also* 9/23/19 Trial Tr., 07:04–05 (“[PENSCO’s counsel]: We also understand through looking at the medical records that there was a prior back surgery and he was also a diabetic; health conditions that were not disclosed to us. I want to make abundantly clear that we are not here accusing that counsel did anything wrong”) and 185:18–20 (“MR. PUGH: Judge, very briefly. Here’s my concern. We did ask specific questions, and again, I’m not casting spurs (sic) with counsel, they obviously didn’t know about it either.”). As demonstrated by the sound rulings made by Judge Mullen prior to trial, and later by the trial court, these accusations are unfounded, and SCE&G has failed at any point to establish good cause for the requested continuance.

SCE&G goes on to allege that it was harmed by the denial of its motion for continuance because the trial court charged the jury on Mr. Larios’ life expectancy under S.C. Code Ann. § 19-1-150. First, *SCE&G did not make any objection to this charge at trial* and has therefore waived its right to do so now. Trial Tr., 638:14–25 (“[MR. PUGH]: Dominion Energy South Carolina had submitted charges on the assumption of risk. Secondary imply to assumption of risk and trespass. And it is our understanding Your Honor does not give those. We would simply take exception to that. . . . And I think the rest is okay.”); 720:11–23 (same). Second, it was proper for the trial court to charge the mortality tables in this wrongful death action, *Haselden v. Davis*, 341 S.C. 486, 505, 534 S.E.2d 295, 305 (Ct. App. 2000), *aff’d*, 353 S.C. 481, 579 S.E.2d 293 (2003). In *Haselden*,

⁹ SCE&G also repeatedly complains about a single answer that Gaspar Larios (Mr. Larios’ brother) gave during his deposition, calling it “noteworthy and unbelievable.” Specifically, Gaspar—who does not speak English—was asked *one* non-specific, broadly worded question about his brother: “How about his health before he fell, how was it?” His answer was: “He was fine. He was a big man and strong.” First, this answer highlights the irrelevance of Mr. Larios’ diabetic condition (which according to MUSC records was “well controlled”), as well as his prior back surgery and head injury. Second, the fact that Gaspar did not give the answers that SCE&G apparently desired is due *solely* to the failure of the questioner to follow up or ask better questions.

the trial court rejected an argument similar to SCE&G's and that ruling was affirmed on appeal. *See* 341 S.C. at 505, 534 S.E.2d at 305 (“[The defendant] additionally argues the court erred in permitting the jury to use the South Carolina mortality tables in the absence of any evidence that [the decedent] could have lived to her full life expectancy. We disagree.”).

For the foregoing reasons, SCE&G's Motion for a New Trial should be denied. Likewise, SCE&G's Motion for Sanctions should be denied.

3. SCE&G waived its argument related to the OSHA report because it never sought to admit it into evidence at trial.

SCE&G contends that a new trial must be granted because the “trial court did not allow it to introduce the OSHA Report” into evidence. That assertion is demonstrably false (as confirmed by a review of the trial transcript), and the misrepresentation made by SCE&G warrants denial of its new trial motion on that basis. In any event, the OSHA report would not be admissible on a wholesale basis because it is chock-full of hearsay, conclusions, ultimate-issue statements, and other inadmissible, confusing, and prejudicial evidence.

Prior to trial, Plaintiff filed an extensive Motion *in Limine* seeking to exclude any reference at trial to the subject matter of OSHA, including OSHA's investigation, report, and citations. SCE&G filed a 13-page memorandum in opposition to this motion. The Court conducted a pretrial hearing on Plaintiff's motion, and SCE&G argued vehemently against such a ruling *in limine*. After hearing arguments of counsel, the Court denied Plaintiff's motion and ruled that it would not exclude all OSHA-related evidence as requested by the Plaintiff. However, at no point subsequent to that pretrial ruling did SCE&G ever attempt to admit into evidence the OSHA report it now complains was disallowed by the trial court. The trial court never made any further evidentiary ruling regarding the admissibility of this evidence whatsoever. By consent of the Plaintiff, SCE&G moved for the admission of various OSHA *citations* into evidence. However, no proffer

of evidence was ever made regarding the remaining OSHA materials, including the OSHA report. See *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (holding that an alleged erroneous exclusion of evidence—which does not exist in the case at bar—is “not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below.”). SCE&G’s own failure to even attempt to have the OSHA report admitted at trial is not grounds for granting a new trial. Nor is Plaintiff’s stipulation to the admissibility of the OSHA citations a legitimate basis for SCE&G’s contention that the trial court committed an error of law related to the admission of the entire OSHA report.

Aside from the obvious preservation issue for SCE&G’s failure to seek its admission, the OSHA report is not admissible as it contains numerous hearsay statements from a number of interviewees, as well as statements by OSHA investigators involving ultimate issues for the jury. SCE&G’s contention that the entire OSHA report would have been admissible under Rule 803(8), SCRE—had SCE&G actually attempted to move it into evidence—clearly ignores the language of that subsection. Rule 803(8), which creates an exception to the general hearsay ban for public records and reports, importantly forbids evidence like the OSHA report: “[I]nvestigative notes involving opinions, judgments, or conclusions are not admissible.” *Id.* (emphasis added). SCE&G has waived its argument regarding the OSHA report, but even still, such evidence would have been inadmissible because the OSHA report is saturated with unverifiable, inadmissible hearsay and opinions, judgments, and conclusions that would have only confused and misled the jury. Therefore, SCE&G’s motion for a new trial on this ground should be denied.

4. The Court’s refusal to preemptively or retroactively strike the testimony of Edward Brill and/or Erin Presnell, M.D. is not grounds for a new trial; This testimony was admissible, and SCE&G had ample opportunity for cross-examination.

Argument number four from SCE&G as to why it is entitled to a new trial is yet another argument that was raised and ruled upon prior to, and again during, the trial of this case. In this portion of its memorandum, SCE&G simply cut and pasted its prior arguments *in limine* and those made following the close of Plaintiff’s case in chief. SCE&G asserts that the trial court should have excluded and/or stricken the testimony of Dr. Erin Presnell, the independent pathologist who performed an autopsy on Mr. Larios, and Edward J. Brill (“Brill”), Plaintiff’s electrical engineering expert. As the Court recognized before and during trial, but addressed once more below, SCE&G’s arguments are unpersuasive and go to the weight of the evidence, not admissibility. *See Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012) (“[A] challenge to an opinion’s reliability generally goes to weight and not admissibility . . .”).

a. Dr. Presnell’s testimony was properly admitted and the Court’s refusal to strike her testimony is not a legitimate basis for a new trial.

SCE&G’s renewed and repeated argument regarding the testimony of Dr. Erin Presnell is that she should not have been allowed to give her medical opinions regarding the causes of Mr. Larios’ death, because the information she received from the coroner’s office was “inaccurate” and because the mark she identified on Mr. Larios’ abdomen is not evidence of an electrical burn. These same arguments were made in full and rejected by the trial court. Trial Tr., 223:23–230:14. As the Court recognized, neither of these assertions by SCE&G warranted excluding Dr. Presnell’s testimony, and, at best, would be appropriate material for cross-examination. There was no error in this ruling, and accordingly, SCE&G had ample opportunity to, and, did cross-examine Dr. Presnell on both issues.

SCE&G's first argument regarding the information relied on by Dr. Presnell ignores her testimony at trial (instead focusing on her deposition testimony). She explained to the jury clearly the information she received from the coroner's office, including the fact that Mr. Larios' shouted out before he fell, that there was evidence of some kind of contact (direct *or* indirect) with an overhead power line, and that the coroner's office observed some rubber-like material on the rungs of the ladder where Mr. Larios was standing. Importantly, Dr. Presnell noted that in South Carolina, it is standard practice for a pathologist to rely on information provided by the coroner (i.e., it is information "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."). *See* Rule 703, SCRE. The fact that Dr. Presnell's autopsy report does not clearly specify the scenario that Mr. Larios' chainsaw made *indirect* contact with SCE&G's power line is immaterial, especially in light of her testimony on that point. Trial Tr., pp. 255:24–256:03 ("The reference to the chainsaw making contact with an electrical source, even though I do say electrical wire in this history, doesn't necessarily – he's cutting limbs, so whether the source is through the limb or not, I'm not specifying in here."). Dr. Presnell clearly explained to the jury her appreciation and understanding of the facts and clarified that any lack of specificity in the wording of her report was not an indictment of the information she received, nor did it impact her medical opinions. This is not the type of issue that warrants exclusion of expert testimony under Rule 702, SCRE.

SCE&G continues its attack on Dr. Presnell's testimony with the flippant and erroneous assertion that "[t]he mark on Mr. Larios' abdomen is not indicative of an electrical burn." This baseless, non-medical opinion from counsel is unsupported by any competing forensic pathologist, or other expert medical testimony or evidence, which SCE&G could have, but failed to obtain before trial. Rather than attempting to do so in front of the jury, SCE&G now uses a sophomoric

footnote to call into question the credibility and professionalism of Dr. Presnell, an independent, non-retained medical expert who has performed approximately 3,000 autopsies, including dozens involving electrical shock, electrocution, and thermal injuries. *See* SCE&G Mem. in Supp., p. 47 (“By the time she was presented as an expert at trial for Plaintiff, [Dr. Presnell] had apparently familiarized herself with [the] requisite standard for expert testimony.”). This argument should be summarily dismissed because, at trial, Dr. Presnell gave all of her medical opinions to the appropriate degree of certainty, including that the mark on Mr. Larios’ abdomen was the result of indirect electrical contact.

For those reasons, there was no error in allowing Dr. Presnell to testify and SCE&G’s motion should be denied.

b. Brill’s testimony was properly admitted and the Court’s refusal to exclude and/or retroactively strike his testimony (after it was presented to the jury) is not a legitimate basis for a new trial.

Brill’s testimony as an electrical engineering expert was reliable and admissible, and any continuing complaints SCE&G has about such testimony go directly to the weight, not the admissibility of this evidence. SCE&G contends that Brill should not have been allowed to testify, not because of a lack of knowledge, education, training or experience, but because SCE&G claims his methodology was not reliable and he could not opine on the cause of Mr. Larios’ shock and fall to a reasonable degree of certainty. This assertion ignores what happened at trial, and once again SCE&G improperly cites to Brill’s deposition testimony in support of its flawed argument.

As for his methodology, Brill testified clearly under cross-examination that he utilized the scientific method, a time-tested process of making observations, asking questions, formulating a hypothesis or explanation, gathering and analyzing data, and testing to confirm the hypothesis. That is what was done by Brill in this case, in addition to relying on his breadth of experience and

knowledge from prior, similar cases. According to Brill, although there was certain information that he was unable to test (e.g., performing a metallurgical study on the burn mark on the chainsaw observed by several witnesses), there was plenty of evidence to reach the opinions he offered. Trial Tr., 350:21–351:11 (“We’re missing a lot. We also have *tremendous amount of information to rely on to apply the scientific method* and come up with the conclusions that meet a reasonable degree of engineering certainty.”) (Emphasis added). This testimony (and the remainder of Brill’s examination) directly rebuts SCE&G’s erroneous refrain that Brill’s opinions are based on speculation rather than sound, scientific methodology.

Finally, SCE&G’s reliance on an out-of-state, federal district court case in which Brill’s testimony was deemed inadmissible following a *Daubert* hearing is misplaced and desperate. *See* SCE&G Mem. in Supp., pp. 51–52. The facts of that case are not at all similar to this case, nor does the court’s finding in that case have any bearing or relevance on this Court’s correct decision to allow Brill’s testimony here.

The trial court considered these same arguments at trial, and properly concluded that Brill would be permitted to testify and give his opinions. There was no error in allowing this testimony and therefore SCE&G’s motion should be denied.

5. The Court’s refusal to directly charge the jury regarding assumption of the risk and trespass was appropriate based on the evidence presented at trial.

The Court’s instructions to the jury on the applicable law were proper, and SCE&G has failed to present any colorable argument to the contrary. Under South Carolina law, the standard to demonstrate an improper jury charge is exacting, particularly with regard to refusals to provide a certain charge. “To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well. Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the

law and the issues involved.” *McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995).” Here, there was no error in refusing to charge the jury on either assumption of the risk or trespass based on the evidence presented at trial. However, even if there was, such error did not cause any prejudice to SCE&G when the jury charge is considered as a whole.

a. SCE&G failed to submit evidence at trial to warrant a charge of assumption of the risk.

A jury charge for a defendant’s affirmative defense can only be submitted when the evidence at trial allows for it, and the burden was upon SCE&G to submit any such evidence. *State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct.App.2010)(“The evidence presented at trial determines the law to be charged to the jury.”). “Assumption of risk is an affirmative defense.” *Howard v. South Carolina Dep’t of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000). “When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence.” *Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 318, 150 S.E. 789, 792 (1929). The trial of this case was devoid of any evidence that warranted a jury charge of assumption of the risk.

Under South Carolina law, the defense of assumption of risk requires a showing of “an *intelligent and deliberate choice* by [a plaintiff] to assume a known risk.” *O’Leary-Payne v. R,R. Hilton Head, II, Inc.*, 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006) (emphasis added). In this state, “there are four requirements to establishing the defense of assumption of risk: (1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger.” *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 508 S.E.2d 565, 569 (1998).

The sole argument advanced for charging the jury on assumption of the risk is that “Mr. Larios assumed the risk of working within ten feet of an electric distribution line.” *See* SCE&G Mem. in Supp., p. 53. Thus, the dangerous condition at issue in this case, which SCE&G’s Motion readily concedes, was working in proximity to energized power lines. As noted above however, knowledge of the dangerous condition must be admitted into evidence for the jury to be charged on assumption of the risk. While one’s conduct or words can imply knowledge of the condition, there was absolutely no evidence presented at trial which suggested or implied that Jose Larios had any knowledge of the existence of power lines being present on the premises at 3402 Myrtle Street. As a result, assumption of the risk could not have been properly charged.

In fact, the evidence to the contrary is voluminous and uncontroverted. Pedro Abraham, the only eye witness to the event and co-worker to Mr. Larios on the morning of the incident, testified that neither he nor Mr. Larios were aware of any power lines on the property. Trial Tr., 369:4-14; 381:8-20. He testified that they did an inspection of the premises prior to engaging in their work and saw no power lines. *Id.* There was no testimony that Mr. Larios had ever trimmed trees on this property on a prior date and acquired knowledge from previous work. Trial Tr., 368:22--369:1; 411:6-21; 409:24--410:1.

SCE&G was permitted to argue at trial that Mr. Larios *should have known about the power lines*. This was a subject in considerable dispute and was a continuing theme of questioning for virtually every trial witness. For this reason, SCE&G was afforded a charge regarding comparative negligence. However, that fact alone does not mandate a jury charge regarding assumption of the risk.¹⁰ *See Hoeffner v. The Citadel*, 311 S.C. 361, 429 S.E.2d 190 (1993)

¹⁰ As previously noted, Defendant also cannot legitimately submit that knowledge should be imputed by law because the assumed risk or danger was inherent too the activity in which Mr.

(finding reversible error in trial court's charging the jury on the defense of assumption of the risk and stating that "[t]he defense of assumption of the risk applies where the plaintiff assumes a risk of harm arising from the *defendant's* negligent or reckless conduct rather than his own. In the absence of express consent to assume the risk, the plaintiff's conduct can be said to imply assumption of the risk where it is shown that he understood and appreciated a known danger created by the defendant, and then freely and voluntarily exposed himself to it.") (internal citations omitted). There simply was no evidence at trial that Mr. Larios, either verbally or through his conduct, understood and appreciated the existence of any power lines and therefore the refusal to charge the jury on assumption of the risk was proper.

b. SCE&G failed to submit evidence at trial to warrant a charge that Mr. Larios was a trespasser with respect to its power line.

In responding to this argument, Plaintiff hereby incorporates its previous arguments above in opposing Plaintiff's argument for judgment notwithstanding the verdict.¹¹ Again, SCE&G's assertion that a jury charge for trespass was warranted is premised entirely upon the flawed notion that a violation of OSHA's ten-foot rule rendered Mr. Larios a trespasser per se. There has been no additional argument submitted for its inclusion in the Court's charge to the jury. Just like its previous arguments, SCE&G's argument should be given no credence by this Court.

Mr. Larios was rightfully present on the premises on the date in question as a landscaping worker. There was no evidence at trial which corroborated the idea that he ever left the premises or went outside the property boundary. Nonetheless, SCE&G asserts that he was a trespasser with respect to its power line because of workplace safety regulations. These regulations do not seek to dictate or define an injured party's legal rights with respect to property or chattel. A supposed

Larios was engaged. While this is commonly referred to as primary implied assumption of the risk, climbing a ladder to trim trees does not inherently expose one to the risk of electric shock.

¹¹ These arguments are set forth on Pages 4-7 of this memorandum.

violation of a workplace safety regulation simply does not render one a trespasser in any legal sense of the term. The suggestion of Mr. Larios as a trespasser injects issues of criminality, property rights, intentional torts, and premises liability that have no bearing on the circumstances of SCE&G's liability. The trial court properly refused to provide this charge.

SCE&G cites to no persuasive authority, much less controlling precedent, that permits a jury to be charged on the "law of trespass" when OSHA's ten-foot rule has been argued to have been violated. This novel argument must be rejected, again, by this Court.

c. Despite these jury charges being rejected, SCE&G has suffered no prejudice given the jury charges provided as a whole.

"In reviewing jury charges for error, [one] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Cole v. South Carolina Electric & Gas, Inc.* 355 S.C. 183, 584 S.E.2d 455 (Ct. App. 2003)(quoting *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). The jury charges provided by the Court provided the near equivalent of what SCE&G claims was omitted, such that no prejudice can be claimed to have been suffered. Indeed, charges were provided about the scope of SCE&G's duty, the OSHA regulations that were alleged to have been violated, the role of comparative negligence, the duty to obey the law by Mr. Larios, and the role of foreseeability within proximate cause.

Defendant's submission that the "the jury had no context in which to evaluate Mr. Larios' actions and, more specifically, the propriety of his action in placing himself within ten feet of [SCE&G's] electric line, in contraction of OSHA safety laws[]" is directly rebutted by not only the above-referenced jury charges but also the jury's finding that Mr. Larios was, in fact, comparatively negligent. Defense counsel freely argued that Mr. Larios was wrongfully within

ten feet of the power lines, that he was negligent in doing so, and that it only holds a duty to those who are foreseeably in proximity to its power lines.¹² The jury was well-equipped to understand that SCE&G's duties and responsibilities could be (and were ultimately found to be) lessened by the wrongful acts of Mr. Larios. The notion that a charge on assumption of the risk or the law of trespass would have permitted the jury to increase their finding of comparative negligence or find that SCE&G held no duty of care is without merit.

6. No juror knowingly failed to respond during *voir dire* because the question at issue in SCE&G's Motion for a New Trial was never presented to the jury venire.

In a last-ditch effort to erase the jury's verdict, SCE&G resorts to arguments of improper juror conduct by submitting an affidavit from defense counsel about an anonymous juror's discussions with her after trial.¹³ The prospect of juror misconduct is a serious allegation and one that seeks to undermine every aspect of the trial proceedings in this case. When these types of attacks are launched, it should be presumed that the allegation, regardless of legal merit, is supported by legitimate factual background. Unfortunately, SCE&G has made material misrepresentations to this Court about the language of the *voir dire* questions posed to the jury panel which are easily rebutted by the trial transcript and should allow the Court to immediately dispense of these juror misconduct allegations. These types of eleventh-hour, post-trial tactics should not be taken lightly by this Court. To be sure, the statements set forth in defense counsel's

¹² See SCE&G's closing argument at Trial Tr., 672: 08–14 (“And unfortunately on the day [Mr. Larios] died, he was trimming trees in violation of the OSHA laws that were specifically in place to protect him. That's the purpose of OSHA laws to protect him. Whether it's his employer or in this case, himself being responsible for working safely and not putting himself in a position where he violates the law and is injured.”)

¹³ The anonymity of this alleged juror alone eviscerates the credibility of this argument and prevents the Court from having any form of record from which to rule upon.

sworn statement and relied upon in the Motion for a New Trial are demonstrably false, incredibly misleading, and only serve the purpose of concocting a narrative that the jury was impartial.¹⁴

The entirety of SCE&G's argument for a new trial based on juror misconduct hinges on the following question being supposedly submitted to the jury venire:

*“Do you know anyone who has been injured by an electrical shock or has been electrocuted?”*¹⁵

SCE&G asserts that this question was read “verbatim” and goes on to allege that a certain unidentified juror represented to counsel after trial that she had a friend who was shocked as a lineman but that the juror did not report this background to the Court in response to the above question. As a result, SCE&G concludes that this is the type of “egregious,” “unreasonable,” and “intentional” behavior that warrants a new trial under the strict requirement of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). However, ***this question was never read by the Court whatsoever.***

Any assertion to the contrary is easily refuted by review of the trial transcript.

In reality, the following two questions were posed to the jury venire:

“Is there any member of the jury panel who has been injured by way of an electrical shock or any type of electrical – electrocution or any type of injury based upon electrical shock? If so, please stand.” (Trial Tr., 146:04–08)

¹⁴ Plaintiff also submits that this affidavit is not admissible or proper for the Court's consideration pursuant to Rule 606(b) of the South Carolina Rules of Evidence. *See, e.g., Lynch v. Carolina Self Storage Center, Inc.*, 409 S.C. 146, 706 S.E.2d 111 (Ct. App. 2014)

¹⁵ Even if this *voir dire* question had been posed, the unidentified juror's conduct would still fail to meet the stringent burdens for a new trial imposed by *Woods*. Specifically, the alleged question only asked prospective jurors to identify if they knew of anyone *injured* by electric shock or electrocution. The affidavit submitted to this Court by defense counsel does not allege that the anonymous juror's friend was ever injured at all. Rather, the affidavit merely suggested that his or her friend was “shocked.” This is not evidence of a question which, “reasonably comprehensible to the average juror,” would require someone to inform the Court of a friend who was shocked but not injured. *Id.* at 588. At worst, one might liberally interpret the question to be ambiguous, which still fails the exacting standards of *Woods* to warrant a new trial.

“Is there any member of the jury panel or a member of your family that has ever received or been shocked by utility power line? If so, please stand.” (Trial Tr., 149:20–23)

No further questions were submitted to the jury regarding an electrical shock or event. Notably, neither question above asked any juror to identify if they “kn[e]w anyone who ha[d] been injured by an electrical shock or been electrocuted[.]” Prospective jurors were only asked to identify if they personally had been injured from an electrical shock or if they or a family member had been shocked by a power line at all. Therefore, the lack of a response from the anonymous juror regarding a friend is appropriate and does not amount to any level of concealment, much less the intentional concealment envisioned by *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001). Accordingly, SCE&G’s Motion must be denied.

7. A jury viewing of the premises was properly denied by the Court.

In its final argument for a new trial, SCE&G cites to the Court’s refusal to allow a jury viewing of the property in question. While either party may request a site visit, the burden rests with the proponent of the visit and the standard is one of necessity. *See* S.C. Code Ann. § 14-7-1320 (permitting jury viewings only “when it appears to the court that such view *is necessary to a just decision.*”) (Emphasis added). During the trial of this matter, a viewing was not only unnecessary, any such visit would have been highly inappropriate and prejudicial to Plaintiff.

The property has been dramatically altered since November 29, 2015 such that any jury viewing would only have resulted in undue confusion. The tree that Mr. Larios fell from has been removed by the Defendants in this case, a neighboring tree has been significantly reduced and shortened, and the entire vegetation surrounding the power lines has been trimmed back as a result of 2018 cycle trimming by SCE&G. Thus, the condition of the property is markedly different than it was approximately four years ago. The purposes of a jury viewing would not have been served given these stark differences because the aim of any viewing is to enable the jury “to understand

the evidence presented in the courtroom.” *City of Columbia v. Jennings*, 288 S.C. 79, 339 S.E.2d 534 (Ct. App. 1986). The evidence presented during trial would appear foreign when juxtaposed with the current site. Had a jury viewing occurred, at best, the scene would only show what the premises should have looked like had appropriate safety measures and trimming been implemented and conducted.

Under *Gossett v. State*, 300 S.C. 473, 388 S.E.2d 804 (1990), evidence of alteration is sufficient to defeat the proposal of a jury viewing. *Id.* (“Here, there is evidence that the crime scene has been altered substantially since the crime occurred. It would therefore be of little, if any, probative value for the jury to view it.”) Additionally, even had no alternation occurred, the litany of photographs presented at trial along with the witnesses’ testimony were sufficient to render a site visit request improper. *State v. Spinks*, 260 S.C. 404, 196 S.E.2d 313 (1973) (where photographs and testimony provide sufficient understanding, a site visit isn’t necessary).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court deny SCE&G’s Motions for Judgment Notwithstanding the Verdict, New Trial, and Sanctions.

Respectfully submitted,

YARBOROUGH APPLGATE LLC

s/ William E. Applegate IV

William E. Applegate IV
Liam D. Duffy
Perry M. Buckner, IV
291 East Bay Street, Floor 2
Charleston, South Carolina 29401
(843) 972-0150 Office
(843) 277-6691 Fax
william@yarboroughapplegate.com
liam@yarboroughapplegate.com
perry@yarboroughapplegate.com

AND

**SMITH, ROBINSON, HOLLER, DUBOSE,
AND MORGAN, LLC**

G. Murrell Smith, Jr. (SC Bar No.: 66263)

murrellsmith@smithrobinsonlaw.com

Shannon N. Peake (SC Bar No.: 102723)

shanonp@smithrobinsonlaw.com

Post Office Box 580

Sumter, SC 29151-0580

Tel:803.778.2471

October 18, 2019

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO. 2017-CP-15-0423
)	
Tiffany N. Provence, as Special)	
Administrator for the Estate of Jose Refugio)	
Licona Larios,)	
)	
Plaintiff,	)	PLAINTIFF’S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT’S
vs.	)	MOTION FOR NEW TRIAL ABSOLUTE
	)	OR NISI REMITTITUR
)	
South Carolina Electric & Gas Company;)	
PENSCO Trust Company LLC; and)	
Edisto Sales & Rentals Realty, LLC,)	
)	
Defendants.)	

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

According to the rules of the common law of South Carolina, “[t]he jury’s determination of damages is entitled to substantial deference.” *Knoke v. S.C. Dept. of Parks, Rec. and Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996); *Clark v. S.C. Dept. of Pub. Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002). “In considering a motion for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000) (citation omitted). There must be “compelling reasons...to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dept. of Health and Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). There must be even more to justify invading the jury’s province by granting a new trial absolute: the verdict must be “so flagrantly excessive as to raise a presumption that it

was the result of passion and prejudice, not of sober, reflective judgment.” *Lucht v. Youngblood*, 266 S.C. 127, 137–38, 221 S.E.2d 854, 859 (1976).

Further, in reviewing this post-trial motion, the Court must view the evidence at trial in the light most favorable to Plaintiff. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964); *Welch*, 342 S.C. at 302–03, 536 S.E.2d at 420. Here, in viewing the totality of the evidence presented, including the testimony of both expert and fact witnesses, which this Court has already determined was sufficient to present the questions of both liability and damages to the jury, the Court should find no “compelling reason” to invade the jury’s province and reduce the thoughtfully undertaken verdict, or, much less, evidence of some “passion or prejudice” on the part of the jury necessitating a new trial absolute. This is an actual-damages verdict with comparative fault attributed to the Plaintiff and no finding of punitive damages against the Defendant. By all objective evidence, this jury’s award of damages was the result of sober and reflective judgment.

SURVIVAL DAMAGES PRESENTED AT TRIAL

The evidence presented at trial showed that the final hours of Jose Larios’s life were painful, debilitating, and filled with trauma. Jose, only forty-one years old, encountered a life-threatening hazard that sent volts of electricity into his body and caused him to fall twenty-five feet down to the ground, all while he was conscious. Jose then endured the pain undoubtedly

caused by the numerous, massive orthopedic and internal injuries he suffered until he was finally pronounced dead at the hospital, at least two hours after his fall.¹

The evidence at trial firmly demonstrated that Jose was alive and conscious after the electrical event. Mr. Pedro Abraham testified that Jose screamed out in pain upon receipt of the electrical shock; that his body went limp, as though he had lost muscular strength and control; and that he was grasping for his own survival atop the ladder before falling twenty-five feet.² By listening to the testimony of Pedro Abraham and expert Ed Brill regarding the electric-shock event,³ the jury could rationally infer that Jose appreciated the life-or-death gravitas of the situation. The jury could most certainly infer and comprehend the tremendous pain and fear that Jose was experiencing as he ultimately fell twenty-five feet to the ground.

Jose landed on his back after the twenty-five-foot freefall, and as the pathologist, Dr. Presnell, testified, Jose sustained fourteen fractured ribs (seven on each side), four fractured vertebrae in his spine, and the severe laceration of multiple internal organs, including his liver and both kidneys as a result of the fall.⁴ These injuries caused internal bleeding and hemorrhaging.

¹ SCE&G concedes that the incident occurred some number of minutes prior to 9:50 a.m. SCE&G Motion at 4 n. 3. SCE&G did not call any expert or fact witness at trial to refute the time of Jose's death, which the pathologist identified as 11:49 a.m. Trial Tr., 266:13–20 (cross-examination of Dr. Erin Presnell); Pl.'s Tr. Ex. #3 (pathology report). **SCE&G's citations to the records of emergency responders and other witnesses or documents not entered into evidence at trial are entirely improper. The Court should not even consider SCE&G's presentation of facts outside the trial record.**

² Trial Tr., 369:15–370:21 (direct examination of Mr. Abraham).

³ *Id.* (Abraham direct); *Id.* at 287:04–301:05 (direct examination of Plaintiff's expert Ed Brill regarding the specifics of the electric-shock event).

⁴ *Id.* at 235:22–239:18 (Dr. Presnell direct); Pl.'s Tr. Ex. # 3 (pathology report).

On his right side alone, Jose lost approximately 1,500 milliliters of blood.⁵ The pathologist's testimony concerning the type and extent of Jose's injuries was uncontested by any witness at trial.

Additional uncontested testimony showed that Jose Larios was still alive and responsive, speaking to Pedro Abraham, after he fell. Unfortunately, Pedro was unable to request help immediately due to poor cellular coverage in the area, and left the scene to find help. This left Jose waiting, alone, for the arrival of medical assistance.⁶ Jose, bleeding internally and unable to move, was left lying on the ground, slowly dying, completely alone, without family, friends, or any form of comfort.⁷ Much later, when his brother Gaspar arrived on scene, he was informed by emergency personnel that Jose was still doing well.⁸

SCE&G points to Jose's statement to Pedro that he was "fine," presumably as some evidence that he was not in pain despite his extensive injuries, ignoring Pedro's additional testimony: "but I realized he was not fine"⁹ The jury could certainly understand and appreciate that Jose, without a doubt, was not "fine." He was alive, he was conscious, and he was trying to be strong, but he most certainly was not "fine" at that moment.

The jury heard all of this testimony and could easily infer the depths of pain and suffering associated with physical trauma and likely psychological distress that Jose was experiencing during this time. The jury heard Jose's brother, Gaspar, testify regarding all that Jose was leaving

⁵ Trial Tr., 235:22–239:18 (Dr. Presnell direct); Pl.'s Tr. Ex. # 3 (pathology report).

⁶ *Id.* at 370:22–372:08 (Abraham direct).

⁷ *Id.*

⁸ *Id.* at 487:12–14 (direct examination of Gaspar Licono Larios).

⁹ *Id.* at 371:22–372:2 (Abraham direct).

behind in this world. Jose would never see his parents, his brother, or his beloved niece again. He would never fulfill his dreams of practicing law, having his own family, perfecting the English language, and even developing a youth soccer stadium.¹⁰

Given the extent of his physical trauma, Pedro's testimony that Jose eventually stopped verbally "responding" is understandable. There was no evidence, however, that Jose was no longer "conscious." The uncontroverted evidence at trial was that Jose did not die for more than two hours after the incident. Therefore, SCE&G's claim in its motion that "at most, Jose survived for 30 minutes,"¹¹ is not supported by the evidence.

After being instructed on the law by the Court, the jury determined that \$10 million was a proper award for Jose's survival claim, and effectively reduced that to \$9 million based on a finding of 10% fault on the part of Jose.

WRONGFUL-DEATH DAMAGES PRESENTED AT TRIAL

After hearing the evidence of Jose's painful death at the age of forty-one, the jury heard substantial evidence of the tremendous loss to Jose's family. Significantly, Jose was not the first child of Mr. and Mrs. Larios to die prematurely. "These parents lost two children earlier in life. So Gaspar [Jose's younger brother] is the last of the remaining of those four children."¹²

¹⁰ Trial Tr., 479:18–484:10; 490:01–16 (Gaspar direct); Pl.'s Tr. Ex. #21 (family photos); *see also* Trial Tr., 415:08–24 (direct examination of Beverly O'Brien discussing Jose's ability to speak English and efforts to improve); *id.* at 416:10–24 (O'Brien direct regarding Jose's plans to have a family); *id.* at 495:16–24 (direct examination of Tiffany Provence).

¹¹ SCE&G Motion at 5.

¹² Trial Tr., at 496:02–07 (Provence direct).

Jose was an impressive person, and the “pride and joy” of his parents.¹³ Through hard work and natural talent, he received scholarships and became the first in his family to complete his education, going so far as earning his law degree.¹⁴ He had been “very creative in getting himself through University. He washed dishes, did . . . odd jobs. He was a teaching assistant to help fund his education.”¹⁵ In addition, in his youth Jose had been a soccer standout in Mexico, and “was actually paid to play soccer.”¹⁶

Unfortunately, after earning his law degree, Jose did not have enough money to obtain his license to practice.¹⁷ In the face of that obstacle, Jose swallowed his pride and went to work in manual labor in the United States, picking oranges with his brother Gaspar in Florida and picking tobacco in Georgia before they moved together to Edisto Island to do landscaping.¹⁸ Jose maintained hope that one day he would earn enough money to finally obtain his law license.¹⁹

As Gaspar told the jury, Jose worked all day, every day, with a smile on his face, because that is who he was.²⁰ Despite his personal ambition to earn enough to pay for his law license, over

¹³ Trial Tr., 497:01–11. (Provence direct).

¹⁴ *Id.* at 484:01–10 (Gaspar direct).

¹⁵ *Id.* at 497:18–21 (Provence direct).

¹⁶ *Id.* at 497:21–498:06 (Provence direct).

¹⁷ *Id.* at 484:01–10 (Gaspar direct).

¹⁸ *Id.* at 485:23–486:05 (Gaspar direct).

¹⁹ *Id.* at 484:06–10 (Gaspar direct).

²⁰ *Id.* at 480:01–482:02 (Gaspar direct).

the years Jose selflessly shared his income with his family. Putting his own dreams on hold, Jose even helped Gaspar, who had a family of his own, purchase a home.²¹

Jose also provided financial support to his parents back in Mexico. Gaspar testified how he and Jose both sent money home, but Jose “was the one that would provide more. He was providing money to the family . . . because he was the [] older one and I have my family.”²² As co-worker Beverly O’Brien testified, sometimes Jose would send a several hundred dollars at a time. It just “depend[ed] on what he had to send.”²³ Other times, as Tiffany Provence testified, Jose was “sending his entire paycheck home to support his parents. He was able to earn here and send the money so that they could provide for their needs, including medical needs.”²⁴ “So he did a lot to try to make ends meet and to make sure that he was not, you know, a burden on his family, was instead providing support to them.”²⁵

The financial assistance was not, however, the reason that Jose was his parents’ pride and joy. “[H]e was their child that got through college and had that law degree.”²⁶ Back in his hometown in Mexico where they still lived, Jose was a “local hero . . . well-known for his soccer and the for the care that he gave his family.”²⁷ Like most parents in their shoes would be, Mr. and

²¹ Trial Tr., 485:11–22 (Gaspar direct).

²² *Id.* at 484:21–485:04 (Gaspar direct).

²³ *Id.* at 405:01–13 (O’Brien direct); *see also id.* at 416:25–417:10.

²⁴ *Id.* at 497:01–08 (Provence direct).

²⁵ *Id.* at 498:04–06 (Provence direct).

²⁶ *Id.* at 495:18–20 (Provence direct).

²⁷ *Id.* at 498:21–499:01 (Provence direct).

Mrs. Larios were “looking forward to [Jose’s] opportunity to live out his dreams of being a lawyer.”²⁸ They never got to see him fulfill that dream.

Instead, they received a call from Gaspar to tell them that Jose had died. As Gaspar described it:

I made the call to Mexico. My grandma picked up. And so I told her to put my dad on. She put my dad on and my dad only knows that my dad is a strong man. So I imagined that when I made the call the entire family was right there around him. And I told my dad that my brother had passed away. And he started crying. And so when my family saw my dad crying, they figured that something serious had happened.

Two days later they told my mom what had happened or maybe a day later they had told my mom. And so my mom started dialing my brother’s cell phone with the hope that he would answer her. And I would pick up and she would say, “Jose? Jose? Is that you, Jose?” And I would say, “No, mom. It’s me, Gaspar.” And she would start crying. And then she would keep calling me on the cell phone over and over with the hope that he would answer the phone.²⁹

Jose, of course, never would answer his mother’s phone call again. Instead, the family had to make funeral arrangements, which involved the difficult task of transporting the body from Edisto to Mexico around Christmastime.³⁰

Of course, the family was crushed by the loss of Jose. They lost their “pride and joy,” which was hurtful not just because of their own loss, but because of never getting to see their son fulfill his own dreams of practicing law, and having his own family. As Gaspar put it to the jury:

We had all kinds of dreams. He would call me Compa and I would call him Compa. And we always tell each other that we just didn’t

²⁸ Trial Tr., 497:04–11 (Provence direct).

²⁹ *Id.* at 487:20–488:16 (Gaspar direct).

³⁰ *Id.* at 488:17–24 (Gaspar direct).

want to be one of like the rest of the people. He always wanted to be someone big. Better than anyone. Y'all have seen the pictures, he's always happy working. And there are so many people that go to work and they are angry. And my brother was always happy. We had all kind of goals. He had a dream he wanted to have his own family. He wanted to have his own children. He wanted to buy property in Mexico so he could build a stadium for children, for the young people. And for his children whom he still didn't have them yet. We never fought. We were always helping each other.³¹

Mr. and Mrs. Larios's grief and suffering are intangible, incalculable "by any fixed measure."

Knoke, 324 S.C. at 142, 478 S.E.2d at 258–59.

Mr. and Mrs. Larios's pain is amplified by having to endure the sadness of their only surviving son, Gaspar, and his daughter Wendy, Jose's beloved niece. Gaspar, Tiffany Provence, and Beverly O'Brien all testified at length regarding Jose's close relationship with Gaspar and Wendy and the devastating impact Jose's death has had on their entire family. They must all bear the burden of this loss for the rest of their lives.

The jury was able to consider the entirety of the above when awarding damages for the wrongful death of Jose Larios. As instructed by the Court, the jury understood it was to consider all elements of wrongful-death damages, including: pecuniary loss; wounded feelings; grief and sorrow; loss of companionship; and loss of the use and comfort of the deceased's society.³² The jury determined that \$11 million—\$5.5 million for each parent—was proper, and effectively reduced that to \$4.95 million each based on a finding of 10% fault on the part of Jose.

ARGUMENT

³¹ Trial Tr., 490:03–16. (Gaspar direct).

³² *Id.* at 709:19–710:17 (Jury Charge).

As set forth at the beginning of this brief, “[t]he jury’s determination of damages is entitled to substantial deference.” *Knoke*, 324 S.C. at 141, 478 S.E.2d at 258. For the Court to grant a new trial absolute, the verdict must be “so flagrantly excessive as to raise a presumption that it was the result of passion and prejudice, not of sober, reflective judgment.” *Lucht*, 266 S.C. at 137–38, 221 S.E.2d at 859. “In other words, to warrant a new trial absolute, the verdict reached must be so ‘grossly excessive’ as to clearly indicate the influence of an improper motive on the jury.” *Welch*, 342 S.C. at 302, 536 S.E.2d at 420. To grant a new trial nisi remittitur, there must be “compelling reasons.” *Proctor*, 368 S.C. at 320, 628 S.E.2d at 518; *Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011).

In judging whether a verdict is excessive upon a motion for new trial absolute or nisi remittitur, the Court should give no greater scrutiny to the award depending on the presence or absence of pecuniary loss. *Clark v. Ross*, 284 S.C. 543, 567, 328 S.E.2d 91, 106 (Ct. App. 1985) (applauding the Supreme Court’s departure in *Lucht v. Youngblood*, 266 S.C. 127, 221 S.E.2d 854 (1976), from the prior, antiquated view that had been skeptical of verdicts missing pecuniary loss as a component of damages);³³ *see also Clark v. S.C. Dept. of Pub. Safety*, 362 S.C. 377, 387, 608 S.E.2d 573, 579 (2005) (emphasizing that “pecuniary loss is only one of six elements to be considered in awarding damages in a wrongful death action”). Intangible losses such as shock, grief, loss of companionship, pain, suffering, and mental distress are just as compensable as pecuniary loss, though they “cannot be determined by any fixed measure.” *Knoke v. S.C. Dept. of*

³³ *Clark v. Ross* was abrogated in part on other grounds in *Sherer v. James*, 290 S.C. 404, 408, 351 S.E.2d 148, 150–51 (1986) (overruling a proximate-cause charge adopted by the Court of Appeals in *Clark v. Ross*).

The antiquated view of scrutinizing cases without the element of pecuniary loss was followed in *Zorn v. Crawford*, 252 S.C. 127, 165 S.E.2d 640 (1969), a case on which SCE&G heavily relies.

Parks, Rec. and Tourism, 324 S.C. 136, 142, 478 S.E.2d 256, 258–59 (1996); *see also Lucht*, 266 S.C. at 137, 221 S.E.2d at 859 (observing these “intangibles, the value of which cannot be determined by any fixed yardstick”); *Harper v. Bolton*, 239 S.C. 541, 547–48, 124 S.E.2d 54, 57 (1962) (observing that “[d]amages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury...”).³⁴

Further, rather than focusing on the size of the verdict, the Court is to examine whether there was “any trial event or any item of evidence that might have caused the jury to base its award on either passion, prejudice, or partiality.” *Clark*, 284 S.C. at 568, 328 S.E.2d at 106 (citing *Lucht*, 266 S.C. at 138, 221 S.E.2d at 860); *see also Jimenez v. Chrysler Corp.*, 74 F.Supp.2d 548, 574–78 (D.S.C. 1999)³⁵ (applying this rule and focusing on the trial testimony, counsel’s arguments to the jury, the defendant’s failure to contemporaneously object to plaintiff’s closing argument, and the overall atmosphere at trial); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 467, 113 S. Ct. 2711, 2725 (1993) (Kennedy, J., concurring) (noting that “the size of the award . . . is not the sole, or even necessarily the most important, sign” of “bias, passion, or prejudice”).³⁶

³⁴ See also *Smith v. Tappen*, No. C.A. 91C-11-017, 1993 WL 389222, at *2 (Del. Super. Ct. Aug. 26, 1993) (“**It is well settled there is no benchmark by which a jury is obligated to measure intangible elements of a claim such as pain and suffering, inconvenience, limitations on bodily function, embarrassment, or intangible permanencies of any kind. This contention is meritless.** The issue before me is not whether I would agree with the amount awarded by the jury, but whether the verdict is so grossly excessive that it is manifestly against the evidence admitted at trial and therefore would rationally and logically “shock the conscience of the Court.”) (emphasis added).

³⁵ Reversed on other grounds, *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001).

³⁶ Similarly, the New Mexico Court of Appeals recently held, in upholding a \$165 million verdict:

For that reason, our Supreme Court has cautioned against overreliance on comparison to prior verdicts when judging for excessiveness, and has instructed that instead each verdict “must be evaluated as an individual one, within the framework of its distinctive facts.” *Lucht*, 266 S.C. at 136, 221 S.E.2d at 858; *see also Jimenez*, 74 F.Supp.2d at 573 (observing that the South Carolina Supreme Court has declined to adhere to a “comparison approach” in evaluating whether a verdict is excessive). Consequently, our Supreme Court has held that whether a verdict is the largest ever in the county is not persuasive on the issue of excessiveness. *Cabler v. L.V. Hart, Inc.*, 251 S.C. 576, 581, 164 S.E.2d 574, 576–77 (1968) (acknowledging “[t]he difficulty in drawing comparisons with prior awards, in order to determine excessiveness,” especially because noneconomic damages such as pain and suffering are “seldom, if ever, alike in any two cases”) (citations omitted). Likewise, whether a verdict is one of the largest ever in the state in a particular type of case is not especially pertinent. *Jimenez*, 74 F.Supp.2d at 574 (observing that in *Knoke v. S.C. Dept. of Parks, Recreation and Tourism*, 324 S.C. 136, 478 S.E.2d 256 (1996), the South Carolina Supreme Court approved a wrongful-death verdict “even though the verdict was nine times greater than the highest previous award upheld by the South Carolina courts in comparable cases”).

In its motion for new trial absolute or nisi remittitur, SCE&G has urged the Court to overlook these guiding principles and simply substitute its own valuation of the case for that determined by the jury. SCE&G hopes the Court will just furrow its brow at the numbers alone

Defendants argue that we may simply “infer” that the jury was improperly influenced by passion or prejudice from the verdict itself and that it is “not necessary to point to trial error as a cause.” **However, we disagree that our case law allows us to infer improper passion or prejudice simply because the verdict is large and therefore “speaks for itself as to the existence of passion or prejudice.”**

Morga v. Fedex Ground Package Sys., Inc., 420 P.3d 586, 598 (N.M. Ct. App. 2018) (emphasis added).

and conclude that the verdict is “so big it must be excessive.” **However, that is exactly what the law instructs the Court not to do.** See, e.g., *Dagnello v. Long Island R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961) (noting that “[t]he very nature of the problem counsels restraint” and that “the trial judge is not called upon to say whether the amount is higher than he personally would have awarded”) (cited by the Court of Appeals in *Clark v. Ross*, *supra*, 284 S.C. at 568, 328 S.E.2d at 106). SCE&G rests its entire motion on the misguided notion that a large verdict must be an excessive one.

In addition, SCE&G has misrepresented the evidence of Jose Larios’s conscious suffering by saying there was none, essentially repeating its argument for directed verdict on the survival action. As to wrongful death, SCE&G’s presentation is not so much a dispute of the facts as it is a show of callous disregard for the suffering and loss to Jose’s parents. SCE&G even goes so far as to end its brief with a lengthy discussion of how the case of Jose is equivalent to the case of a prison inmate unworthy of a substantial verdict.³⁷ Fortunately for Plaintiff, and all South Carolinians, SCE&G’s utter disdain for this case and Jose’s life and meaning to his parents is not relevant to the Court’s resolution of this motion.

Moreover, SCE&G misrepresents the law on damages, claiming there must be some degree of pecuniary loss to serve as a “benchmark” for an award of non-pecuniary damages like physical and mental suffering. SCE&G has also cherry-picked samplings of smaller verdicts from prior cases in support of a biased and invalid verdict-comparison “analysis” not sanctioned by the Supreme Court. Finally, SCE&G has disingenuously claimed that Plaintiff’s closing argument was inflammatory in its mention of the value of the loss of Jose’s life to his parents. That is the

³⁷ SCE&G Motion at 13–14 (somehow comparing this case to *Brinkley v. S.C. Dept. of Corr.*, 386 S.C. 182, 687 S.E.2d 54 (2009)).

only “trial event” identified by SCE&G as possibly inflaming the passion or prejudice of the jury. Yet, not only was Plaintiff’s closing not inflammatory or otherwise improper, but also SCE&G waived its argument here by failing to contemporaneously object to any portion of Plaintiff’s closing at trial.

As the Court observed at the end of trial, this jury was exceptionally focused and “engaged in this case.”³⁸ There was substantial evidence from which the jury could determine both: (1) that Jose Larios suffered a horrific, painful, and agonizing death; and (2) that the loss to Jose’s parents was immense, incalculable. Mr. and Mrs. Larios have been forced to live the rest of their lives not merely without their beloved son, but knowing that he died in physical and mental agony. This jury worked hard, and deliberated for more than four hours, to determine appropriate compensation for both Jose’s suffering and for his family’s incalculable loss. For these reasons, the Court should decline the invitation to invade the jury’s province and should deny SCE&G’s motion for new trial absolute or nisi remittitur.

I. THERE WAS NO “TRIAL EVENT” THAT WOULD HAVE STOKED THE JURY TO PASSION, PREJUDICE, OR PARTIALITY, AND SCE&G’S FOCUS ON “PECUNIARY LOSS” AS SOME SORT OF “BENCHMARK” FOR INTANGIBLE DAMAGES IS NOT CONSISTENT WITH THE LAW OF DAMAGES.

The *only* trial event of which SCE&G complains is Plaintiff’s closing argument on damages for wrongful death. **Although SCE&G raised no objection at the time**, SCE&G now complains for the first time, post-trial, that Plaintiff’s closing was “improper,” and that “[t]he verdict had to be influenced by counsel’s argument because there was no evidence or testimony that would have informed the jury’s deliberations with respect to pecuniary loss.”³⁹ This is the

³⁸ Trial Tr., 742:06–25.

³⁹ SCE&G Motion at 7.

only “trial event” identified by SCE&G that SCE&G claims “caused the jury to base its award on either passion, prejudice, or partiality.” *Clark v. Ross*, 284 S.C. at 568, 328 S.E.2d at 106. SCE&G has identified no other testimony, document, argument, comment, or event of any type that could have impassioned or prejudiced the jury against SCE&G.

SCE&G’s argument on this issue fails because: (1) Plaintiff’s closing argument was consistent with the Court’s jury charge and the law on damages; (2) SCE&G misapprehends that pecuniary loss is not even necessary for an award of intangible damages (and there is certainly no legal requirement of a pecuniary “benchmark”); and (3) SCE&G failed to contemporaneously object to Plaintiff’s closing and is barred from raising this issue now.

In closing argument, Plaintiff’s counsel went through the list of wrongful-death damages and discussed at length with the jury the damages testimony they should consider.⁴⁰ Counsel explained the damages as follows: “grief, sorrow, mental shock, suffering, and the loss of [human] companionship,” as well as “loss of enjoyment of life.” Counsel continued: “You have to look at the whole universe of damages and what is the value of life. So, ladies and gentlemen, how do you value [a] life?”⁴¹ Counsel then posed the following hypothetical to the jury: “If Jose Refugio Larios [Jose’s father] saw an ad in the paper, and the ad in the paper said, ‘If you sacrifice your son, Jose Larios, we will give you \$20 million.’ ...Would Jose Larios’s parents answer that ad? Would they even consider it for one single second?”⁴²

⁴⁰ Trial Tr., 662:16–669:4 (Plaintiff’s closing).

⁴¹ *Id.* at 666:17–22 (Plaintiff’s closing).

⁴² *Id.* at 666:24–667:05 (Plaintiff’s closing).

Not only is Plaintiff's closing argument proper, but it is consistent with South Carolina law and the Court's charge to the jury. The Court charged the jury on wrongful-death damages, in pertinent part, as follows:

It is not necessary to show the money value of the deceased's life since direct proof of the value of human life is not possible. What is reasonable compensation is left to your sound discretion and judgment.⁴³

See Mishoe v. Atlantic Coast Line R. Co., 186 S.C. 402, 197 S.E. 97, 106 (1938) (the original source of this charge). In discussing the process of awarding damages with the jury, asking the jury to think about the value of Jose Larios's life to his parents is entirely consistent with the intangible elements of damages for wrongful death—loss of society, loss of companionship, grief, sorrow, wounded feelings, mental shock and suffering.

Plaintiff's counsel created further context to this discussion with additional examples to the jury such as how much would it be worth to Jose Larios's parents to never be able to call their son again, or receive a call from him again, and how much would it be worth to not see his smiling face over a holiday.⁴⁴ While SCE&G has cherry-picked one phrase of Plaintiff's closing remarks, all arguments were made solely in the context of the value of the loss to Jose's family. When viewed in context, Plaintiff's discussion and hypothetical to the jury in closing remarks was not a misrepresentation of the law on wrongful-death damages and in no way could be considered to have aroused passion or prejudice from the jury as contended by SCE&G.

⁴³ Trial Tr., at 709:19–23 (Jury Charge).

⁴⁴ *Id.* at 662:16–663:21 (Plaintiff's closing).

Moreover, the Court instructed the jury to follow its pronouncements of the law, not the arguments of counsel or any other source.⁴⁵ Counsel told the jury the same—to listen to the Court as to what the law is.⁴⁶ Consequently, even if Plaintiff’s counsel had misstated the law of damages as SCE&G suggests—he did not—any alleged inaccuracy was cured by the Court’s instructions of law to the jury. SCE&G was in no way prejudiced, and is not entitled to a new trial.

In addition, SCE&G’s claim as to Plaintiff’s closing is predicated on a flawed understanding of the law of damages. After incorrectly claiming Plaintiff’s closing was improper, SCE&G claims that “[t]he verdict had to be influenced by counsel’s argument because there was no evidence or testimony that would have informed the jury’s deliberations with respect to pecuniary loss.” As noted above, the existence or non-existence of pecuniary loss is irrelevant to the jury’s award of intangible damages for survival or wrongful death, so SCE&G’s assertion here is analytically flawed and completely discounts the jury’s valuation of intangible damages. *See Knoke*, 324 S.C. at 142, 478 S.E.2d at 258–59 (upholding a substantial verdict where no evidence of pecuniary loss was presented); *Clark v. Ross*, *supra*, 284 S.C. at 567, 328 S.E.2d at 106 (applauding the Supreme Court’s departure in *Lucht*, more than forty years ago, from viewing verdicts with skepticism when there is no component of pecuniary loss); *Lucht*, 266 S.C. at 137, 221 S.E.2d at 859 (observing these “intangibles, the value of which cannot be determined by any fixed yardstick”); *accord Harper v. Bolton*, 239 S.C. 541, 547–48, 124 S.E.2d 54, 57 (1962) (observing that “[d]amages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury...”).

⁴⁵ *Id.* at 59:24–60:18; 696:24–697:08 (Jury Charge).

⁴⁶ *Id.* at 649:03–20 (Plaintiff closing); 691:16–23 (SCE&G closing)

Consistent with this law, the Court correctly charged the jury on wrongful-death damages, in pertinent part, as follows:

The damages in an action for wrongful death include:

- (1) Pecuniary Loss...;
- (2) Mental shock and suffering;
- (3) Wounded feelings;
- (4) Grief and sorrow;
- (5) Loss of companionship;
- (6) Loss of the use and comfort of the deceased's society...; and
- (7) Medical and funeral expenses.

It is not necessary to show the exact amount of the damages suffered by the beneficiaries or that the beneficiaries suffered a monetary loss. In addition, the person for whose benefit the action is brought does not have to be dependent on the deceased for support.⁴⁷

This is well-established law in South Carolina. Notwithstanding Defendant's flawed argument or the law—which does not require proof of monetary loss—it is worth noting that Plaintiff *did* introduce evidence of pecuniary loss at trial which the jury could consider in determining the magnitude of the loss to Jose's family. Plaintiff introduced substantial, impactful testimony of Jose's sending money home to his parents on a frequent basis. Plaintiff introduced evidence that Jose intended to obtain his license to practice law, earn more income, and become an even greater provider for all of his family. All of this evidence was introduced at trial without objection by SCE&G. Just because Plaintiff did not bring in an economist or blackboard specific dollar amounts does not mean the jury is incapable of putting monetary value on the wrongful

⁴⁷ Trial Tr., 709:19–710:17 (Jury Charge).

death damages. Rather, SCE&G's seems to confuse the legal requirement with its own frustration that it could not use a specific monetary benchmark to minimize the value of Plaintiff's losses.

Finally, and significantly, SCE&G **waived** the ability to complain about the content of Plaintiff's closing argument because SCE&G failed to contemporaneously object.⁴⁸ That failure constitutes a waiver of any right to object now. "The general rule is that the lack of a contemporaneous objection to an improper argument acts as a waiver." *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994). The very narrow exception to this rule is that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious inflammatory argument results in clear prejudice." *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998) (quoting *Toyota of Florence*). In *Dial*, the Supreme Court made clear that the "vicious inflammatory argument" contemplated in the exception must be an argument that "constitutes abuse of a party or witness." *Id.* at 259, 509 S.E.2d at 272. In *Toyota of Florence*, the Court found that racist posters about the party opponent that counsel used as props in a closing argument met this narrow exception. 314 S.C. at 263, 442 S.E.2d at 615. However, an argument deemed possibly racial but not racist was found not to meet the narrowly construed exception in *Dial*, 333 S.C. at 260, 509 S.E.2d at 272.

Here, Plaintiff's asking the jury to think about the value of a life in a wrongful-death and survival action obviously does not meet the very limited *Toyota/Dial* exception to the contemporaneous-objection rule. There is no possible way that Plaintiff's closing argument could be construed as "abuse of" SCE&G or any witness at trial, and that is probably why SCE&G

⁴⁸ *Id.* at 722:01–05 ("[THE COURT]: And I also want to note that at the close of the arguments of both plaintiff and defendant, there were no exceptions to the closing arguments. There was nothing contemporaneously objected to or exceptions to either plaintiff or defendant's closing arguments.")

relegated this argument to a footnote. SCE&G's failure to object constitutes a complete waiver of its argument as to Plaintiff's closing argument.

For these multiple reasons, SCE&G's claim as to Plaintiff's closing argument as a ground for a new trial fails. Since SCE&G has identified no other "trial event" or item of evidence which could have caused the jury to act with passion, prejudice, or partiality, the motion for new trial absolute on both wrongful death and survival must be denied.

II. ALTHOUGH OUR SUPREME COURT HAS DECLINED TO ADHERE TO A "COMPARISON APPROACH" TO EVALUATING WHETHER A VERDICT IS EXCESSIVE, SCE&G INVITES THIS COURT TO ENGAGE IN A COMPARISON OF VERDICTS BASED ON CHERRY-PICKED SAMPLING OF SMALLER VERDICTS.

The jury here had wide discretion in valuing Jose's conscious pain, suffering, fear, anguish, and mental distress, as well as his parents' mental shock and suffering, wounded feelings, grief, sorrow, loss of companionship, and loss of society based on the uncontested damages evidence put on the record at trial. There is no "going rate" for these items of intangible loss and this Court should not seek to establish one here.

SCE&G, however, wants the Court to fall into the mindset of finding that yes, indeed there is a going rate for these incalculable losses, and all the Court has to do is look at prior verdicts. That mindset would land our courts in a trap of arbitrary analysis and frequently invading the province of juries based on cherry-picked data. There are no actuarial tables for this. There is no mathematical equation. That is why the Supreme Court has declined to adhere to a comparison approach for examining a verdict for excessiveness. *Jimenez*, 74 F.Supp.2d at 573 (recognizing our Supreme Court's decisions in *Knoke* and *Lucht*).

If a court does engage in some comparison to prior verdicts for limited guidance, the court must be careful to evaluate each case individually and recognize that each case cannot be compared as “apples to apples.” Each plaintiff is different and the losses sustained by his beneficiaries are unique. For example, the Court should appreciate that comparing, for example, a 2019 verdict to a 2009 or 1999 verdict, is not going to indicate dollar-for-dollar equivalence. *Lucht*, 266 S.C. at 136, 221 S.E.2d at 859–60 (citing *Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975); *Rogers v. Atlantic Coast Line R. Co.*, 222 S.C. 66, 77–78, 71 S.E.2d 585, 590 (1952); *Richardson v. Gen Mot. Acceptance Corp.*, 221 S.C. 14, 21–22, 68 S.E.2d 874, 877 (1952). Further, our Supreme Court has recognized that a verdict that may have been “excessive” twenty or even ten years ago may not be excessive today. *Smoak v. Seaboard Coast Line R. Co.*, 259 S.C. 632, 639, 193 S.E.2d 594, 597 (1972) (finding that “[a] comparison of today’s verdict to those of yesterday is only of minimal value”).

In this regard, the Court should be careful not to focus simply on inflation-adjusted values of prior verdicts upheld by our courts. For example, plugging a 1999 verdict into an inflation-adjustment calculator is not the answer, because factors other than inflation can reasonably affect the amount of jury verdicts in a community over time as well. Evolving community experiences and mores that may or may not relate to the economy may impact the community’s valuation of a plaintiff’s damages in a particular case. *See, e.g., Woodford v. Illinois Cent. Gulf R. Co.*, 518 S.W.2d 712, 718 (Mo. Ct. App. 1974) (observing inflation *as but one* economic factor that may come into play); *Spargur v. Dayton Power & Light Co.*, 163 N.E.2d 786, 795 (Ohio Ct. App. 1959) (observing the particularities unique to each community and the differing impacts on verdicts); *Waller v. Skeleton*, 212 S.W.2d 690 (Tenn. Ct. App. 1948) (observing that economic factors other than inflation, such as cost of living, may properly influence a jury’s verdict). There are countless

reasons, quantifiable and non-quantifiable, that explain for increases and decreases of jury verdicts over time, including but not limited to demographic changes, economic ebbs and flows, inflation, employment rates, consumer confidence, political climate, geopolitical climate, stock market fluctuations, and even the influence of celebrity and sports culture.

For these reasons, as mentioned above, the Supreme Court has held that whether a verdict is the largest ever in the county is not persuasive on the issue whether the verdict is excessive. *Cabler v. L.V. Hart, Inc.*, 251 S.C. 576, 581, 164 S.E.2d 574, 576–77 (1968) (citing *Haselden v. Atlantic Coast Line R. Co.*, 214 S.C. 410, 53 S.E.2d 60 (1949); *Jackson v. Solomon*, 228 S.C. 225, 89 S.E.2d 436 (1955); *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964); and *Oliver v. Blakeney*, 244 S.C. 565, 137 S.E.2d 772 (1964)); *accord Spargur*, 163 N.E.2d at 795. The same is true for a verdict that is the largest ever in the state for a case of its kind. *Jimenez*, 74 F.Supp.2d at 574 (observing that in *Knoke* the South Carolina Supreme Court approved a wrongful-death verdict “even though the verdict was nine times greater than the highest previous award upheld by the South Carolina courts in comparable cases”).

The Court must keep these notions in mind, and to the extent it wants to look to prior verdicts for some level of guidance, it should be aware of the larger verdicts that have been upheld and not found to be excessive in South Carolina. For example, just this past summer, in an order dated July 29, 2019, Judge Dickson denied post-trial motions for remittitur and new trial, upholding the jury’s verdict for \$21 million to the plaintiff, and \$14 million to the defendant/cross-claimant. *Brandon Glover v. David Hill, JHOC, Inc., and Willie Glover*, C/A No. 2016-CP-38-01152 (Orangeburg County).⁴⁹

⁴⁹ The plaintiff in *Glover* was awarded \$21 million in total damages despite having incurred only \$300,000 in medical expenses.

A review of more recent verdicts (within this decade) from neighboring jurisdictions, outside of just our small State, reveals an almost identical verdict to the one rendered here and several that are far larger. For example, the trial court in Clayton County, Georgia, recently upheld the jury's wrongful death award of \$20 million to compensate the family of a young Hispanic man living and working outside of Atlanta while his family remained in Mexico. *Kirschenbaum as Admin. of Estate of Florencio Gomez-Mendez v. JAMCO Properties, Inc.*, No. 2105CV00848E (Georgia Sept. 9, 2016); *see also Madere v. Schnitzer Southeast and Schnitzer Steel*, Case No. SC17CV106 (Georgia Aug. 23, 2018) (**\$280 million verdict, including \$30 million for survival and \$150 million for wrongful death**); *Estate of Dougherty v. WCA of Florida*, No. 01 2017 CA 001288 (Florida Oct. 5, 2018) (**\$25 million verdict in wrongful death in favor of parents of adult decedent**); *Carter v. Glazerman*, No. 12-CA-009942 (Florida Jan. 26, 2018) (**\$109.76 million verdict in medical malpractice, including \$70 million pain and suffering**); and

In 2008, eleven years ago, then-Circuit Court Judge Few found that a \$9 million wrongful death verdict was not shocking or grossly excessive, and therefore denied the defendant's motion for new trial on that basis. However, Judge Few granted defendant's thirteenth juror motion based on the argument that the jury's 40-minute deliberation was insufficient. The Court of Appeals reversed, finding that granting a new trial based on the length of jury deliberations was improper. *Youmans v. S.C. Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008).

A sampling of other cases in South Carolina reveals that verdicts in the millions of dollars for a single wrongful death have been upheld in this State. Significantly, these verdicts are close to twenty years old, and each one would be higher now based on inflation and the other intangible factors discussed above. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408, (Ct. App. 2000) (wrongful death and survival with \$6.9 million verdict); *Jimenez v. Chrysler Corp.*, 74 F.Supp.2d 548, (D.S.C. 1999) (wrongful death verdict of a minor with no pecuniary loss for \$12.5 million in actual damages plus \$250 million in punitive damages; actual damages remitted to \$9 million); *Knoke v. S.C. Dept. of Parks, Rec. and Tourism*, 324 S.C. 136, 478 S.E.2d 256 (1996); (wrongful death with no pecuniary loss; verdict of \$3 million which was, at the time, **9 times higher greater than any previous wrongful death verdict in South Carolina**).

Cheston-Thornton v. HACC Pointe South, Inc., No. 2014CV01498-D (Georgia 2018) (**\$1 billion verdict against security company in favor of minor rape victim**).

Here, the Court is charged with reviewing what happened, and did not happen, in the trial of *this* case. *Lucht*, 266 S.C. at 136, 221 S.E.2d at 858. There was not “any trial event or any item of evidence that might have caused the jury to base its award on either passion, prejudice, or partiality.” *Clark v. Ross*, 284 S.C. at 568, 328 S.E.2d at 106. There is no “compelling reason” to invade the jury’s province and alter the verdict. *Proctor*, 368 S.C. at 320, 628 S.E.2d at 518; *Curtis*, 392 S.C. at 501, 709 S.E.2d at 82. Indeed, SCE&G did not offer any evidence, medical or otherwise, to counter Plaintiff’s evidence of wrongful death or survival damages, and declined its opportunity to even cross-examine the Plaintiff’s central damages witnesses.

As laid out above, there is ample evidence to support the jury’s \$11 million award for wrongful death and \$10 million award for survival, which the jury effectively reduced to \$9.9 million and \$9 million respectively by its thoughtful assessment of Jose’ fault. *See Welch* 342 S.C. at 303, 536 S.E.2d at 420 (holding that “the trial court must evaluate the adequacy of the verdict in light of the evidence presented.”) This verdict is the product of a hard-working, focused, inquisitive jury, who weighed all of the evidence, including the evidence that it found indicative of Plaintiff’s comparative fault. These awards are not excessive, and the Court should therefore allow them to stand as dutifully delivered by this jury—as is.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court deny SCE&G’s motion for new trial absolute or nisi remittitur.

Respectfully submitted,

YARBOROUGH APPEGATE LLC

s/ William E. Applegate IV

William E. Applegate IV
Liam D. Duffy
Perry M. Buckner, IV
291 East Bay Street, Floor 2
Charleston, South Carolina 29401
(843) 972-0150 Office
(843) 277-6691 Fax
william@yarboroughapplegate.com
liam@yarboroughapplegate.com
perry@yarboroughapplegate.com

AND

**SMITH, ROBINSON, HOLLER, DUBOSE,
AND MORGAN, LLC**

G. Murrell Smith, Jr. (SC Bar No.: 66263)
murrellsmith@smithrobinsonlaw.com
Shannon N. Peake (SC Bar No.: 102723)
shanonp@smithrobinsonlaw.com
Post Office Box 580
Sumter, SC 29151-0580
Tel:803.778.2471

Attorneys for Plaintiff

October 18, 2019

trial event or outside influence as a basis to vacate the verdict. The Court has simply substituted its own view of the case for that of the jury and thrown out the verdict, which is not the proper use for a new trial absolute. *Knoke v. S.C. Dept. of Parks, Rec. and Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996) (holding that “[t]he jury’s determination of damages is entitled to substantial deference”).

Three years of litigation where the Defendant, South Carolina Electric & Gas Company (“SCE&G”), vigorously contested liability culminated in a week-long jury trial where both parties were given the opportunity to present their case. After the jury proved SCE&G wrong about its view of this case, the Court stripped the jury of their fact-finding authority and vacated the verdict because the Court took a different, defendant-friendly view of the evidence and damages. *But see* S.C. CONST., § 14 (“The right to a trial by jury shall be preserved inviolate.”). The Court used the word “speculate” or some derivative thereof seven times throughout its Order granting new trial absolute but, with all due respect, the only speculation is the Court’s conclusion that the jury’s verdict “can only be explained upon the basis of sympathy, passion, caprice or some other consideration found outside the evidence that is presented in this case.” Order at 2. Without specifically saying it, the Court speculated that the jury “must have” been so out to get SCE&G that they delivered a \$21 million verdict for an undocumented immigrant. There is no evidence of that, however, and pursuant to Rule 59(e), SCRCPP, Plaintiff respectfully moves the Court to reconsider, alter, or amend its decision, and reinstate the jury’s thoughtfully delivered verdict.

As a brief reminder of the case presented to the jury, Jose Larios was shocked by a power line while standing twenty-five feet in the air on a ladder. He plunged to the ground and sustained more than a dozen broken bones, the laceration of multiple organs, and massive internal bleeding, before eventually suffering the ultimate injury—death. The Colleton County jury that was

extensively voir dired by the Court and selected to serve as the fact finders at this trial determined that, based on the evidence presented at trial in the year 2019, in the modern world we live in, the damages for that tragic injury and loss are worth \$21 million. The jury also found Mr. Larios 10% at fault, reducing the verdict to \$18.9 million, and declined to award punitive damages against SCE&G. These factors alone should alleviate any speculation by the Court that the jury was out to get SCE&G with this verdict.

The Court focuses on the lack of evidence of pecuniary damages such as medical bills, funeral expenses, and lost wages. Order pp. 6-7. In doing so, it appears to accept SCE&G's argument that an award of non-economic damages must be based on some specific evidence of monetary loss. Neither SCE&G nor the Court provides any law to support this assertion and it is legally incorrect. "Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased." *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 384, 827 S.E.2d 183, 198 (Ct. App. 2019) (internal quotation marks omitted). "Damages recoverable in a wrongful death action include: (1) Pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries" *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (internal quotation marks omitted). These are the *recoverable* but not *required* damages. Plaintiff chose to present damages chiefly based on non-economic losses of conscious pain and suffering and mental distress of Mr. Larios, and the mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of his society to Mr. Larios' beneficiaries. There is no dispute that there is evidence of all of these elements of damages. The presence or amount of evidence of

any particular pecuniary loss does not affect the ability to recover non-economic damages, and the Court erred in interpreting the law and evidence to the contrary. The Court appears to disregard the compensability of intangible damages, giving short shrift to grief and shock as independently compensable elements of damage for wrongful death. Order at 7–8. The Court all but concludes that intangible damages are inherently speculative, not independently recoverable, and that a verdict for such damages is invalid without some sort of benchmark of itemized pecuniary loss. As argued at length in Plaintiff’s memorandum in opposition, this is not the law.¹ (Also, as noted herein, the Court’s analysis disregards its own charge on damages.) By way of analogy, if a person dies instantaneously and incurs no medical bills or makes only \$30,000 per year as opposed to \$1,000,000 per year, neither of those pecuniary damages amounts have any bearing on the intangible loss to their beneficiaries. The amount of damages is within the jury’s province, and this Court should reconsider its decision to invade that province.

Disregarding critical facts that foreclose a finding of passion or prejudice, the Court has decided that the verdict “is not supported by the evidence and can only be explained upon the basis of sympathy, passion, caprice or some other consideration found outside the evidence that is presented in this case.” Order at 2. The Court fails to view the evidence in a light most favorable to Plaintiff. Before noting some specific evidence, two points are especially noteworthy. First, the Court overlooked the significant fact that SCE&G never challenged the damages testimony Plaintiff presented at trial, never raised a contemporaneous objection to Plaintiff’s closing argument, and never objected to the Court’s jury charges on damages. After Plaintiff mentioned

¹ As Plaintiff raised at the hearing on SCE&G’s post-trial motions, the South Carolina General Assembly, in recently adopting a system of tort reform, elected not to place statutory caps on non-economic damages in this type of case. The Court’s decision invades the province of the legislature in exacting tort reform from the bench.

a \$20 million sum in closing argument, SCE&G did not even address that suggestion in its closing. The only reference SCE&G made to the issue of damages at trial was its agreement with Plaintiff, in SCE&G's own closing, that "the loss of Mr. Larios is tragic." Tr. Trans. at 669:9–670:2. Second, SCE&G chose not to cross-examine any of Plaintiff's damages witnesses. Apparently confident in its case on liability, SCE&G effectively ceded the issue of damages at trial to Plaintiff. Nevertheless, the Court granted a new trial absolute—predicated solely on the amount of damages—based on its conclusion that the evidence of damages was merely "speculative" or "guesswork." SCE&G waived this argument when it elected not to raise it at trial by way of cross-examination or argument to the jury. The Court cannot *sua sponte* raise an argument that effectively operates as a directed verdict ruling on damages when SCE&G failed to raise the argument either during or after trial. This is legal error.

The Court's *ex post facto* finding of "speculative" damages is not only procedurally and legally improper, but also plainly incorrect on the merits. The Court notes that "Mr. Larios was conscious during the initial shock and immediately after the fall." Order at 4. Therefore, the survival damages are not speculative. There was evidence of conscious pain and suffering which the jury lawfully valued in determining survival damages. *Knoke*, 324 S.C. at 142, 478 S.E.2d at 258–59 (holding that intangible damages such as pain and suffering are entirely compensable, on their own, despite the inability to calculate them "by any fixed measure"). However, rather than stopping when it found evidence of the damages awarded, the Court proceeded to incorrectly state that Plaintiff sought "medical damages" as part of the survival claim but failed to present evidence of the medical or funeral expenses, leaving the jury to speculate. Order at 3. Plaintiff did not even ask the jury to award "medical damages" for survival. Further, the Court minimized the testimony of the pathologist, Dr. Erin Presnell, who testified that as a result of his twenty-five-foot fall, Mr.

Larios sustained fourteen fractured ribs (seven on each side), four fractured vertebrae in his spine, and severe lacerations of multiple internal organs, including his liver and both kidneys, which caused massive internal bleeding. Tr. Trans. at 235:22–239:18; *see also* Pl.’s Tr. Ex. #3 (pathology report). The jury apparently found this testimony compelling, and drew the inference that these injuries caused significant pain and suffering. The Court, however, found the testimony less compelling and drew a much different inference, favorable to SCE&G, that “there is no testimony as to how those injuries would affect the person prior to succumbing to those injuries.” Order at 3–4. If the Court viewed the evidence in a light most favorable to Plaintiff, as it is supposed to, then it would have found the jury’s inference supported by the evidence presented.

The Court viewed additional evidence in a light most favorable to SCE&G. It minimized the fact that Mr. Larios experienced an electrical shock from a power line. It all but dismissed the pain and mental shock that Mr. Larios experienced from this event, finding “there is no expert to testify on the intensity of the shock,” and “there is no medical expert testimony regarding the nature, level, and extent of pain.” Order at 4. Rules 701 and 702, SCRE, do not require an expert to explain to a jury that being shocked by a power line while twenty-five feet above ground is likely to cause, at the very least, immense mental shock and fear, and likely significant physical pain. These are compensable elements of damage in a survival claim, and the Court incorrectly rejected the rational inferences that the jury permissibly drew from the evidence.

Likewise, the Court rejected the jury’s valuation of the survival action on the capricious reasoning that Mr. Larios did not survive long enough, or suffer long enough, to support the verdict. Whether Mr. Larios lived in misery for fifteen minutes, thirty minutes, or two hours is arbitrary for purposes of the jury’s valuation of survival damages. There is no bright line test for the amount of time a person must suffer and the Court did not tell the jury to calculate damages by

the minute or by the hour. Shock, pain, grief, and other intangible damages can be measured by intensity just as much as they can be measured by duration, and it is within the jury's discretion, not the Court's, to make this calculation. As the Court correctly charged the jury: "The amount of damages for mental suffering cannot be exactly measured but must be left to the sound discretion of you, the jury." Tr. Trans. at 713: 9–11. The jury followed the Court's charge and delivered a verdict on the survival action comprised of various elements of intangible damage, which the jury valued in their broad discretion. The Court is not supposed to vacate the verdict simply because it dislikes the evidence. The Court is supposed to give substantial deference to the jury. *Clark v. S.C. Dept. of Pub. Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002).

The jury also followed the Court's charge on wrongful death damages. Pursuant to *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 197 S.E.2d 97, 106 (1938), the Court charged the jury that there is a presumption of pecuniary of loss "where the relationship of parent and child exists." Tr. Trans. at 709:24–710:4. SCE&G did not object to this charge. The Court charged that "[i]t is not necessary to show the exact amount of damages suffered by the beneficiaries." *Id.* at 710:13–14. This is also consistent with *Mishoe*, which provides: "Where the law presumes a pecuniary loss to the beneficiaries, substantial damages, it is said, may be recovered without proof of special pecuniary loss." 197 S.E.2d at 106 (quoting 17 Corpus Juris, § 258, pp. 1365–66). In such cases, "the plaintiff need not establish the decedent's "fortune, his earnings, his capacity to earn, his habits, or treatment of his family." *Id.* (citation omitted). Following that law, the Court charged the jury that, as to all types of damages, "It is not necessary to show the exact amount of damages suffered by the beneficiaries or that the beneficiaries suffered a monetary loss. In addition, the person for whose benefit the action is brought does not have to be dependent upon the deceased for support." Tr. Trans. at 710:13–17. Pursuant to this charge on the presumption of pecuniary

loss and recoverable damages—to which SCE&G did not object—the jury was allowed to award substantial damages for pecuniary loss regardless of whether there was specific proof of calculable pecuniary loss.² The wrongful death damages evidence was significant for pecuniary and non-pecuniary loss. *Compare* Order pp. 6-7 (incorrect finding “little, if any, evidence of pecuniary loss”, “no testimony of how much or how often” Mr. Larios sent money to his parents, and “no evidence” that his parents depended on him for support) *with* Pl’s Memo. in Opp. to Mot. for New Trial pp. 5-9, 18-19. During the testimony of Mr. Larios’ brother, 8 of 12 of jurors, both men and women, cried as a result of the compelling evidence of Mr. Larios’ relationship with his family, their grief and loss over his death, and the unimaginable pain of his parents for the loss of their son. Plaintiff planned to call Mr. Larios’ niece (who was present in the courtroom) to testify as a witness but chose not to given the emotional impact of the evidence already presented. Now, weeks after the jury delivered its verdict, the Court has contravened its own charge and granted a new trial absolute in large part on the perceived absence of substantial, specific pecuniary loss to Mr. and Mrs. Larios. This is error.

Additionally, the Court did not identify a single trial event, an item of evidence, or anything else that would have caused the jury to base its award on passion, prejudice, or partiality. *Clark*, 284 S.C. 543, 568, 328 S.E.2d 91, 106 (Ct. App. 1985) (observing that the absence of such an event dictates against a finding of passion or prejudice) (citing *Lucht v. Youngblood*, 266 S.C. 127, 138, 221 S.E.2d 854, 860 (1976)). The reason is that there was no such outside influence on this jury, as set forth in the attached affidavits from numerous jurors themselves. *See* Rule 606(b),

² Plaintiff does not intend to rehash but does incorporate all arguments in her memorandum in opposition, including that Plaintiff presented evidence of pecuniary loss, pecuniary loss is not necessary to a verdict for wrongful death or survival, and intangible damaged for both actions are independently compensable.

SCRE (providing that “[u]pon an inquiry into the validity of a verdict or indictment...a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror”). These affidavits should resolve any doubt in the Court’s mind as to the presence of outside influence on this verdict. The absence of outside influence, passion, or prejudice is further supported by the extensive *voir dire* conducted by the Court. It directly questioned jurors for bias and prejudice toward SCE&G and immigrants. The empaneled jury satisfied the parties and the Court with their answers. The Court’s decision to vacate the verdict renders the *voir dire*, and the entire jury process, meaningless. The Court should reinstate the jury’s verdict.³

With all due respect, the jury based its decision on the evidence presented at trial, and this Court erred in setting that decision aside based on evidence outside of the record. During *voir dire*, the Court made clear based on binding legal precedent that Mr. Larios’ citizenship and legal status could not come into play. Now, however, the Court vacated the jury’s verdict partly due to the alleged lack of visits by Mr. Larios to his parents in Mexico, or their visits to see him in the United States. In so doing, the Court directly injects the issue of Mr. Larios’ legal status, which impeded such cross-border travel for family visits, into the verdict in this case. Implicit in the Court’s finding is the notion that an undocumented immigrant, which the Court knew Mr. Larios to be, somehow has less of a relationship with his family because he cannot freely cross back and forth over the border for family visits. By comparison, a military wife who may not see her soldier

³ In addition to seeking correction of the errors identified herein, Plaintiff requests that the Court reconsider and rule on all arguments raised in Plaintiff’s memorandum in opposition to SCE&G’s motion for new trial absolute or *nisi remittitur*, many of which the Court does not reference in its Order and has overlooked or improperly disregarded. Plaintiff incorporates each of those arguments here and asks that the Court rule on them.

husband for a year or more does not suffer any less of a loss in his death. Similarly, to the extent that a lack of frequent visitation was due to the inability of Mr. Larios and his parents to afford international travel, the notion that their familial bond was therefore “less than” is no less offensive or improper. Of critical importance is the fact that SCE&G chose not to cross-examine any of Plaintiff’s damages witnesses regarding this issue of visitation. Indeed, SCE&G elected not to cross-examine any witness on any issue of damages. Instead, SCE&G raised these unfounded challenges to the Larios family bond for the first time in its post-trial motions, and therefore the Court’s findings on this issue are not based on any actual evidence presented at trial. Moreover, the Court erroneously substituted its own factual inferences for those reasonably drawn by the twelve fact-finding jurors, who based their verdict not on SCE&G’s post-trial attempts to sow doubt, but instead on the actual evidence at trial.

In conclusion, the Court’s grant of new trial absolute is based on numerous errors of law, a view of the evidence favorable to the defendant instead of the plaintiff, and the failure to give the jury’s verdict substantial deference as required by law. *See, e.g., Knoke*, 324 S.C. at 141, 478 S.E.2d at 258 (holding that “[t]he jury’s determination of damages is entitled to substantial deference”); *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964) (setting forth the standard that the Court must view the evidence in the light most favorable to the nonmoving party). The Court’s Order fails to mention crucial facts that weigh against finding the verdict was a result of passion, prejudice, or some other outside influence, including the jury’s assignment of 10% comparative fault to Mr. Larios and that, after asking a clarifying question, the jury declined to award punitive damages. These facts make it clear that while the jury may have valued the case higher than the Court would have valued it, the verdict was the product of the jury’s “sober, reflective judgment,” not passion or prejudice. *Lucht*, 266 S.C. at 137–38, 221

S.E.2d at 859. Plaintiff therefore requests that the Court vacate its Order and reinstate the jury's verdict.

Respectfully submitted,

YARBOROUGH APPEGATE LLC

s/ William E. Applegate IV

William E. Applegate IV

Liam D. Duffy

Perry M. Buckner, IV

291 East Bay Street, Floor 2

Charleston, South Carolina 29401

(843) 972-0150 Office

(843) 277-6691 Fax

william@yarboroughapplegate.com

liam@yarboroughapplegate.com

perry@yarboroughapplegate.com

AND

**SMITH, ROBINSON, HOLLER, DUBOSE,
AND MORGAN, LLC**

G. Murrell Smith, Jr. (SC Bar No.: 66263)

murrellsmith@smithrobinsonlaw.com

Shannon N. Peake (SC Bar No.: 102723)

shanonp@smithrobinsonlaw.com

Post Office Box 580

Sumter, SC 29151-0580

Tel:803.778.2471

November 12, 2019

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Brian P. Brooks, who being duly sworn deposes and says:

1. My name is Brian P. Brooks. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.

Brian P. Brooks

SWORN to before me
this 9 day of November, 2019.

Notary Public for South Carolina
My commission expires: 4/7/2027



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Tracey W. Carney, who being duly sworn deposes and says:

1. My name is Tracey W. Carney. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.

Tracey Carney Murray
Tracey W. Carney

SWORN to before me
this 8 day of November, 2019.

Georgie F Hawk
Notary Public for South Carolina
My commission expires: 4/7/2021



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Jessica N. Curry, who being duly sworn deposes and says:

1. My name is Jessica Curry. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.


4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.



Jessica N. Curry

SWORN to before me
this 8 day of November, 2019.



Notary Public for South Carolina
My commission expires: 4/7/2027



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Veronica D. Daugherty, who being duly sworn deposes and says:

1. My name is Veronica D. Daugherty. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.


3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.


Veronica D. Daugherty

SWORN to before me
this 8 day of November, 2019.


Notary Public for South Carolina
My commission expires: 4/7/2027



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Irvin M. Fryar, who being duly sworn deposes and says:

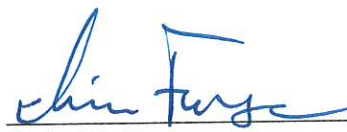
1. My name is Irvin M. Fryar. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

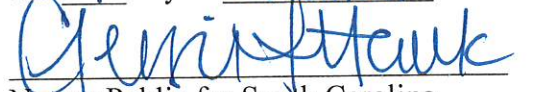
4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.



Irvin M. Fryar

SWORN to before me
this 7 day of November, 2019.


Notary Public for South Carolina
My commission expires: 4/7/2027



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Teresa H. Patterson, who being duly sworn deposes and says:

1. My name is Teresa H. Patterson. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

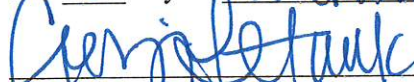
3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.


Teresa H. Patterson

SWORN to before me
this 8 day of November, 2019.


Notary Public for South Carolina
My commission expires: 4/7/2027



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Ulysee Robinson, Sr., who being duly sworn deposes and says:

1. My name is Ulysee Robinson, Sr. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.

Ulysee Robinson
Ulysee Robinson, Sr.

SWORN to before me
this 11 day of November, 2019.

Georgie Hawk
Notary Public for South Carolina
My commission expires: 4/7/2027



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Steve B. Sweat, who being duly sworn deposes and says:


1. My name is Steve B. Sweat. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

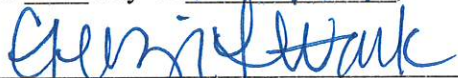
4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.



Steve B. Sweat

SWORN to before me
this 7 day of November, 2019.



Notary Public for South Carolina
My commission expires: 4/7/2027



STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

AFFIDAVIT

PERSONALLY, appeared before me, Elaine K. Williams, who being duly sworn deposes and says:

1. My name is Elaine K. Williams. I am a resident of Colleton County, State of South Carolina and am of legal age and sound mind to make the statements contained in this affidavit.

2. During the week of September 23, 2019, I served as one of the jurors in the case of *Tiffany N. Provence, as Special Administrator for the Estate of Jose Larios v. South Carolina Electric & Gas Company*.

3. During jury deliberations, we carefully followed the judge's instructions, and did not consider or discuss anything outside of the evidence that was presented through the witnesses and documents at trial.

4. We, the jurors, evaluated all of the evidence and discussed it for several hours before reaching a unanimous verdict.

5. Our verdict was not based in any way one motion, sympathy, bias for or against either party, or any other outside factors that we were instructed not to consider.

Elaine K. Williams
Elaine K. Williams

SWORN to before me
this 7 day of November, 2019.

Georgie F Hawk
Notary Public for South Carolina
My commission expires: 4/7/2021



Much of Plaintiff's argument is based on the general principle of deference to the jury's evaluation of pain and suffering. Although it is quite true that a jury verdict is entitled to deference, that principle is subject to the obligation of the Court to review the verdict for excessiveness or, for that matter, inadequacy. See, e.g., *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 639, 529 S.E.2d 758, 763 (Ct. App. 2000) ("Although we agree that a jury's assessment of a plaintiff's pain and suffering is entitled to substantial deference, this deference does not abrogate the authority of the trial court to grant a new trial nisi upon finding 'the amount of the verdict to be merely inadequate or excessive.'"). There are several variations on this theme, including Plaintiff's argument that the Court should defer to the jury because it followed the Court's instructions. See, e.g., Pl.'s Mot., pp.6-7.

The deference given to a jury does not entitle it to award damages grossly disproportionate to the evidence before it, and a review of appellate decisions on this subject fully demonstrates the trial court's authority and, indeed, obligation to address excessive verdicts. The fact that an award by the jury is based on intangible injuries does not eliminate this obligation. See *Becker*, 339 S.C. at 639-40, 529 S.E.2d at 763-64 (affirming grant of new trial nisi remittitur "notwithstanding the subjectivity necessarily involved in determining a significant portion of [the plaintiff's] damages"). Similarly, the fact that the jury was instructed to evaluate intangible damages based on its discretion does not mean that any verdict the jury delivered was insulated from review for being grossly excessive. Like the Court, the jury has to exercise its discretion in a responsible manner based on its instructions to consider the evidence before it. The fact that the evidence must be viewed in the light most favorable to the Plaintiff and that the jury has

discretion to evaluate non-economic damages does not mean that the trial court cannot grant a new trial if that jury delivers a verdict that was grossly excessive.

Plaintiff also complains that the Court improperly focused on the speculative nature of the damages awarded. Pl.'s Mot., p.2 ("The Court used the word 'speculate' or some derivative thereof seven times throughout its Order ... but, with all due respect, the only speculation is the Court's conclusion that the jury's verdict 'can only be explained upon the basis of sympathy, passion, caprice or some other consideration found outside the evidence that is presented in the case.>"). However, regardless of whether damages are economic or non-economic, the "evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy," and "[n]either the existence, causation 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) (internal quotation marks and citation omitted). Thus, in discharging its obligation to review the verdict for excessiveness, the Court properly evaluated the jury's damages award to determine if it was supported by the evidence or if the analyses required to support that verdict necessarily are speculative in nature.

Similarly, Plaintiff's argument about DESC's objections and challenges to the evidence misses the mark. Pl.'s Mot., p.4. First of all, DESC cannot object to evidence that is not introduced. Second, the minimal evidence that Plaintiff actually introduced regarding damages was not objectionable standing alone; it just was not enough to support a verdict of \$21 million, and was so sparse that it rendered a \$21 million verdict grossly excessive by comparison. In determining not to object to the limited damages evidence actually introduced, DESC was not foreclosed from filing a motion for a new

trial absolute because that evidence was not sufficient to support a verdict of \$21 million. Notably, Plaintiff does not cite to any cases in support of this argument, and her trial event arguments in no way support that contention because many of the cases affirming the grant of a new trial absolute do so based on a comparison of the evidence with the verdicts. Third, with respect to the Court's damages instruction, the issue is not whether the jury could have awarded any amount for non-economic damages, but whether the evidence supported an award of \$21 million for those damages. The Court properly evaluated the record and determined that the damages award was grossly excessive based on the record.

Moreover, contrary to Plaintiff's assertion, Pl.'s Mot., p.3, the Court in its Order in no way determined that an award of non-economic damages must be based on specific evidence of monetary loss. The problem with Plaintiff's case is, again, that she did not put up sufficient evidence to support the grossly excessive amount of damages she actually was awarded, a problem that cannot be alleviated by baselessly blaming the Court for evaluating the excessiveness of the verdicts in comparison to the evidence actually presented to the jury. As the Court noted, there was "little evidence of conscious pain and suffering and mental distress" to support the award of survival damages. Order, pp.3-5. There also was little evidence of either pecuniary or non-pecuniary damages to support the wrongful death damages. Order, pp.6-8. And contrary to Plaintiff's argument, there is no basis for characterizing the Court's analysis as "view[ing] additional evidence in a light most favorable to SCE&G," Pl.'s Mot., p.6, because Plaintiff's problem is that there was not sufficient evidence to support the verdicts actually rendered. In sum, there was no evidence of pecuniary damages that

would have helped support the excessively large award actually given, either directly or indirectly, in turn rendering the damages awards grossly excessive and speculative.

As to the actual evidence in the record, the Court correctly noted that there simply was no evidence to establish that he was conscious for a lengthy period of time such that an award of \$10 million for pain and suffering was warranted. See Order, p.3 (“There is no further evidence presented that Mr. Larios ever regained consciousness. Whether he did or not is never addressed by any witness or testimony.”). And, contrary to Plaintiff’s argument, Pl.’s Mot., p.6, the point of the Court’s discussion of expert testimony regarding the intensity of the shock, Order, p.4, is not that expert testimony was required for its existence, but that there was no evidence or testimony in the record that the shock was so severe that a \$10 million survival verdict was warranted. In sum, there was no evidence in this record to support a \$10 million survival award for pain and suffering based on the facts and conditions actually presented to the jury. The same conclusion holds true for the \$11 million wrongful death damages: the record does not support that verdict amount because the actual evidence in the record is not substantial enough to support an award of \$11 million in compensatory damages.

To advance her argument, Plaintiff submits nine identical affidavits from jurors in the case, each one stating with the same language that there was no outside influence on their deliberations. Pl.’s Mot., pp.8-9. But, the question of whether a verdict is grossly excessive is based not upon whether there were prejudicial outside contacts or information presented to the jurors, but upon whether the verdict is “shockingly disproportionate” based on the amount of the verdict in comparison to the evidence in the record and thus indicates that the jury must have based the verdict on “passion,

caprice, prejudice, or other considerations not reflected by the evidence.” Order, p.2 (quoting *Welch*, 342 S.C. at 302, 536 S.E.2d at 420). In short, the “passion, caprice, prejudice, or other considerations” are indicated in this case not by actual extraneous contacts or evidence, but by the disconnect between the evidence and the verdict, reflecting that the jurors themselves brought improper considerations into their evaluation of the evidence. Because that determination is made by the trial court based on its own evaluation of the evidence and does not intrude into the jury’s deliberations, and because at bottom the affidavits are an attempt to buttress the jury’s deliberations in violation of Rule 606(b), SCRE, the affidavits should be rejected.¹

Plaintiff also argues that a new trial absolute should not be granted for a grossly excessive verdict unless there was some trial event that occurred. Pl.’s Mot., pp.8-9. However, the cases do not support the argument that a trial event is a required showing before the Court may grant a new trial absolute based on a grossly excessive verdict. Rather, “[t]here must be some semblance of a basis for justifying the verdict” in the record itself. *Zorn v. Crawford*, 252 S.C. 127, 138, 165 S.E.2d 640, 646 (1969) (internal quotation marks and citation omitted) (reversing for new trial grossly excessive verdict because it could “only be explained upon the basis for sympathy, passion or prejudice on the part of the jury”). Plaintiff’s citation to *Clark v. Ross* does not advance her case because the Court of Appeals did not determine that a trial event was a condition predicate to granting a new trial absolute; rather, the court opined that the verdict,

¹ At this point in her motion, Plaintiff in a footnote “requests that the Court reconsider and rule on all arguments raised in Plaintiff’s memorandum in opposition to SCE&G’s motion for new trial absolute or nisi remittitur.” Pl.’s Mot., p.9 n.3. Because Plaintiff does not specify the arguments to which she refers, DESC opposes all of those arguments for reasons stated in this response and in its Motion for New Trial Nisi Remittitur or, in the Alternative, New Trial Absolute.

although large, was not shocking in its view and then noted that the appellants had not pointed them to any trial event to change that view. *Clark v. Ross*, 284 S.C. 543, 568, 328 S.E.2d 91, 106 (Ct. App. 1985), *abrogated by Sherer v. James*, 290 S.C. 404, 351 S.E.2d 148 (1986). Here, in contrast, the Court correctly determined that the verdict was grossly excessive based on the evidence in the record and, thus, ordered a new trial absolute. In rendering that decision, the Court was not required to consider whether some trial event occurred as a condition predicate.

At the beginning and end of her motion, Plaintiff recycles the same (frankly offensive) theme: that the new trial absolute was granted because Mr. Larios was an undocumented immigrant. Pl.'s Mot., p.2 ("Without specifically saying it, the Court speculated that the jury 'must have' been so out to get SCE&G that they delivered a \$21 million verdict for an undocumented immigrant."); Pl.'s Mot., p.9 ("Implicit in the Court's finding is the notion that an undocumented immigrant ... somehow has less of a relationship with his family").² That is a ridiculous assertion, one unsupported by anything in the record, especially given that the Court went out of its way to ensure that this "theme" was not an issue.³ Moreover, regardless of the reason that Mr. Larios did not return to Mexico does not change the fact that there was a paucity of evidence in

² This theme runs throughout the motion. See Pl.'s Mot., p.1 ("Before the jury had deliberated and rendered their verdict, almost anyone worried that a jury from Colleton County might act with passion or prejudice likely expected it to be exacted against the immigrant Plaintiff.").

³ For example, while addressing motions in limine, the Court made clear that "[t]he immigration of Mr. Larios has no basis of fact in this case. It's not an issue in this case. It's not a fact that the jury needs to consider. He is a human being that is now deceased, but on his behalf, the special administrator for his estate has come before the Court to avail itself to the laws of this state and this country. And they were given the same opportunity and credit as any other person." Tr. of Sept. 23, 2019 hearing, at 176:21–177:4.

the record regarding Mr. Larios' relationship with his parents to support an award of \$11 million for wrongful death. Again, the question is not whether the evidence supported any award for any amount of damages for wrongful death, but whether an award of \$11 million for wrongful death was grossly excessive in comparison to the actual evidence of record. As the Court correctly determined, based on the evidence actually introduced, the \$11 million wrongful death award was grossly excessive, warranting a new trial absolute.

In short, in ordering a new trial absolute, the Court thoroughly and properly discharged its duty to review a judgment that was "shockingly disproportionate" to the evidence that was presented to the jury. In determining to grant the new trial, the Court did not commit any error of law but correctly evaluated the evidence in light of the governing legal principles. The correctness of the Court's determination is not changed by the fact that the jury assigned 10% of fault to Mr. Larios or that it inquired about and did not award punitive damages. The jury's verdict of \$21 million in non-compensatory damages unquestionably is grossly excessive and the product of passion or prejudice, and the Court properly ordered a new trial absolute. Plaintiff's motion should be denied.

CONCLUSION

For the reasons set forth above and in this Court's Order, DESC respectfully contends that Plaintiff's motion for reconsideration should be denied.

Respectfully Submitted,

RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

s/ Steven J. Pugh

Steven J. Pugh (SC Bar #14341)
spugh@richardsonplowden.com
R. Wilder Harte (SC Bar #101228)
wharte@richardsonplowden.com
Megan C. White (SC Bar #101895)
mwhite@richardsonplowden.com

ATTORNEYS FOR DEFENDANT SOUTH
CAROLINA ELECTRIC AND GAS COMPANY,
N/K/A DOMINION ENERGY SOUTH CAROLINA,
INC.

November 22, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF COLLETON) CASE NO.: 2017-CP-15-00423

TIFFANY N. PROVENCE, AS SPECIAL)
 ADMINISTRATOR FOR THE ESTATE OF)
 JOSE REFUGIO LICONA LARIOS,)
)
 V.)
)
 SOUTH CAROLINA ELECTRIC & GAS)
 COMPANY, PENSICO Trust Company, LLC,)
 EDISTO SALES AND RENTALS REALTY, LLC.)
)

SEPTEMBER 23rd, 2019
 COLLETON COUNTY COURTHOUSE
 WALTERBORO, SOUTH CAROLINA
 BEFORE THE HONORABLE THOMAS RUSSO, JUDGE.

APPEARANCES:

William E. Applegate, IV, Esquire
 Liam D. Duffy, Esquire
 Perry M. Buckner, IV, Esquire
 Yarborough Applegate LLC
 291 East Bay Street, Floor 2
 Charleston, SC 29401
Attorneys for the Plaintiff

Steven J. Pugh, Esquire
 Megan C. White, Esquire
 Richardson, Plowden & Robinson, P.A.
 PO Drawer 7788
 Columbia, SC 29202
*Attorneys for the Defendant SCE&G, now
 Known as Dominion Energy*

Christian Stegmaier, Esquire
 Collins & Lacy, P.C.
 P.O. Box 12487
 Columbia, SC 29211
Attorney for Defendant PENSICO Trust Company LLC

Robert M. Kennedy, Jr., Esquire
 Phelps Dunbar LLP
 GlenLake One
 4140 ParkLake Avenue, Suite 100
 Raleigh, NC 27612-3723
Attorney for Defendant Edisto Sales & Rentals Realty, LLC
 Rebecca H. Hill
 Official Court Reporter

INDEX

DEFENSE MOTION FOR CONTINUANCE
 BY MR. STEGMAIER 3

PLAINTIFF’S MOTION IN LIMINE TO STRIKE ANSWERS OF PENSICO
 BY MR. BUCKNER 24
 REPLY BY MR. STEGMAIER 29
 REPLY BY MS. BRUNVIG 43

PLAINTIFF’S MOTION SCE&G a/k/a DOMINION ENERGY
 BY MR. APPEGATE 59

PLAINTIFF’S MOTION IN LIMINE AS TO EMPTY-CHAIR DEFENSE
 BY MR. APPEGATE 68
 BY MR. PUGH 74
 BY MS BRUNVIG 81
 BY MR. KENNEDY 84
 BY MR. APPEGATE 86

PLAINTIFF’S MOTION IN LIMINE TO EXCLUDE REFERENCE TO
 OSHA VIOLATION-RELATED EVIDENCE
 BY MR. APPEGATE 87
 BY MR. PUGH 93
 BY MS. BRUNVIG. 95

JURY QUALIFICATIONS 103

VOIR DIRE 108

JURY SELECTION 162

BATSON MOTION
 BY MR. BUCKNER 170
 BY MR. STEGMAIER 171
 BY MS. BRUNVIG 172
 BY MR. KENNEDY 172

MOTION REGARDING CORPORATION STATUS
 BY MR. APPEGATE 174

PLAINTIFF’S OMNIBUS MOTION IN LIMINE
 BY MR. BUCKNER 178
 BY MR. STEGMAIER. 183
 BY MR. DUFFY. 185

BY MR. PUGH 187
 BY MR. DUFFY. 190
 BY MR. KENNEDY.

MOTION AS TO BEER CANS
 BY MR. DUFFY 194

CERTIFICATE OF REPORTER 200

EXHIBITS

NO.	DESCRIPTION	
1	DEFENDANT PENSICO BRIEF	182

1

1 THE COURT: I appreciate everyone sending me something
2 over the weekend. I've tried to get up to speed with what
3 is going on. If you want to tell me what we need to take up
4 first and what has been resolved.

5 MR. STEGMAIER: Good morning, Judge. I'm Christian
6 Stegmaier of Collins and Lacy. We have the privilege of
7 representing the co-Defendant in this case, PENSCO, and Rick
8 Jackson as the homeowner, and so we represent the Homeowner.

9 We do have a motion for continuance that we would like
10 to bring before the Court, as it relates to this particular
11 Defendant. I know that's something we've managed to argue
12 on the front end. So when you ask if we have business to
13 take up, that's something that we would like to do.

14 THE COURT: Okay. Let me hear from you now.

15 MR. STEGMAIER: All right. Again, my name is Christian
16 Stegmaier; I'm from Collins and Lacy. This case is about
17 two-plus years old, and during the course of the discovery
18 there has been a multitude of written discovery exchanged
19 between the parties; there has been a multitude of
20 depositions taken.

21 The challenge in this case is this, that the decedent
22 in this case is a Mexican national whose parents are the
23 beneficiaries who live in Mexico. The Personal
24 Representative in this case is a lawyer, I believe, from
25 Summerville. Mr. Larios, the decedent, was living with his

1 brother down, I think, in Hollywood, living in the same
2 house; and he has been deposed within the last month.

3 In the course of discovery, there have been exclusive,
4 express interrogatories posed to the Plaintiff as it relates
5 to prior accidents involving tree trimming. We have
6 responses if we need to hand up to the Court, but my
7 representation to the Court is this, the Plaintiff stated
8 that "We don't know of anything." I'm paraphrasing as far
9 as that goes. "We don't have anything in our possession
10 responsive to those requests."

11 Of course, as this Court knows in any personal injury
12 action is what's important, especially to the Defendant, is
13 to find out about prior accidents, prior injuries, because
14 we are always wondering about causation, we are wondering
15 about pre-existing conditions, things along those lines; so
16 it affects both liability and damages.

17 We took the brother's deposition in mid August. He was
18 asked expressly, "How was your brother's health at the time
19 of the accident?" It was something like, "He was good and
20 strong. He's fine. He's in good health."

21 About two weeks ago, Mr. Kennedy advised us that his
22 client had found out that there was some sort of notion that
23 the decedent in this case had been involved in what we
24 understand to be a fairly serious tree-trimming related
25

1 accident four months before the subject accident, which is
2 the basis for this lawsuit.

3 We talked with Judge Mullen about it. We issued a
4 subpoena and found out that he had been taken to the Medical
5 University through a witness who will be testifying in this
6 case. He spent five days in the Medical University; most of
7 the time in the ICU.

8 We got those medical records after issuing our subpoena
9 and then there was a concurrent Court Order from Judge
10 Mullen to the Medical University telling them to expedite.
11 We got those medicals last Tuesday; 360 pages of medicals,
12 plus all the images.

13 We have not had the opportunity to consult with any
14 expert, whether it's an expert involving tree trimming
15 protocol or, more importantly, a neuro-radiologist or a
16 radiologist, anything along those lines.

17 We made a motion for continuance -- the Defendants made
18 a motion for continuance, which was denied by an e-mail, but
19 was not formally denied by any Order. We believe that we
20 have the opportunity to raise this motion again today for
21 the simple fact that we want to know more about the
22 circumstances relating to the injury. It has been
23 characterized in the medical records as a TBI, a traumatic
24 brain injury; that's serious.

25

1 THE COURT: So -- and I guess your position is there are
2 some questions you didn't ask Jackson because he was not the
3 30(b)(6) guy as far as you understood?

4 MR. DUFFY: That's absolutely true, Your Honor.

5 MR. APPLGATE: Your Honor, I mean, I'm sorry we've
6 three-wayed this thing.

7 THE COURT: That's okay.

8 MR. APPLGATE: It's not my intention, but again, Mr.
9 Duffy brought this up. The problem is, it is a strange
10 construct the way it's set up. The guy owns this house, and
11 it's owned by his trust, and the Defendant, and it's sent
12 off to be managed by this other property.

13 What I can tell you is how this will play out over the
14 course of the week is that yet, there's this air when you
15 read the deposition of Mr. Jackson, the Edisto Realty, that
16 everyone's kind of like, "Well, I don't really know." And
17 we need to be able to talk about "Who does own it?" "Who
18 do the responsibilities lie with?" And the credibility of
19 Mr. Jackson, again, to show the failure -- the lack of
20 credibility that he has, you know, is very important to us.
21 If we had -- if we asked -- and that's part of the other
22 motion that I think will be addressed.

23 Again, we just want to put the website pages which
24 explain, so that they can put them next to Mr. Jackson's
25 testimony that says, "I did this." "I did this." "I did

1 this." All of that is in -- it specifically states in the
2 website, you can't do any of that.

3 THE COURT: That knife cuts both ways, right? I mean,
4 if Mr. Jackson is going to assaulted with some attack on his
5 credibility, then they're going to have some credibility
6 issues that they'd like to address that you're going to
7 vehemently object to because it won't be ---

8 MR. APPELATE: Hey, I mean, again, I can anticipate
9 what those are. I mean, obviously, credibility always could
10 be an issue.

11 THE COURT: Well, it's going to be the issue of the
12 previous accident, and the non-disclosure of the previous
13 accident, and what are you doing here in this country in the
14 first place? And is your visa expired? Why are you
15 staying? I mean, it's a big door that can be swung open if
16 that's what we're doing.

17 This seems rather -- you're talking -- listen, I grew
18 up in a town smaller than Waltherboro; I'm from Edgefield,
19 man. And I'm telling you, things can be simple or they can
20 be difficult. And this appears rather simple to me, and
21 that is, here's a guy, Jackson. I don't know him from
22 Adam's housecat. But apparently he's got some idea in his
23 mind that, you know, I'm going to purchase a property down
24 at the beach. I'm going to put it in a trust. It's going
25 to fund -- it's just going to be income generating. That's

1 your property owner. The fact that he put it in a trust and
2 they're managing the trust part of it is a money thing, but
3 it's not an ownership thing. And so, there's your owner of
4 this property, so based upon your theories of responsibility
5 and negligence, I would think that applied both to Jackson
6 and PENSCO is one. I mean, that's who they are.

7 MR. APPLGATE: And your Honor, exactly that. And
8 that's why the request that Mr. Buckner -- the relief we
9 requested is so clear, instruction by the Court, so that's
10 clear, so that a jury, the people who may or may not
11 understand this construct ---

12 THE COURT: I mean, in the trial there will be some
13 instruction along the lines -- I don't know because I
14 haven't thought it through, you know, some instruction to
15 the jury that you're going to hear names in this case,
16 Jackson and PENSCO. PENSCO is the trust that this property
17 was placed into after being purchased by Mr. Jackson. So
18 they are the entity, so to speak, that is over this income,
19 this property. Those -- and I don't know how to word it,
20 but those names are synonymous; they're interchangeable.
21 When you hear PENSCO, as far as what responsibilities they
22 have in this case, that's Jackson. So if it's Jackson, it's
23 PENSCO. I mean -- and I don't -- again, that's not artfully
24 worded, but that's -- there can be some instruction to that
25 effect, and then what they didn't do I know goes to your

1 excuse them, come back in the morning, and then we'll pick
2 up where we've left off?

3 MR. APPELATE: So we will finish the motions after the
4 jury?

5 THE COURT: Yeah. Yeah. And I'll -- and then we'll
6 pick up after the jury's been selected.

7 MR. BUCKNER: Thank you, Your Honor.

8 THE COURT: Yeah.

9 (Whereupon, the Court is in recess in the trial of this
10 case. Thereafter, 2:00 p.m., the Court is back on the
11 record and the following is held on the record.)

12 THE COURT: Ladies and gentleman, we will now move to
13 the second page of the jury qualification. As I told you
14 earlier this involves questions that I am required to ask
15 you. These are questions that determine your general
16 eligibility to serve, and state law requires that I ask
17 these questions of you. For many of you, probably none of
18 these questions will apply. But for those of you that some
19 of these questions do apply, you could -- if I ask a
20 question that applies to you, you could just stand and give
21 your response from where you're standing, just as we did
22 during the roll call.

23 Now, if there's anyone and I ask a question, and if you
24 want to give your response in a little bit more private
25 setting, I could have you come forward, and I can take your

1 response up here at the bench. It's not completely private,
2 this is a Court of record. So our court reporter would be
3 involved in that conversation, and any of the attorneys who
4 would like to come forward and hear your response would have
5 the right to do that as well. But don't get terribly
6 concerned, we're not going to dig into your personal lives
7 or anything like that.

8 The first question simply is, is there any member of
9 the jury panel who is not a citizen of the United States of
10 America? If so, please stand.

11 Thank you. There are none. Is there any member of the
12 jury panel who is not a resident and citizen of Colleton
13 County, South Carolina? If so, please stand.

14 Thank you. There are none. Is there any member of the
15 jury panel who is unable to read, write, speak, or
16 understand the English language? If so, please stand.

17 I just want you all to know, I didn't write these
18 questions. Obviously, if you don't understand the English
19 language, you wouldn't understand the question, you wouldn't
20 stand anyway, so. That's kind of like asking everyone who's
21 not present, please raise your hands. But I don't write
22 them, folks, I just read them. Okay?

23 All right. Is there any member of the jury panel who
24 has less than a sixth grade education or its equivalent? If
25 so, please stand.

1 THE COURT: Okay. All right. And then, Mr. Gunter,
2 Juror Number 80?

3 JUROR NUMBER 80: Yes, sir. My only person has been
4 eliminated, so we're good.

5 THE COURT: Okay. All right. Thank you, sir. Is there
6 any member of the jury panel or member of your family who is
7 an immigrant or a naturalized American citizen? If so,
8 please stand. All right. And this is 191.

9 JUROR NUMBER 191: Yes, sir. Rachel Veveiros.

10 THE COURT: Juror 191. Yes, ma'am.

11 JUROR NUMBER 191: My husband is a naturalized citizen.

12 THE COURT: All right. And ma'am, would that in any way
13 affect your ability to give both sides a fair trial?

14 JUROR NUMBER 191: No.

15 THE COURT: Thank you very much. Throughout the course
16 of my questions to you, I always follow up with a question
17 about whether or not it would affect your ability to remain
18 fair and impartial. Is there any member of the panel --
19 I'm trying to see how I need to word this. Could every
20 member of this panel remain fair and impartial if any of the
21 individuals in this case were non-U.S. citizens? Please
22 stand if you could not remain fair and impartial.

23 Thank you. There are none. Is there any member of the
24 jury panel who harbors any negative opinions about
25 undocumented Mexican immigrants? If so, please stand.

1 Is there any member of the jury panel or member of your
2 immediate family who has ever suffered a traumatic brain
3 injury? If so, please stand.

4 Thank you. There are none. Folks, as you're aware
5 from what I said earlier, as I've gone through these
6 questions, I've always -- those of you that have responded
7 to my questions, I've always had that follow-up question as
8 to whether or not it would in any way affect your ability to
9 give both the Plaintiff and the Defendants a fair and
10 impartial trial. Anytime we try a case in this courtroom,
11 whether it's a civil case or a criminal case, our goal and
12 our purpose is to seat a panel that can set aside anything
13 outside this courtroom, and confine your consideration of
14 the evidence in this case solely on the evidence as it's
15 presented in this courtroom, leaving the outside world out
16 there; and decide this case based solely upon the evidence
17 as it's presented during the course of this trial, giving
18 both the Plaintiff and the Defendants a fair and impartial
19 hearing. That's our purpose anytime we pick a jury panel;
20 that's what we want to do at the end of the day is seat a
21 panel that can do that.

22 Now, I could ask questions all afternoon, probably, to
23 determine whether or not there's any of you that could not
24 do that, but maybe the simplest thing to do is to ask you.
25 Oftentimes, breaking things down to their simplest form

STATE OF SOUTH CAROLINA)
) CERTIFICATE
 COUNTY OF COLLETON)

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas for Walterboro, Colleton County, South Carolina, on the 23rd day of September 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

OCTOBER 11TH, 2019

Rebecca H. Hill

Rebecca H. Hill,
 Official Court Reporter

1 STATE OF SOUTH CAROLINA)
 2) IN THE COURT OF
 3 COUNTY OF COLLETON) COMMON PLEAS
 4
 5 TIFFANY N. PROVENCE, as)
 6 Special Administrator for)
 7 the Estate of Jose Larios)
 8 Plaintiff,)
 9 Vs.) CASE NO. 2017-CP-15-00423
 10 SCE&G Company; PENSCO Trust)
 11 Company LLC; and EDISTO SALES)
 12 & RENTALS REALTY, LLC,)
 13 Defendants.)

14 SEPTEMBER 24-27, 2019
 15 WALTERBORO, SOUTH CAROLINA

16
 17 HONORABLE THOMAS A. RUSSO, JUDGE

18 A P P E A R A N C E S:

19 BY: WILLIAM E. APPLGATE IV, ESQUIRE

20 LIAM D. DUFFY, ESQUIRE

21 PERRY M. BUCKNER IV, ESQUIRE

22 Attorneys for the Plaintiff

23 BY: STEVEN J. PUGH, ESQUIRE

24 MEGAN C. WHITE, ESQUIRE

25 Attorneys for the Defendant SCE&G/Dominion

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY: CHRISTIAN STEGMAIER, ESQUIRE
KELSEY J. BRUDVIG, ESQUIRE
Attorneys for the Defendant PENSCO Trust Co.
BY: ROBERT M. KENNEDY JR, ESQUIRE
Attorney for the Defendant Edisto Sales

KATHERINE A. SPIRES
REGISTERED PROFESSIONAL REPORTER

	<u>I N D E X</u>			
	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u> <u>RECROSS</u>
1				
2	Opening Statements			
3				
4	Mr. Applegate	64		
5	Mr. Pugh	86		
6	Mr. Stegmaier	102		
7	Mr. Kennedy	113		
8	RICHARD CARTER			
9	Mr. Buckner	125		
10	Mr. Pugh		138	
11	Ms. Brudvig		148	
12	MARION WHALEY			
13	Mr. Applegate	149		207
14	Mr. Pugh		166	217
15	Mr. Stegmaier		193	220
16	Mr. Kennedy		205	
17	ERIN PRESNELL			
18	Mr. Applegate	231		
19	Mr. Pugh		248	
20	Mr. Stegmaier		261	
21	Mr. Kennedy		268	
22	EDWARD BRILL			
23	Mr. Applegate	273		362
24	Mr. Pugh		318	
25				

1	PEDRO ABRAHAM			
2	Mr. Buckner	366		398
3	Ms. White		376	401
4	BEVERLY O'BRIEN			
5	Mr. Duffy	402		
6	Mr. Pugh		419	
7	MARK BRANHAM			
8	Mr. Duffy	434		473
9	Mr. Pugh		461	
10	RAY JACKSON			
11	Video	477		
12	GASPAR LARIOS			
13	Mr. Applegate	478		
14	TIFFANY PROVENCE			
15	Mr. Applegate	492		
16	Proffer by Mr. Pugh		509	
17	ERIC JACKSON			
18	Mr. Pugh	537		597
19	Mr. Applegate		565	
20	RODNEY WALKER			
21	Mr. Pugh	602		619
22	Mr. Duffy		614	
23	JANE SMOAK			
24	Mr. Pugh	620		630
25	Mr. Buckner		626	630

1	CLOSING STATEMENTS	
2	Mr. Applegate	647
3	Mr. Pugh	669
4	JURY CHARGE	
5	The Court	695
6	VERDICT	740
7	Certificate of Reporter	745
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EX</u>
1			
2	P-1	124	137
3	P-2	160	161
4	P-3	234	235
5	P-4	240	242
6	P-4A	294	294
7	P-5	297	297
8	P-6	373	373
9	P-7	399	399
10	P-8	413	418
11	P-9	418	419
12	P-10	438	438
13	P-11	451	452
14	P-12	455	455
15	P-13	477	477
16	P-14	569	569
17	P-15	583	583
18	D-1	172	172
19	D-2	172	172
20	D-3	176	177
21	D-4	176	177
22	D-5	186	187
23	D-6	187	188
24	D-7	188	189
25			

1	D-8	Photo	189	190
2	D-9	Photo	191	192
3	D-10	Report	251	251
4	D-11	Photo	401	401
5	D-12	Photo	468	469
6	D-13	SCE&G	470	470
7	D-14	OSHA	517	517
8	D-15	Photo	559	560
9	D-16	Photo	561	561
10	D-17	Report	622	623
11	C-1	Juror note	54	54
12	C-2	Coroner's report	271	271
13	C-3	Photo	271	271
14	C-4	Photo	271	271
15	C-5	Juror note	722	722
16	C-6	Juror note	722	722
17	C-7	Juror note	739	739
18				
19				
20				
21				
22				
23				
24				
25				

1 THE COURT: Guys, I got a note here that juror
2 number 169, Holdan Smoak, he was one of the alternates.
3 He was the one that made the comment that -- remember he
4 wanted to get the phone number because his girlfriend
5 was due. Well, she went in labor last night about 4:30
6 in the morning and he's at the hospital. So, Mr. Smoak,
7 he was the alternate, but he will not be with us this
8 week. He's over at the hospital.

9 All right. Mr. Pugh?

10 MR. PUGH: Yes, sir. Judge, can I move right to
11 there?

12 THE COURT: Sure.

13 MR. PUGH: May I start with the easy ones first?

14 THE COURT: And that would be fine.

15 MR. PUGH: Your Honor, as to our motion --

16 THE COURT: Aren't they all supposed to be easy
17 though? Come on.

18 MR. PUGH: Agreed.

19 THE COURT: I'm just kidding.

20 MR. PUGH: As to our motion to publish pleadings.
21 We've agreed that that one would be deferred. We may or
22 may not have to bring that up later, but for now we can
23 set that one aside.

24 THE COURT: All right.

25 MR. PUGH: The same with regard to our motion to

1 exclude reference to out-of-state litigation. We're
2 deferring at this time in setting that one to the side.

3 THE COURT: Okay.

4 MR. BUCKNER: Which one was that, Steve?

5 MR. PUGH: Motion to exclude out-of-state
6 litigation. Then we have, Your Honor, that leaves us
7 with the omnibus motion and we've made some progress on
8 that. If Your Honor has that in front of you.

9 THE COURT: Yeah. Let me get that in front of me
10 before we go.

11 MR. PUGH: Your Honor, beginning on page 3, we have
12 numbers 5 and 7. And as to number 5, it's my
13 understanding that certainly the plaintiff is going to
14 talk about the Dominion or South Carolina Electric and
15 Gas Company is the largest provider, utility provider in
16 the State of South Carolina and things like that. No
17 numbers; correct?

18 MR. BUCKNER: No numbers.

19 MR. PUGH: And they're also going to talk -- and
20 this ties in with number 7. They're going to talk about
21 the fact that Mr. Larios was employed. The incident to
22 his employment, he was paying bills at his house, and
23 sending some money back to relatives in Mexico.

24 And I understand that there won't be blackboarding
25 or -- because there's not enough time in this case,

1 we're not talking about black boarding here's what his
2 loss wages were, future loss of earnings, none of that
3 business. It's just in the ballpark of what I said.

4 MR. BUCKNER: Yeah. There will be no suggestion
5 that we're entitled to those economic damages. But we
6 do want to talk about in the context of Mr. Larios, that
7 this is part of his story about what he did, he was a
8 hard working guy that sent money back. That's just, you
9 know, this is his story. Presentation we're going to
10 give to the jury about his background. Again, we don't
11 intend to talk about the man -- well, the defendant in
12 that regard or get into the jury needs to compensate us
13 for that. We just want to be able to say it as part of
14 the story. And I think we got an agreement on that.

15 MR. PUGH: Number 8, Your Honor, is and we talked
16 about this and in fairness to all counsel, I think we
17 believe that there's a little bit of a cultural issue
18 here. And let me highlight it very quickly for you the
19 testimony. So when I deposed the brother, Gaspar and we
20 asked how did your brother's death affect you and other
21 family members. A standard question. He said three
22 things that are listed here in the motion. One, my
23 father in Mexico was so upset about the death of my
24 brother that he never worked again. Number one.

25 MR. APPLGATE: I think he stopped working.

1 So it seems like we had an opportunity to have a
2 clean jury that doesn't have these things with all the
3 information known to the lawyers and the fair
4 opportunities for us to have clean jury where we don't
5 have this potential bias. I believe with what you said
6 about, you know, that does appear that way, you know,
7 from his -- that he's an honest man and he wanted to
8 make sure we knew. It was just that that kind of
9 happens a little late in the game for us to make that
10 determination.

11 THE COURT: Yeah. I a -- go ahead.

12 MR. STEGMAIER: The only thing I would say is in the
13 voir dire, I don't believe Lewis Tree -- was Lewis Tree
14 Service specifically named?

15 MR. BUCKNER: Yeah. Yes. And we struck someone who
16 worked for the company for that reason. And then
17 weren't provide it, had opportunity to do the same here.

18 THE COURT: Right.

19 MR. BUCKNER: And would have accordingly adjusted
20 our strikes. That's the prejudice.

21 THE COURT: And -- go ahead, Mr. Pugh.

22 MR. PUGH: Quickly. Just for the record. I would
23 agree with Your Honor. I mean, we have a gentleman
24 Mr. Cole who sat through two and a half, three hours
25 yesterday and saw plenty of people condition him on how

1 MR. PUGH: May we have a five minute break?

2 THE COURT: Yeah. Go ahead. Let's do that and
3 we'll get started in a few minutes.

4 (There was a short break taken)

5 THE COURT: All right. Anything we need to take up
6 then before we get started? Anything from the
7 plaintiff? Anything?

8 MR. APPLGATE: We might finally be ready.

9 THE COURT: Anything from the defense?

10 MR. PUGH: I wasn't even looking.

11 THE COURT: Anything before we bring the jury out?

12 MR. PUGH: I don't think so.

13 MR. STEGMAIER: No, Your Honor.

14 MR. PUGH: I know you love hearing that.

15 THE COURT: All right. Let's go ahead and bring the
16 jury out, please.

17 (The jury entered the courtroom at 10:17 a.m.)

18 THE COURT: All right. Thank you, folks, please
19 have a seat. I'm sorry, we got more coming in. Thank
20 you, ladies and gentlemen.

21 Before we get started, obviously, you've noticed
22 that you're down in numbers a little bit. Hopefully,
23 everything has been -- gone very well. Mr. Smoak, I
24 think he said it was his finance', anyway, she went into
25 labor and he's at the hospital for the birth of their

1 child. And I had to excuse Mr. Cole. And, so,
2 Ms. McAlhaney, you are part of the starting line up,
3 okay.

4 MS. MCALHANEY: Yes, sir.

5 THE COURT: So, ladies and gentlemen, we are ready
6 to proceed. I have a few things I want to share with
7 you before I turn it over to the attorneys. But before
8 I do that, I'm going to ask you, if you would, give
9 madam clerk your attention. And she's going to place
10 you under your oath for your role as jurors in this
11 case.

12 THE CLERK: Please stand and raise your right hand.

13 (WHEREUPON, the jurors were sworn in)

14 THE CLERK: Thank you. You may be seated.

15 THE COURT: Folks, it's very important throughout
16 the case that you hear and are able to see everything
17 that goes on. So, if at any time during the course of
18 this trial you can't hear a witness or you can't hear
19 one of the attorneys or the Court, don't hesitate to get
20 my attention and let me know and I'll have them repeat
21 their response and we'll have them either talk slower or
22 a little more clearer. Okay. But it's very important
23 that you hear everything and see everything.

24 Also, let me tell you now that during the course of
25 this trial it is important that you are comfortable to

1 the extent, I think the temperature, we're going to try
2 to keep it pretty good. We got it set and hopefully it
3 will maintain a comfortable temperature. But if at
4 anytime during the course of the trial anyone of you
5 needs to take a break, don't hesitate to get my
6 attention and let me know that. We can stop and take a
7 break at any time.

8 You know, I don't know if there's really a delicate
9 way to put this, but sometimes mother nature calls and
10 she calls at inopportune times. If we are in the middle
11 of a witness's testimony or whatever and you need a
12 break, don't hesitate to let me know that. We can
13 always stop and pick up where we left off. That's not a
14 problem. But I would rather you do that and let's take
15 that break and we can pick up where we left off rather
16 than you sit there and wait in hopes that the witness's
17 testimony is almost over and if it's not then you start
18 sitting in there and you're dealing with your thought
19 processes more of when are they going to finish verses
20 what are they saying. I'm more interested that you
21 listen to what it is they're saying. Okay. And so it's
22 very important that you let me know if you need a break.

23 I don't know if any of you have actually -- I think
24 maybe one or two of you may have, but most folks don't
25 have an opportunity to sit on a jury trial such as

1 you're doing this week. Most people experience a trial
2 simply through television, the movies, or through books.
3 And, of course, we know that those trials are always
4 full of high drama and intense action and riveting
5 circumstances because that's Hollywood's efforts to
6 entertain us.

7 Now, this trial is not meant for your entertainment.
8 This trial is a fundamental part of our democracy.
9 During the course of this trial, while any one of those
10 things may occur, the important thing to understand is
11 that this is a trial that is not Hollywood. This is
12 real life here in Colleton County. And this trial, it
13 may be fast, it may be slow, it may be very deliberate,
14 maybe repetitive. In other words, it's very different
15 from Hollywood and the movies.

16 This courtroom is a place of honor that is dedicated
17 to the protection and to the preservation of citizen's
18 rights through what most many folks who have considered
19 the greatest system of justice ever created. The
20 attorneys that appear before you, they are advocates for
21 the parties that they represent. But first and
22 foremost, they are officers of the court, sworn to
23 uphold the integrity and the fairness of our judicial
24 system. You should expect them to be professional,
25 reasonable, and ethical in the performance of their

1 duties.

2 Now, you have just taken an oath to try this case
3 and to reach a fair and just verdict and so you are also
4 expected to be professional, reasonable, and ethical in
5 the performance of your duties. I have absolutely no
6 doubt you will do that and I want to thank you for your
7 service on this case.

8 Now, I'm going to share a few things with you.
9 This is not a charge on the law. I will give you the
10 law applicable to this case at the close of the
11 evidence. But right now, I just want to give you a few
12 things basically to help you. I'm going to explain the
13 procedures we're going to follow so you can better, you
14 know, follow along with what we're doing.

15 You've been selected as fair and impartial jurors
16 whose purpose and is to determine the facts of this
17 case. I told you that yesterday. You are the judges of
18 the facts. If at anytime I make any comment regarding
19 the facts or the evidence, you must disregard those
20 comments because only you can jury are allowed to decide
21 the facts of this case. You determine those facts from
22 the testimony that you hear and any other evidence that
23 may be presented during the course of this trial.

24 You should not be influenced by any opinions or
25 statements that you may have heard outside this

1 courtroom. It is especially important that you perform
2 your duty of determining the facts diligently and
3 conscientiously. Because ordinarily there's no way that
4 the Court can correct an erroneous determination of
5 facts by a jury.

6 Now, on the other hand, but with equal emphasis, the
7 same law that makes you the judges of the facts, makes
8 me the judge of the law. The law is given by this Court
9 is the only law that you may consider and you must
10 follow it and you must accept it even though you may
11 disagree with it. I'm not allowed to tell you what I
12 think about the facts of the case. And you're not
13 allowed to disagree with me about what the law is or
14 what you think the law should be. Your duty is to take
15 the law as I give it to you and apply it to the facts as
16 you find the facts from the testimony of the witnesses
17 and any other evidence that is presented during the
18 course of this trial.

19 Now, it's very important and I shared this with you
20 yesterday before you left, that throughout the course of
21 this trial, it's very important that you do not have any
22 conversation with anybody about the case, that you don't
23 discuss the case back in the jury room until I tell you
24 it is appropriate to do so.

25 It is extremely important that throughout this case

1 you keep an open mind and that you do not decide any
2 issue until all of the facts and the evidence has been
3 presented, the attorneys have addressed you with their
4 closing remarks, and I've given you the charge on the
5 law. Only then would it be appropriate for you to have
6 any conversation about this case.

7 Now, in just a moment, I'm going to recognize the
8 attorneys for their opening statements. I would
9 recognize the plaintiff first. I have no idea what the
10 attorneys are going to share with you in their opening
11 statements, but typically what you'll hear is what they
12 believe the evidence in this case will show. It is very
13 important that you understand that what the attorneys
14 share with you during their opening statements is not
15 evidence. They are not under oath. They're not
16 testifying. What they're going to share with you more
17 than likely is what they believe the evidence in this
18 case will show. What their contention is that the
19 evidence will show.

20 The evidence in this case is going to be presented
21 to you through the testimony of witnesses who are placed
22 under oath and testify from this witness stand and then
23 any other exhibits that come in during the course of the
24 trial.

25 During the trial, folks, you may hear from time to

1 time one of the attorneys say something along these
2 lines, "Judge, we have a matter of law we need to take
3 up with the Court" or "May we approach the bench." If I
4 can resolve the matter up here at the bench and allow
5 you to remain where you're at, I will do that. But some
6 times a question of law may arise and it may require me
7 to go a little bit more in depth into the -- into the
8 matter and I may ask you to step back into your jury
9 room. If I do that, the only reason I would do that is
10 simply this, sometimes in dealing with a matter of law,
11 it requires me to make some comment about the testimony
12 or the evidence that is in connection with that issue of
13 law.

14 And as I told you earlier, I'm not to have any
15 influence over you regarding the facts. So in an effort
16 to resolve that issue of law, I may ask you to step back
17 into the jury room and let me resolve that matter and
18 then I'll bring you back out and we'll pick up where we
19 left off.

20 It is extremely important, ladies and gentlemen,
21 that in determining the facts of this case, you are
22 going to have to decide whether or not the testimony of
23 a witness is believable. It's going to be my job as a
24 matter of law to rule whether certain testimony is
25 allowed into this record. But once testimony is allowed

1 into this record, whether or not you believe it, is
2 solely up for you to decide.

3 In deciding whether to believe a witness, you have
4 the right to consider whether the witness has any
5 interest in the result of the trial, whether the witness
6 has been biased toward one side or the other. The
7 opportunity for the witness to have seen things in the
8 matters about which they testify. You have a right to
9 consider anything in this record that will help you to
10 evaluate the credibility and the believability of the
11 witnesses.

12 So that means it's important that you listen
13 carefully to the witnesses, observe the witnesses,
14 listen carefully to the counsel as well as to the Court.
15 Please try not to let your thoughts wonder, but pay
16 strict attention to all of the testimony and the
17 evidence. So that at the close of the evidence after
18 the attorneys have addressed you with their closing
19 remarks and I have given you the law, you will then be
20 in a position to go back and begin your deliberations in
21 deciding this case. Okay.

22 So those are just some preliminary remarks. But
23 before I turn it over to the attorneys, let me first
24 inquire from the plaintiff, are there any objections or
25 exceptions to the Court's opening remarks?

OPENING STATEMENT BY MR. APPELEGATE

1 MR. APPELEGATE: No, Your Honor.

2 THE COURT: Anything from the defendants?

3 MR. PUGH: None, Your Honor.

4 MR. STEGMAIER: No, sir.

5 MR. KENNEDY: No, sir.

6 THE COURT: All right. Thank you, folks. Ladies
7 and gentlemen, if you would please now give the
8 attorneys your undivided attention as they address you
9 with their opening statements.

10 MR. APPELEGATE: Thank you, Your Honor.

11 Ladies and gentlemen, my name is William Applegate,
12 I know we somewhat met yesterday. I along with Liam
13 Duffy from my office and Perry Buckner represent the
14 Estate of Jose Larios. Ms. Tiffany Provence is here,
15 she is the Special Administrator for the Estate and
16 Mr. Larios' brother, Gaspar is here as well.

17 In the event that you guys know who we're here
18 talking about today, this is a picture who we have of
19 Jose Larios who's taken a little bit of time before he
20 passed away, we'll see more pictures of him to know a
21 little bit more about him over the course of the week.

22 A power company has a duty to protect to the public
23 from the high voltage power lines it has put to run
24 through our communities. To do this, a power company
25 must keep its power lines free and clear from any and

1 all vegetation, trees that are growing into the power
2 lines. If they fail to do this and someone is hurt or
3 killed, they are responsible for the harm.

4 This rule exists because the danger of electricity
5 is very well known in the power industry. This danger
6 and what it can cause, the fact that it will cause
7 serious injury and death is known in the power industry.
8 According to the National Bureau of Labor an American
9 worker is killed every three days from a power line
10 shock or electrocution.

11 A landowner must inspect its property to discover if
12 there are any latent dangers on their property and
13 either eliminate those dangers or warn about them. If a
14 landowner hires a property manager to manage their
15 property and that property manager takes control of the
16 property, they also must inspect and discover any latent
17 dangers on that property and either eliminate them or
18 warn invitees about those hazards. If they do not do
19 this and someone is hurt or killed, they are responsible
20 for the harm. These are not my rules. This is nothing
21 that I came up. This is what you'll hear are the
22 standards. This is what the law is.

23 Let me tell you about what happened in this case.
24 November 29, 2015, my client, Jose Larios, who lives
25 over on Highway 174 headed out towards Edisto Beach.

1 He's a landscaper. It's a Sunday. He generally works
2 six or seven days a week. He wakes up 5:30 in the
3 morning, he begins his morning task. He takes a shower.
4 He gets dressed. He goes out has a cup of coffee with
5 his brother Gaspar and they talk about the jobs they're
6 doing that day.

7 He works for a landscaping company out on Edisto and
8 he's got work to do. Gaspar works for a different
9 company. They actually have a friend in town, an old
10 friend from home, Pedro Abraham. Pedro is staying with
11 them and because one of Jose's coworkers is called in
12 said he couldn't make it to work that day, he's asked
13 Pedro to come along and help him. He's got a tree
14 trimming job he's got to go do. He's got to cut a bunch
15 -- trim up a bunch of palm trees and he's asked Pedro to
16 come along and help pick up the branches and kind of get
17 the job site ready to go.

18 They get in the car. They head out towards Edisto
19 Island, they stop and get some breakfast along the way.
20 Takes some snacks over to the site and they get there
21 pretty early that morning. They head to 3402 Myrtle.
22 Okay. This is right down in the heart of Edisto Island.
23 Far down -- once you get on the island you're gonna kind
24 of travel far down on the other end of the island.
25 Right smack dab in the middle of the island. It's not

1 on the front beach, it's not on the back. It's sort of
2 right smack dab in the middle of Edisto Island.

3 They head to that property. Before they get there
4 they stop off, they get a truck from Jose's boss. They
5 get a ladder, the extension ladder he needs for the job
6 and they get all the tools they need and they head to
7 the job site. They arrive at 3402 Myrtle Street and
8 this is a side view so you get some protective. We'll
9 show you some more pictures over time. This is sort of
10 walking in from this -- to the side of the property.

11 Okay. This is sort of their entry path. You can see
12 there's quite a few palm trees on this property.

13 There's actually 35 different palm trees located around
14 this one property. And that's their task for the day.

15 They get the tools or pretty much the chainsaw, he's
16 got the extension ladder, Mr. Larios has a rope that he
17 uses to tie himself around the tree to make sure that
18 he's safe when he's up there. And they begin their
19 process of going around and trimming these trees.

20 Gaspar -- sorry. I mean Jose and Pedro set the
21 ladder up, make sure it's safe and then they proceed up
22 the ladder. Jose proceeds up the ladder, ties himself
23 off with his rope at the top and then uses his chainsaw
24 the cut all the lower fruit pods and all the branches
25 that are dead and dying -- limb the tree up. We've all

1 see people limb up a palm tree. We get it nice and
2 cleaned up. They do eight trees.

3 You'll hear testimony that after about every three
4 trees, Pedro would inspect the chainsaw, add some gas,
5 make sure everything in the chain was tightened, looking
6 good, and then Jose would claim up -- back up and go do
7 the next tree. On the ninth tree, they set up the
8 ladder. Jose goes to the top. He ties himself off and
9 he's cutting and Pedro is walking around underneath
10 picking up limbs to take out to the street so they can
11 be picked up and discarded.

12 As he's sitting there picking up limbs, all of a
13 sudden he hears ah! And he looks up, Jose's screaming.
14 He looks -- he describes it as he looks as if he's lost
15 the strength in his body. His head goes down. He
16 unbuckles the rope, and then he proceeds to fall over 25
17 feet off the top of the ladder down to the base on the
18 ground landing on his back.

19 Pedro runs over and grabs his friend, lifts his
20 head, says, are you okay? He says, I'm okay. Pedro
21 knows -- does not believe that that's the case. He
22 immediately picks up his phone, he calls 911. He tries
23 to call 911, he doesn't have service. He runs out on
24 the street, he tries to find someone. Luckily a woman
25 is out walking, he flags her down, he tells her, hey, I

1 need help, will you please do something, she calls 911.
2 We ultimately get rescue. Ambulance come, they try to
3 revive him. By the time he comes back on the property,
4 Jose's not talking anymore. He's not saying anything.
5 He's lifted up his head and he can't get him to
6 communicate with him. EMS comes, they try to revive
7 him. This happened at about 9:40 and ultimately
8 Colleton County Medical Center, he's determined to be
9 deceased at around 11:45.

10 Over the course of the next few days everyone's
11 scratching their head about what happened. The first
12 thing is the Colleton County coroner, Richard Carter,
13 gets a call. There's been a fatality, can you do an
14 investigation? He -- the first thing he does, he calls
15 his deputy coroner. He's headed to the hospital. He
16 calls deputy coroner Marion Whaley and he says,
17 Mr. Whaley, you need to go out to the property to see
18 what happened. Go check the scene, and secure the
19 scene.

20 So Mr. Carter, he heads off to the hospital to see
21 what's going on with Mr. Larios. And Mr. Whaley the
22 deputy coroner heads to 3402 Myrtle. He gets there, he
23 tapes off the area, he does an inspection, he takes a
24 bunch of pictures, he determines -- he spends hours
25 there taking pictures and examining the situation and

1 then he leaves.

2 The next day, he communicates with a federal agency
3 to come who generally does inspections on workplace
4 accidents. So he calls the OSHA investigation and says,
5 come, do an inspection, an investigation on this thing
6 and the OSHA investigators on that Monday come to
7 Charleston -- I mean, come to Edisto.

8 On Tuesday morning, Mr. Whaley is called over to a
9 meeting at a law firm to meet with the witness. The one
10 sole eyewitness, Mr. Pedro Abraham who was there. They
11 are have translator there. They're talking about
12 exactly what happened. Pedro tells them the story.
13 They hear about the scream. They also look at the
14 chainsaw and they find that the chainsaw has a burn mark
15 on it or what appears to be a burn mark on it. All of a
16 sudden the light goes off. Marion Whaley goes back to
17 the scene. Mr. Carter says, you need to figure out what
18 happened here. Was there something that caused him to
19 fall from this ladder?

20 They go back to the scene. They start to
21 investigate. They find burnt palm fronds. They find --
22 they look up in the tree and, again, there's burnt palm
23 fronds and then they look and they finally see that
24 hidden in the trees are power lines. They see they're
25 touching the power line.

1 Over the course of this investigation, now
2 Mr. Whaley, Mr. Carter communicate with the coroner's
3 office -- I mean, with the pathologist at MUSC who's
4 doing the autopsy. She goes and examines the body and
5 she finds that there's a burn mark consistent with an
6 electric shock on his abdomen. So they put together
7 this whole set of facts. They've got a scream. We've
8 got burn marks in the tree ultimately which you'll find
9 out is that Mr. Whaley called SCE&G and said, look,
10 there's power lines involved here, you need to do an
11 inspection.

12 He states that SCE&G came. They went up in a bucket
13 truck. They did an investigation. They looked and one
14 of the things they told him is there was a burn mark on
15 the power line. So armed with this information, they
16 communicate with the pathologist who looks at
17 Mr. Larios, finds the burn mark on his abdomen, and she
18 makes a determination about his death. He died as a
19 result of blunt force trauma from the fall that was as a
20 result of the shock that caused him to fall off the
21 ladder. And that is how he died.

22 So who are we suing and why? First, we're seeing
23 SCE&G, the power company who put these lines in place
24 was in charge of maintaining this property. We know
25 that they violated this rule that requires them to keep

1 their power lines free and clear. Because, again, we've
2 talked to the investigators. We've looked at the
3 pictures. We've examined the scene. We know what
4 happened as far as this electrocution. We know that the
5 power lines were not as SCE&G is required to do by their
6 own policies and procedures 10 feet away from any and
7 all vegetation. So, again, these trees were growing
8 into the power lines.

9 You'll also hear about the National Electric Safety
10 Code and ANSI's standards. You'll hear multiple codes
11 that all enforce the same principle. Is that the
12 company -- the power company must ensure the power lines
13 are free and clear from the vegetation. And that's
14 their duty. We've all scene this. We've all
15 experienced what is it when SCE&G in this area comes
16 through and cleans out the trees. They come in and make
17 a wide swath and they do that for that reason because it
18 is dangerous and if they don't, people get hurt.

19 It's not a difficult task for them to do this. As
20 you know they're in the best position to do it. They
21 know where the power lines are. They are the maps and
22 they have a process in place. They have tree companies
23 that come and do this process for them on a regular
24 basis. So they come in and make sure this is done. But
25 that is their job. Because as we know, it's a very

1 lucrative business for them to be in. This is a very
2 large company that serves over 720,000 people in the
3 state of electricity, another 368,000 people with gas in
4 the state. Okay. This is a major company. And what
5 comes along again with this privilege is if they
6 maintain these lines.

7 There are two other parties in this case. PENSICO
8 Trust and Edisto Realty. Let me explain to you a little
9 bit about that. So 3402 Myrtle Street is a vacation
10 rental property. A man by the name of Ray Jackson is
11 the beneficiary owner of this property. He put this
12 property into what we call self-directed IRA for some
13 tax benefit to help him in retirement. The property is
14 owned, therefore, technically by this trust company.
15 Okay. Mr. Jackson though is the beneficiary of this
16 trust.

17 All right. What you're going to hear in this case
18 and the reason why we sued them is that PENSICO Trust as
19 the owner and Mr. Jackson as the owner, they have this
20 duty. They have a duty to make sure that they inspect
21 the property, discover any hazards about it on the
22 property and then either eliminate it or warn about it.
23 They have a duty to make sure that if they are aware of
24 this and they inspect it and find this, then they call
25 SCE&G, say, come, clean these power lines, they're in

1 contact before they invite someone onto the property and
2 send them up into the trees with chainsaws.

3 The other Edisto Realty defendant has the same duty.
4 But Mr. Jackson and PENSCO Trust, they hired Edisto
5 Realty to manage this property and they gave them
6 control over the property. And they -- Edisto Realty
7 took over obligations and responsibilities as it relates
8 to that property as far as maintaining it, keeping it
9 safe, running the bills, paying all the service
10 providers, having people come clean it, and prepare it
11 on a weekly basis so they can be -- they could get rent
12 and they take a nice fee for that service.

13 So what you will see here in this case is a little
14 bit of finger pointing in between these two parties.
15 Because each of them are maybe claiming that the other
16 person may have this responsibility. Okay. And you'll
17 need to listen to that. But either way, what you will
18 find in this case, what you need to listen to is, again,
19 the law which is there's a requirement if you own
20 property that you go and discover these dangers and you
21 eliminate or warn about them.

22 And what you will hear in this case is that no one
23 from PENSCO Trust Company ever inspected this property.
24 No one from PENSCO Trust ever did anything to go and
25 look around this property to see whether it was safe,

1 whether there were any dangers, and they definitely
2 didn't do anything to warn anyone about it.

3 You will hear that Mr. Jackson likewise did not do
4 anything as it relates to this property. Took really no
5 responsibility for anything related to this property and
6 definitely didn't inspect as the law requires. Didn't
7 discover any hazards and didn't warn anybody about it
8 even though he was the one who hired Mr. Larios' company
9 and sent them up in those trees.

10 Likewise, Edisto in the same boat. Edisto Realty
11 did not do any inspection. They did not do anything to
12 warn or eliminate this hazard. That's the law and those
13 are the facts that you will hear over the course of this
14 week.

15 Now, over the course of the last two and half years
16 that we've been litigating this case, the defendants
17 have come up with a large number of excuses. They are
18 denying liability completely. Not taking any
19 responsibility for Mr. Larios' death in this situation.
20 First they're going to tell you and they've hired an
21 expert to tell you this, an engineer come in and looked
22 at the same facts the coroner looked at, the OSHA
23 investigator looked at, the pathologist at MUSC looked
24 at, and they're going to tell you, it didn't happen. He
25 was not shocked. So despite what these investigators

1 say, he was not shocked. Why did he fall? No real
2 explanation for that, but he's going to tell you he was
3 not shocked.

4 So disregard the chainsaw. Disregard the burn mark
5 on his chest. And here you see behind me is one of the
6 pictures you'll see throughout this case is one of the
7 burn marks that appeared on this chainsaw at the time of
8 this event. Burn mark on the power line and the trees
9 coming in contact. Well, here's the burn mark on
10 Mr. Larios. The burnt seed pods in the tree. That line
11 right there, ladies and gentlemen, you can see what's
12 obviously a palm frond and what we see throughout all
13 these trees is these long fruit pods, you know.

14 And so we'll make sure you're understanding what
15 we're talking about a lot during this case. So this is
16 an example of one of these fruit pods that sticks out of
17 this tree. But this is what we talked about by the
18 experts, about the witnesses in this case is this is a
19 fruit pod or a fruit stalk, everyone seems to call it
20 something a little bit different.

21 So despite all of this evidence including this
22 scream from Jose that's unexplained by anything else and
23 the pictures of the power lines running in and around
24 the trees, he's going to tell you it just didn't happen.
25 And what I'll ask you is just listen very carefully to

1 his -- what he has. What is his evidence? What was his
2 methodology? What he did do when he comes up here and
3 tries to tell you that.

4 But, look, when that doesn't work, they're going to
5 come in and say, well, okay, wait. But if in fact he
6 was shocked, wasn't our fault because we followed these
7 standards that we have for ourselves. We even adopted a
8 standard that says, we trim these trees every five
9 years. And if we trim these every five years, then
10 we're okay and the expert says, I think five years is
11 fine. So irregardless of being out on an island in
12 South Carolina in the middle of a forest, they take the
13 position, hey, that's fine, so it's not our fault.

14 Then the engineer is going to tell you that it was
15 Jose's fault. If that defense doesn't work, it was
16 Jose's fault. Jose should have inspected the property
17 and seen these power lines. It was open and obvious.
18 You can't claim that we did something wrong when it's
19 right there. Clearly you don't walk up to a power line
20 and get near it whether you're 10 feet or 20 feet away.
21 You see a power line you're supposed to stop everything
22 and get away, call the power company.

23 But I want you to listen carefully as we go through
24 the trial of this case because you have to listen to the
25 evidence. Is it reasonable to think that Mr. Larios

1 would see this power line? You're going to hear from
2 the coroner, Marion Whaley who was out there
3 investigating the scene as an investigator, as a coroner
4 who is there for the purpose of determining what
5 happened. He didn't see the power line. It wasn't
6 until days later and they figured out all these other
7 different facts that he came back and saw the power
8 line. You're going to hear from Pedro Abraham who was
9 the only eyewitness on the scene who was out there with
10 him that day. We looked around, surveyed the area, we
11 didn't see any power line. Clearly we wouldn't have
12 gone up in there if we had. That doesn't make any
13 sense.

14 You're going the hear from another coworker of
15 Mr. Larios who had worked on the property before who's
16 going to tell you what the property looked like. It was
17 a jungle back there. You couldn't see the power lines.
18 We didn't know they were there. You're going to hear
19 from an OSHA investigator who came and investigated the
20 scene. He's going to say they went out and spent hours
21 and didn't know there were powers lines there. Another
22 individual who's hired for the purpose of trying to
23 figure out what happened. They don't see the power
24 lines. So you're going to need to question, is it open
25 and obvious? Is it fair to blame Jose who's not here to

1 defend himself this morning for not seeing this power
2 line?

3 You're also going to hear from Mr. Jackson, the
4 PENSCO Trust entity that beneficially owns this vacation
5 rental property. Mr. Jackson is going to tell you, he's
6 owned this property for over 30 years. He didn't know
7 the power lines were there. He did not know. So you're
8 going to have to question, is it reasonable for them to
9 say it's open and obvious condition.

10 Then they're going to spend a lot of time, ladies
11 and gentlemen, they got to get another hurdle. Okay.
12 Then they're going to go into, okay, what if it wasn't
13 Jose's fault, you don't believe the first four things on
14 our list that keep us from having any responsibility in
15 this matter, and then it was Jose's bosses fault. He's
16 got a landscaping company out there. He works. Jose
17 works for him. Surely his boss should have known these
18 things. The boss should have told him how to see the
19 power line. Should have trained him better to see that
20 power line. Maybe the boss knew about it. Maybe he
21 should be told about it. No one else knew about it, but
22 maybe the boss did. And so you need to look at that.

23 And they're going to look at different regulations,
24 citations about, okay, was he not wearing a helmet, he
25 was not wearing eye protective gear, wasn't wearing leg

1 straps. And tell you those were all things that his
2 boss should have had him do. But known of those have
3 any bearing on why he died if he had been wearing any of
4 that stuff. He still would have died.

5 So you need to listen to that. Importantly, again,
6 it sort of reminds me of my 11-year old boy when I find
7 him doing something wrong. And, again, it's one excuse
8 after another. Listen to the defense, listen to the
9 evidence most importantly.

10 At the end of this case you're going to be asked to
11 consider damages. What are damages in this case? One
12 of the damages is what we call a survival damage and the
13 judge will explain this to you. But it's just a damage
14 that's associated with that experience of being shocked,
15 being sent to the ground, in that time period the fear,
16 the anxiety, the thought process that's going through
17 your head as you die. So whatever that two hours of
18 period of time that he went through suffering, what is
19 that worth?

20 You're going to be asked and you are the deciders.
21 You are the people who have been chosen to make a
22 decision about this and at the end of the week you're
23 going to have to put something on a verdict form to
24 explain what is the value of that? What is that worth?

25 The other damage is for the harms and losses to the

1 family. You need to think about the impact on Jose's
2 parents. How has this impacted them? The reality of
3 the loss of Jose's society, of his companionship, the
4 mental anguish for them to suffer on a daily basis
5 knowing that with the simplest of acts, the simplest
6 precautions, this could have been avoided. Had SCE&G
7 just had done what their guidelines tell them to do Jose
8 would still be here. If the owners of the property just
9 had told him, hey, there's power lines up in here, don't
10 go up in that tree, Jose would still be here today,
11 working, enjoying his life. You're going to see the
12 affect on his brother, his only sibling and how that's
13 changed his life. And you need to think about the value
14 of that. What is the value of Jose Larios worth?

15 Now, you'll hear over the course of this week, but I
16 want to tell you a little bit about Jose Larios. Jose
17 Larios was 41 years old when he died. At 29 he left a
18 small town in Mexico to come to the United States. He
19 had heard like many of our ancestors before us about the
20 land of opportunity. He had followed that same beacon
21 of hope that people have for generations to see if he
22 could find a better life for himself because opportunity
23 was not abundant for him.

24 His brother had come here and formed a life. Gaspar
25 had jobs, had work, had family, had friends, and was

1 acclimated in the community in Edisto, so he followed
2 the path. Made it up to Edisto through a little bit of
3 a journey and started his life here 12 years
4 approximately before he died. Started off in Florida.
5 He picked oranges. He and some of his other buddies had
6 done, they picked oranges seven days a week for pickins.
7 He did that for a couple of years and then he made his
8 way up to Edisto.

9 He lived with his brother Gaspar and his niece Wendy
10 and their family and they lived together. You know, he
11 came here and he didn't have this experience to start
12 off landscaping. And after a short period of time, this
13 sort of tree trimming, he just happened to have the
14 knack for climbing these trees and getting up in there.
15 So that's sort of ended up being his specialty after
16 dealing with sort of all the other low and blow and
17 different aspects, that's what he was doing. That is
18 what he loved to do.

19 Over the course of this week you're going to see all
20 the pictures about how much this guy loved his job.
21 There are tons of pictures of him just happy. He loved
22 to work. And he was out there doing his best and he
23 worked like I said six or seven days a week.

24 When he wasn't working, he loved being with his
25 family. He loved animals and you could never keep him

1 from going up, picking up a stray cat or dog, bringing
2 him home. He become passionate about the local history.
3 He was learning English and studying the English.
4 You'll hear testimony about how much he was reading, how
5 much he was enjoying learning about the local history
6 here on Edisto Island and the surrounding areas. You're
7 going to hear that this was a young man who was bright
8 and capable. Who had a lot of dreams and a lot of hopes
9 to live his life in this area.

10 And, again, at the end of this, I'm going to ask you
11 to make a decision. I'm going to have you consider the
12 conduct of which you'll hear through the witnesses,
13 through the evidence I introduce to you, I want you to
14 consider the conduct of SCE&G, the conduct of these
15 homeowners, and the fact that here we sit almost four
16 years after his death, and these companies, these
17 individuals have refused to take any responsibility.
18 I'm going to ask you to make a decision and to put a
19 number on the value of his life.

20 The last thing I will leave you with is a little bit
21 of the law, but I want you to think about it. The judge
22 will charge you on the law, but this again, most juries,
23 you need to understand, this is not a criminal case. So
24 you guys have all watched TV and you hear about beyond a
25 reasonable doubt. That is a criminal case. And, yes,

1 the prosecution of a state must prove beyond a
2 reasonable doubt. Okay. That somebody is guilty.

3 In the civil world, and this is a civil case, this
4 is a case about money damages. Somebody is negligent.
5 They do something wrong and then they have to pay
6 damages as I explained to you earlier. In that case, we
7 call it the preponderance of the evidence. What does
8 that mean? That's kind of a hard legal term.

9 Preponderance of the evidence is if you look at the
10 scales, you have a scale, you put a feather on one and a
11 rock on the other one. If it leans in one direction, if
12 it leans a little bit more in one direction than the
13 other. If you put one feather on one side and two
14 feathers on the other, if it's the two feathers, that's
15 a finding for the plaintiff.

16 People in football season like the analogy of the 50
17 yard line. You got to throw that ball, you got to get
18 to the 51 yard line. If at the end of the trial you're
19 looking at it and you say, now the plaintiff's are at
20 the 51 yard line, you find for the plaintiff.

21 You're going to hear a little bit about this case,
22 ladies and gentlemen, about different parties as I told
23 you about. Hear about SCE&G. You're going to hear
24 about PENSCO Trust, and you're going to hear about
25 Edisto Realty and all their involvement in this thing.

1 Okay. But the defendants are also, as I explained to
2 you, they're going to try to make this about a person
3 who's not in the case. They're trying to make this
4 about Jose Larios' boss, suggested his fault.

5 I'll tell you at the end of the case, he will not be
6 on the verdict form. You will not be asked to assess
7 what his level was in determining what percentage of
8 fault he has. So don't get too distracted by this
9 sideshow about the employer and what his involvement is
10 in this case. We have three defendants here, you need
11 to be listening to is the plaintiff proving the case?
12 For example, against SCE&G. Did they have a duty to the
13 plaintiff, to the public, to keep these lines clear?
14 Did they keep the lines clear? If, no, they breached
15 that duty. And did that breach cause damages? And if
16 we prove those four things, then you have a finding for
17 the plaintiff. And that goes for the same thing for
18 Edisto Realty and the same thing for PENSCO Trust. If
19 you find that they are the owners or the managers of the
20 property and if they did not inspect the property to
21 find these dangers and then either eliminate them or try
22 to eliminate them or warn about them, findings for the
23 plaintiff. And then we can go talk about the damages
24 that you'll hear about over the course of this trial.

25 Thank you very much.

1 THE COURT: Thank you, Mr. Applegate. Mr. Pugh?

2 MR. PUGH: May it please the Court.

3 THE COURT: Yes, sir.

4 MR. PUGH: Good morning. My name is Steve Pugh and
5 I represent a company now known as Dominion Energy South
6 Carolina. They were formally known as South Carolina
7 Electric and Gas Company. With me to try this case are
8 Megan White who will be helping me and you will see her
9 throughout this case. Also I have Mark Branham who is
10 an employee of Dominion Energy.

11 Ladies and gentlemen, there is no dispute, none,
12 that Mr. Larios tragically fell 25 feet to his death.
13 There is also no dispute that his family no doubt feels
14 a tremendous loss. And, frankly, I think everyone is
15 sympathetic with that. The Court will tell you at the
16 end of the case that we all come into the courtroom with
17 different life experiences and different thoughts,
18 families, considerations, things that have happened to
19 us or those we love and know.

20 The Court will also tell you that as jurors in this
21 case that can't come into play in this way. You cannot
22 have bias or sympathy or prejudice toward anybody
23 whether it's some company or the family. But this case
24 isn't about that. This case is about why. Why did
25 Mr. Larios fall? The plaintiff has told you their

1 theory is that he was somehow shocked by coming into
2 contact with an overhead primary.

3 The plaintiff, their theory is that somehow
4 Mr. Larios and, I guess, others have not noticed or
5 could not have seen the overhead power lines that are
6 in the right-of-way behind this property. Those power
7 lines have been there for, I believe, approximately 40
8 years. They're on the bike path out on Edisto in a
9 right-of-way.

10 After the incident as Mr. Applegate told you, there
11 were a number of folks that came out and investigated.
12 The coroner's office, OSHA, and others. And incident to
13 those investigations, a lot of photographs were taken.
14 So let me show you a couple of photographs. This is a
15 photograph taken when Mr. Larios had fallen. Here's the
16 ladder up against the tree cut off here at the top.
17 And, I believe, if you look at this photograph and you
18 look at this line, see this straight line running across
19 here?

20 Let me show you another photograph. This is with
21 the ladder down on the ground, but nothing -- no further
22 trimming had been done. This time we've got a wire at
23 the bottom and we've got a wire at the top.

24 The evidence in this case will show that November
25 29, 2015 was not Mr. Larios' first time to this

1 property. Unlike his friend that he took with him,
2 Mr. Larios had been doing work at this property for
3 approximately eight years. His employer Mr. Stevens,
4 Will Stevens with Stevens Irrigation have been doing
5 work at this property for 12 years. There were many,
6 many opportunities during the many times being out there
7 for anybody at the property had looked to see these
8 lines. If you can photograph it, you can see it.

9 No one, not plaintiff's counsel, and not Dominion
10 Energy is suggesting that Mr. Larios meant to touch a
11 power line. No one is suggesting that Mr. Larios, who
12 by all counts, was a bright educated fellow. That he
13 didn't know not to get near or touch power lines. No
14 one is arguing that Mr. Larios doesn't have a
15 responsibility as we all do for our own safety.
16 Instead, the plaintiff's theory is that of why Dominion
17 is responsible for Mr. Larios falling from the ladder is
18 simply that he could not have seen those lines, those
19 power overhead lines in the right-of-way. That somehow
20 the lines were invisible.

21 I want to talk to you very briefly about the fact
22 that there are two wires. There's a top wire as you can
23 see here. That top wire is called the primary. This
24 top wire carries electricity. That's an energized line
25 and it's higher up on the poles that run back here in

1 the right-of-way. This bottom wire is called the
2 neutral. The neutral is that, it doesn't carry
3 electricity.

4 What's very much in dispute in this case is why did
5 Mr. Larios fall. Dominion submits that there is no
6 credible evidence. And you'll hear all the evidence and
7 there's no credible evidence to support the plaintiff's
8 theory that in fact he received an electrical shock
9 which caused -- or before he fell. And as you consider
10 the testimony that you'll hear in this case and we
11 believe the testimony you'll hear, in part, would be the
12 following:

13 Mr. Larios had no entry or exit wounds which were
14 indicative of electrical contact.

15 Mr. Larios' hands and feet didn't have a mark on
16 him.

17 His clothing which included two shirts, socks, and
18 shoes didn't have a mark on them. And yet the
19 plaintiff's theory is that the mark on his abdomen or
20 stomach was somehow caused by electricity.

21 In this case you will hear from, it was mentioned of
22 a gentleman named Pedro Abraham who was his first day of
23 ever going out to 3402 Myrtle Street to help his friend
24 clean up the vegetation that was cut. Mr. Abraham will
25 tell you that he has no tree trimming experience. He

1 had never been trained in anything with regard to tree
2 trimming. Wasn't familiar with the OSHA laws. Had no
3 medical training, et cetera.

4 Unlike Mr. Larios who had been there many, many
5 times, and as they told you a moment ago, this was
6 Mr. Abraham's first day of going to 3402 Myrtle Street.
7 Mr. Abraham is going to tell you that those lines that I
8 just showed you, these two wires visible in the
9 photograph, he will tell you they weren't invisible.
10 Could not be seen.

11 You will hear Mr. Abraham also tell us two further
12 things. He was interviewed by OSHA, that was the
13 meeting at the lawyer's office a few days later that
14 Mr. Applegate mentioned. And in that OSHA interview
15 about what happened to his friend, how did he fall?
16 What were the circumstances of the fall? Mr. Larios --
17 excuse me. Mr. Abraham did not tell OSHA two things.
18 Number one, he didn't tell OSHA that when they went out
19 there before they began this eight or nine trees or tree
20 trimming at 3402 Myrtle Street, he didn't tell OSHA,
21 yes, we looked all around the property for potential
22 hazards.

23 The second thing he didn't tell OSHA that he told us
24 when he testified was when my friend yelled and I looked
25 up, I saw my friend smoking. I saw the tree smoking.

1 Never told OSHA that. Never told the investigator
2 trying to figure out what in the world had occurred.

3 The plaintiff is also enchanting as you've heard to
4 provide testimony of someone named Dr. Erin Presnell.
5 Dr. Presnell is a pathologist that performs autopsies at
6 the Medical University of South Carolina. Dr. Presnell
7 performed the autopsy on Mr. Larios on the Monday
8 following his death. Dr. Presnell's original
9 conclusions in her preliminary report were that
10 Mr. Larios had died from blunt force trauma as a result
11 of a 25-foot fall from a ladder. That he had fractured
12 seven ribs on each side. He had four vertebrae broken
13 in his back, sustained multiple lacerations to his liver
14 and both kidneys, and she concluded that those were
15 caused by blunt force trauma. There is no mention of
16 electricity in that preliminary report.

17 You will hear that a few days later, she had a
18 telephone call with Mr. Carter, Richard Carter of the
19 Colleton County Coroner's Office who you'll hear from, I
20 believe, at some point perhaps today. And you'll hear
21 what Mr. Carter will tell you about his discussion with
22 Dr. Presnell.

23 After that discussion with Mr. Carter, Dr. Presnell
24 had Mr. Larios' body brought back up for a visual
25 inspection. Because the first time she looked at his

1 body, she made no reference to any marks possibly being
2 caused by electrical contact. And after being told a
3 couple of things, and we will hear that from Mr. Carter,
4 she then says -- about -- makes a reference to this
5 mark, single mark on his abdomen as having some
6 indication of being potentially caused by electricity.
7 And you'll hear her testimony.

8 Now, the plaintiff's theory of how Mr. Larios was
9 shocked will come in through a gentleman named Edward
10 Brill, an expert that they retained. And Mr. Brill's
11 testimony, we believe will be, you saw this seed pod, an
12 example art that was held up, this long dead looking
13 object. Mr. Brill's testimony will be that it is his
14 opinion that there was one of those coming up out of the
15 center of the top of the tree and that somehow that seed
16 pod while Mr. Larios was up there doing his work was
17 moved over to the energized primary. The top wire we
18 talked about and that is what caused him to receive a
19 shock or a tingle, whatever the case may be.

20 Mr. Brill will also tell us a couple of things. He
21 will tell us that in doing the work that he was doing on
22 the day in question, Mr. Larios was an unqualified
23 worker as that term is defined by OSHA. I will explain
24 to you in a moment what that distinction is. Mr. Brill
25 will tell you that as an unqualified worker, Mr. Larios

1 was not permitted to place any conductive object within
2 10 feet of an energized primary.

3 In fact, Mr. Larios we believe -- excuse me,
4 Mr. Brill we believe will confirm that Mr. Larios could
5 only have received a shock if he violated those OSHA
6 laws. And Mr. Brill will not have an opinion, we
7 believe, with regard to this mark on Mr. Larios'
8 abdomen.

9 In discussing Mr. Brill's testimony, I
10 referenced OSHA safety laws. And Mr. Applegate touched
11 on it in his opening as well. To borrow a phrase, the
12 OSHA safety laws, those are not my rules. They are the
13 law. They're not excuses. They are the law. The OSHA
14 laws require us all to have some role in our own safety.
15 And they require our employer to provide us with a safe
16 workplace. To provide us with methods, training, tools,
17 experience on how to do our job safely.

18 You will hear that in this case, Mr. Larios'
19 employer Will Stevens, a gentleman who had been at this
20 property some 12 years, as a result of that OSHA
21 investigation received multiple serious citations from
22 OSHA. And one of them reads like this:

23 "Stevens knew or should have known that Mr. Larios,
24 his employee, trimming trees in close proximity within
25 10 feet to energized power lines was exposed to the

1 hazard conduct to energized lines."

2 MR. APPLGATE: Your Honor?

3 (Bench conference)

4 MR. PUGH: Thank you, Your Honor.

5 In relation to the lines that are in the
6 right-of-way behind 3402 Myrtle Street, those overhead
7 power lines, the two wires we looked at. We believe
8 that there will be no evidence in this case that there
9 were repetitive outages. That there were electric
10 service issues. That there was anything to do with
11 trees or vegetation being reported or causing problems
12 or issues with regard to those lines before this
13 incident. No one requested that SCE&G or Dominion
14 Energy come out and de-energize or make those lines not
15 carry electricity anymore. That no one asked that they
16 be insulated. No one asked that they be moved. Not in
17 the many, many times that Mr. Stevens or Mr. Larios had
18 performed their work at 3402 Myrtle Street.

19 I told you a moment ago this distinction about
20 qualified and unqualified. Let me just tell you, you're
21 going to hear from a couple of witnesses in this case.
22 Landis Bunton and Allen Frasier, they work for Lewis
23 Tree Service, a contractor who does tree trimming along
24 the right-of-ways for Dominion Energy or SCE&G at the
25 time.

1 And they're going to talk about their experience and
2 training and what they -- the equipment they use and how
3 they do it because they are qualified. Meaning they are
4 permitted to get within a certain distance of power
5 lines while they're energized and they'll talk to you
6 about that further.

7 As to this property, 3402 Myrtle Street, what you
8 won't hear is, and I want this to be clear, that that
9 property, the tree that we're talking about is in the
10 backyard of the property owned by either PENSICO or
11 Mr. Ray Jackson. That Mr. Jackson and/or PENSICO is the
12 one who originally hired Will Stevens and Stevens
13 Irrigation to do the landscape work out there. That
14 Mr. Stevens had that -- excuse me. Mr. Jackson and/or
15 PENSICO had that relationship. And that work had been
16 done by Stevens and Mr. Larios as I had suggested, for
17 eight years for Mr. Larios, perhaps 12 for Mr. Stevens.
18 And all the while during all of that work there is no
19 notice, none to Dominion Energy or SCE&G of that work to
20 be done. No one said we're coming out and we're going
21 to do this work. No one asked anything with regard to
22 those power lines that you see in the photograph.

23 Mr. Applegate talked about overhead right-of-way
24 line-clearance and tree trimming and keeping vegetation
25 clear and he referenced things like ANSI, those are

1 standards that talk about everything from microwaves to
2 tree trimming to a lot of things. But he also mentioned
3 something called the National Electric Safety Code.
4 That is another standard that deals with a number of
5 things in the industry. But one of them is it deals
6 with power lines. It deals with vegetation and you'll
7 hear some testimony about what the consensus is with
8 regard to vegetation management according to the NESC
9 and ANSI as to the right-of-ways.

10 You will hear that SCE&G or Dominion performs
11 vegetation along its rights of ways. And you will hear
12 that it does that on a five year trimming cycle. Now,
13 let me make sure we're all clear about what that means.
14 Five year trim cycle isn't like your high school
15 reunion. It happens every five years. Five year trim
16 cycle is a continuous thing. There are tree trimmers,
17 in fact, I assume when Mr. Frasier or Mr. Bunton come in
18 here and testify, they'll tell you they had just come
19 from somewhere wherever that somewhere is where they
20 were trimming. Whether it be for Dominion or some co-op
21 or somebody else. And that is just a continuous
22 trimming with the goal being if they trim, and the
23 testimony in this case will be or evidence in this case
24 will be, in 2008, trimming was done along this
25 right-of-way behind 3402 Myrtle Street and again in

1 February of 2013. Keep in mind, the incident occurred
2 in November of 2015. And they will talk to you about
3 how that's done every five years and with the goal being
4 that approximately every five years you're back at the
5 same place again. That's the way it's scheduled.
6 That's how five year trim cycles work.

7 And you will hear from a couple of foresters from
8 Dominion, a retired fellow named Lou Ehinger and the
9 gentleman that's here with me, Mark Branham talk about
10 how and why and what Dominion Energy is doing with
11 regard to their vegetation management program.

12 Apparently the plaintiff's theory in this case is
13 that Dominion or SCE&G has a duty at all times to
14 maintain a 10-foot as he said swath of land cleared out
15 all day every day add infinite forever.

16 We submit to you, ladies and gentlemen, that that
17 will not be the evidence in this case. As I stated
18 earlier that work was typically done on a five year trim
19 cycle. And you will hear some testimony in this case
20 about something called midcycle trimming. And we'll
21 hear more about that as witnesses talk to you.

22 Dominion Energy monitors its overhead lines in
23 various ways. It has people, you see the trucks, people
24 out in the field all the time on any given day in
25 Dominion service territory. There are hundreds and

1 hundreds of people out in the field working. I'm not
2 talking about people in -- sitting in offices behind
3 computers. I'm talking about people out in the field
4 working on overhead right-of-ways or lines.

5 They also monitor their overhead lines in the
6 operation of them through a computer system. We live in
7 digital age. I mean, we got, I guess, we have doorbells
8 now that you can see who's at your front door if you're
9 1,000 miles away. They have something called SCADA data
10 and that is simply a way that they can monitor all of
11 their various overhead distribution wires that we saw
12 the two in this right-of-way. And they can determine
13 whether there were any outages, any services, any faults
14 that occurred on those lines and determine why and where
15 they occurred. As I told you a moment ago, there won't
16 be any evidence in this case, we don't believe, that
17 there were repetitive outages or service issues at this
18 location that we're talking about.

19 Mr. Applegate mentioned in his opening that it
20 wasn't until a couple of days later that SCE&G was even
21 contacted. Several days had gone by, no one thought
22 this had anything to do with electricity. But when they
23 finally contacted SCE&G, they came out the same day.
24 And you'll hear from those witnesses. And you will hear
25 that these linemen went out, they walked down the bike

1 path and looked up. They also backed a bucket truck
2 down the bike path and one gentleman, Cameron Luden put
3 himself in that bucket and went up in between the two
4 wires that we talked about. Mr. Luden is going to tell
5 you he put himself -- the bike path is here, as you can
6 see up here, and he put the bucket with himself in it
7 right between these two lines. And he will tell you
8 that he was looking for things like was there vegetation
9 growing into these lines? Were there burn marks? Were
10 there pitting? Was there any indication that something
11 had occurred two days earlier? And he will tell you his
12 observations based upon his putting himself up there.
13 And we believe his testimony will inform or tell you
14 that he saw nothing.

15 Now, you're going to see a bunch of photographs. As
16 y'all may know, if you photograph something from
17 different angles depending on where you're standing,
18 depending on what you're looking at, depending on how
19 the camera's zoomed in, what the lighting looks like,
20 things look a little different. And you will hear
21 Mr. Luden and his coworker lineman, a gentleman named
22 Rodney Walker tell you that they -- as I said, they
23 walked down the bike path and they looked up over their
24 head to see what there was. And they will tell you that
25 there was separation between those two -- between the

1 two wires and any vegetation. Okay.

2 And they will tell you, these are a couple more
3 photographs. Let me show you. So let me help you get
4 oriented. This is the photograph we've been looking at.
5 Here's this gazebo right here. Now, this is taken --
6 this photograph is taken looking down the bike path.
7 Here's the gazebo right here. Okay. Here are the
8 wires. Here are the trees. Again, the gazebo is down
9 here. Here are the wires. Here are the trees, the
10 separation.

11 So, on December 2nd, another SCE&G or Dominion
12 employee went out to where this circuit terminates out
13 on Palmetto Boulevard on Edisto Beach. And up on the
14 pole, there's a fuse, and they pulled that fuse on
15 December 2nd to look at it and see if it was blown or
16 showed any activity of anything having occurred or fault
17 occurred on the line. And you will hear the evidence
18 and testimony in this case that that fuse was not in
19 anyway blown or showed any signs of fault on the line.

20 Mr. Applegate told you that there are three
21 defendants in this case. There's Dominion Energy, there
22 is PENSCO, Mr. Jack -- Ray Jackson, and then there's
23 Edisto Realty. I'll let the lawyers or expect the
24 lawyers for those other defendants will talk to you more
25 about the landowner or property owner who hires someone

1 to do a job on their property. What their role is or is
2 not. And I'll let their -- let those lawyers talk about
3 that.

4 But you heard Mr. Applegate touch upon it that
5 Mr. Larios having been hired to go out there on to that
6 property to do some work was an invitee, a business
7 invitee. And the Court will give you the law at the end
8 of the case about what that means. We don't believe
9 that you will hear anyone tell you that it was legal for
10 Mr. Larios to come either with something he's holding or
11 otherwise within 10 feet of that energized overhead
12 primary in the right-of-way behind the property. As for
13 that, there are different laws that the Court will give
14 you.

15 Ladies and gentlemen, I don't think there is anyone
16 whoever wants someone to be injured. There is no
17 argument about that. As I started with you, I said this
18 family has had a tremendous loss. There's no argument
19 about that. The argument in this case is why did
20 Mr. Larios fall and if there's any credible evidence
21 which we submit there's not that he sustained some
22 electrical shock then you have to look to his own
23 conduct. The conduct of the people that hired his
24 employer who sent him out there. His employer who had
25 been out there 12 years. His employer who apparently

1 didn't train him or provide him with appropriate
2 knowledge and tools to do his job. Because if
3 Mr. Larios received a shock as the plaintiffs allege it
4 was because he violated those OSHA work rules that I
5 talked to you about. That 10-foot rule with regard to
6 an energized line.

7 Ladies and gentlemen, I thank you for your attention
8 and I appreciate your jury service this week. Thank you
9 very much.

10 THE COURT: Mr. Stegmaier?

11 MR. STEGMAIER: Thank you, Your Honor. Could we
12 take a break for just five minutes?

13 THE COURT: Yeah. Folks, if you need anything while
14 you're back there, let me know. Okay. And, please, no
15 conversation about the case and we'll bring you back out
16 shortly.

17 (The jury left the courtroom at 11:40 a.m.)

18 (There was a short break)

19 THE COURT: Let's bring the jury in, please.

20 (The jury entered the courtroom at 11:52 a.m.)

21 THE COURT: Thank you, folks. Please have a seat.

22 All right. Mr. Stegmaier, are you ready to proceed?

23 MR. STEGMAIER: Yes, sir.

24 I was telling the Judge, I appreciate the
25 accommodation. And I'll be very candid with y'all, I