

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LAURENS COUNTY

Donald B. Hocker, Circuit Court Judge

Appellate Case No: 2019-001514

Martha Foster Watts,

Plaintiff - Appellant

v.

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

Defendant - Respondent

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SC Court of Appeals

**AMENDED INITIAL BRIEF
OF DEFENDANT-RESPONDENT**

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court correctly denied Appellant Watts' Motion for a New Trial when the Motion was based on the trial court admitting into evidence a video depicting events relevant to the two collisions at issue at trial.
- II. The trial court correctly denied Appellant Watts' Motion for a New Trial when the Motion was based on the trial court's rulings regarding comments defense counsel made about the video during closing argument.

STATEMENT OF THE CASE

Plaintiff Martha Foster Watts (the Appellant), commenced this action on August 13, 2015 in the Laurens County Court of Common Pleas against Defendant Laurens County Sheriff's Office (the Respondent), asserting a claim for negligence arising out of an automobile collision the Plaintiff had with a non-party, Sherill King ("Ms. King"). (Complaint) The Defendant filed an Answer to the Plaintiff's Complaint in which it denied liability pursuant to the South Carolina Tort Claims Act and asserted affirmative defenses, specifically comparative fault on behalf of the Plaintiff. (Answer) The Plaintiff filed an Amended Complaint on December 17, 2015. (Amended Complaint) The Defendant filed an Answer to the Amended Complaint on January 14, 2016. (Answer to Amended Complaint). The claim for negligence and the defenses remained the same in the amended pleadings.

This action was tried before a jury from April 16, 2018 to April 19, 2018 with the Honorable Donald B. Hocker presiding. (T. 1-451) On April 19, 2018, the jury returned a verdict in favor of the Defendant specifically finding the Defendant not negligent. (T. 447-448). On April 27, 2018, the Plaintiff filed a Notice of Motion and Motion for a New Trial or Judgment NOV pursuant to Rules 59(b) and Rule 60(b)(3) of the South Carolina Rules of Civil Procedure. (Plaintiff's Notice of Motion and Motion for New Trial or Judgment NOV). The Defendant filed a response to Plaintiff's Motion on June 21, 2018. (Defendant's Response to Plaintiff's Motion for New Trial or Judgment NOV) Oral arguments took place on December 19, 2018 and the parties were allowed additional time to supplement their memorandums and/or selected portions of the trial transcript. (Plaintiff's Supp. Memo. Of Law Supporting Motion for New Trial Under Rules 59 & 60); (Defendant's Memorandum in Opposition to Plaintiff's Motion for New Trial Pursuant to Rules 59 & 60)

The Plaintiff contended that a new trial was warranted because a surveillance video of a nearby business adjacent to the scene of the accident on Highway 76 was inadmissible and improperly admitted into evidence based on Rules 1001, 1002, 1003 and Rule 403 of the South Carolina Rules of Evidence. (Plaintiff's Notice of Motion and Motion for a New Trial or Judgment NOV); (Plaintiff's Supplemental Memorandum of Law Supporting Her Motion for a New Trial Under Rules 59 and 60). The Plaintiff further claimed she was entitled to a new trial because of comments defense counsel made about the video during his closing argument and the trial court's overruling of objections made by plaintiff's counsel to defense counsel's statements. (Plaintiff's Notice of Motion and Motion for a New Trial or Judgment NOV); (Plaintiff's Supplemental Memorandum of Law Supporting Her Motion for a New Trial Under Rules 59 and 60). The grounds for the Plaintiff's motion regarding the surveillance video were that it was inaccurate, that the original was not presented, and that the surveillance video was either not relevant or that its probative value was outweighed by its prejudicial impact. (Plaintiff's Notice of Motion and Motion for a New Trial or Judgment NOV); (Plaintiff's Supplemental Memorandum of Law Supporting Her Motion for a New Trial Under Rules 59 and 60). The Defendant responded that the surveillance video was admissible pursuant to Rules 401, 901, 1001, 1002, 1003, and Rule 1004 of the South Carolina Rules of Evidence and that his closing argument was proper and in no way prejudicial so as to warrant a new trial. (*See* Defendant's Response to Plaintiff's Motion for a New Trial or Judgment NOV); (*See also*, Defendant's Memorandum in Opposition to Plaintiff's Motion for a New Trial Pursuant to Rules 59 and 60).

Based on the arguments submitted in both parties' memoranda, a review of all of the evidence, and considering the oral arguments of counsel, the trial judge denied the Plaintiff's motions in an Order dated August 6, 2019. (Transcript of Record on Plaintiff's Motion for New

Trial); (Order Denying Plaintiff's Motions for New Trial) The Plaintiff subsequently filed a Notice of Appeal on September 6, 2019. (Notice of Appeal)

STATEMENT OF FACTS

The underlying action arises out of two separate automobile collisions that occurred in close proximity of time on the night of August 15, 2013. The first collision occurred when Deputy Barton Holmes ("Deputy Holmes"), who was travelling east on Highway 76 in Laurens County in his patrol car, made a U-turn in front of Ms. Sherell King ("King")¹, who was also travelling east on Highway 76 toward Clinton, South Carolina. (Holmes Dep., p. 17) (T. 91-92) Deputy Holmes made the U-turn to catch a vehicle travelling in the opposite lane that he had clocked traveling 69 miles-per-hour in a 40 mile-per-hour zone. (Holmes Dep., pp. 16-17) Ms. King's vehicle hit Deputy Holmes' patrol car on the left rear back quarter panel as Deputy Holmes was making the U-turn. (Holmes Dep., p. 17); (T. 91) After the collision, Deputy Holmes' patrol car came to rest in the median facing in the westbound direction toward Laurens. (Holmes Dep., p. 17); (T. 92, 102) Ms. King's vehicle came to a rest in the left lane next to the median facing in the eastbound direction toward Clinton. (Holmes Dep., p. 17); (T. 101, 102) The area of the highway where the vehicles came to a rest was "a fairly open road" with good visibility. (Holmes Dep., p. 18)

After the vehicles came to a rest, Deputy Holmes got out of his vehicle and motioned for Ms. King to clear the lane. (Holmes Dep., p. 22) He explained that, even though Ms. King had her headlights and taillights on, it is always safer to clear the lane. (Holmes Dep., p. 22) He returned to his vehicle and recalled having to wait a short period of time for his radio to clear so that he could contact dispatch to report the collision with Ms. King. (Holmes Dep., p. 22) Deputy

¹ Ms. King has never been a party to this action.

Holmes recalled that his toggle switch for his blue lights was turned on, and he had no reason to believe that his blue lights were not functioning as they should have been. (Holmes Dep., p. 28)

The second collision occurred when the Plaintiff's vehicle collided with the back end of Ms. King's vehicle, immediately after which the Plaintiff's car crossed the median and the opposite lanes of traffic and stopped after running into the fence that surrounded the front of Dixie Iron & Metal, a scrap metal recycling facility in Laurens owned by Matt Cagle. (T. 260) The Plaintiff had also been traveling eastbound on Highway 76 in the same lane as Mrs. King's vehicle after leaving the Bingo parlor between 10:30 p.m. and 11:00 p.m. (T. 149) She testified that the highway was so dark that she did not see that Ms. King's vehicle was stopped in her lane until right before she hit Ms. King's car. (T. 150-152) The Plaintiff denied seeing any lights from either of the vehicles involved in the previous collision. (T. 150-152) However, the Plaintiff also testified that she had looked down from the road and then looked up before she made impact with Ms. King's vehicle. (T. 150)

Deputy Holmes witnessed the second collision. (Holmes Dep. pp. 24-25) He recalled seeing the Plaintiff's vehicle travelling downhill and recalled hearing the sound of breaks locking up which he described as tires squealing immediately before the Plaintiff hit Ms. King's vehicle. (Holmes Dep., p. 24) He also recalled hearing the sound of the impact. (Holmes Dep., p. 24) After the impact, he witnessed Ms. King's vehicle move forward toward Clinton and the Plaintiff's vehicle veer off to the left, cross the median and two lanes of oncoming traffic and come to a rest in a chain link fence at a scrap yard across the street. (Holmes Dep., pp. 24-25)

Ms. King testified that her headlights and taillights were in working condition on the night of the collision. (T. 100) She also testified that her headlights and taillights were on during the collision and afterward. (T. 102) She also testified that Deputy Holmes' headlights and taillights

were also on during and after the collision. (T. 102) Ms. King testified that after the vehicles stopped, her headlights were on facing toward Clinton, and Deputy Holmes' headlights were on facing toward Laurens. (T. 92, 102) Ms. King testified that Deputy Holmes' blue lights were on when the Plaintiff hit her vehicle. (T. 104) In fact, Ms. King testified that Deputy Holmes' headlights, taillights and blue lights were on when the Plaintiff hit her vehicle. (T. 104, 109) Ms. King testified that her headlights and taillights were also on when the Plaintiff hit her vehicle. (T. 109) Whether the headlights and taillights of the vehicles driven by Deputy Holmes and Ms. King were on before and at the time when the Plaintiff hit the back end of Ms. King's vehicle was one of the key disputed facts at the trial of the case.

Another key disputed fact at the trial was the amount of time that elapsed between the first and second collision. Ms. King testified that the Plaintiff's vehicle hit her vehicle two to five to ten seconds after she collided with Deputy Holmes' vehicle. (T. 102, 105-106) However, she acknowledged that any estimation of how many seconds elapsed between the two collisions was speculation. (T. 108) He recalled he had time to exit his vehicle, motion for Ms. King to clear the lane, return to his vehicle and wait for his radio to clear so he could report his collision to dispatch. (Holmes. Dep., pp. 22, 30) He did not recall the timing of the second collision to be immediately after the first and considered the collisions to be two separate accidents. (Holmes Dep., pp. 30, 44) Deputy Holmes testified:

Q. Okay. Now, can you tell us the time interval between the two impacts, Barton?

A. I believe that initially I - - I've always thought of it in my head that it was - - it wasn't like a - a bam-bam sequence of events. There was a period of time between them. I believe in my statement to - - to Trooper Duncan after a week or so after the accident I estimated 15 seconds or so. I believe it's actually longer than that. But, again,

somebody that's involved in something like that, I wouldn't be surprised if their sense of - - of time was skewed. But there was a period of time between the two collisions, time enough for me to get my wits about me, you know, briefly pop out of my vehicle, get back in, and remember waiting to key up on the radio before the second incident happened.

(Holmes Dep. p. 30, lines 8-23.) With regard to the timing of the two collisions, there is no dispute that Ms. King's vehicle collided with Deputy Holmes' vehicle right after he made the U-turn in the highway. (Holmes Dep., p. 17) It is also undisputed that both vehicles came to a stop after the collision. (Holmes Dep., p. 17); (T. 101-102). Furthermore, there is no dispute that the Plaintiff's vehicle crossed the median and the two opposite lanes of traffic on Highway 76 and ran into the fence surrounding Dixie Iron & Metal immediately after colliding with Ms. King's vehicle. (T. 151)

The collision between Deputy Holmes and Ms. King was investigated by the Multidisciplinary Accident Investigation Team ("M.A.I.T.") of the South Carolina Highway Patrol. (T. 223) As part of the investigation, Deputy Holmes was interviewed by Trooper Duncan, a member of the M.A.I.T. team at the time. (Holmes Dep., p. 54) During the investigation, Trooper Duncan discovered that a surveillance video existed that captured images of events that took place during the two collisions that occurred on August 15, 2013. (T. 278, 280) Mr. Cagle had cameras mounted that were focused toward Highway 76 from his recycling facility. (T. 261-262) Mr. Cagle explained to Trooper Duncan that his surveillance system did not record on tape or disc and that the system would eventually record over the video of August 15, 2013. (T. 265) Therefore, in order to preserve the evidence from the video for his investigation, Trooper Duncan went to Mr. Cagle's recycling facility on August 20, 2013, set up a video camera and recorded Mr. Cagle's monitor while it played the surveillance video. (T. 277-284) The video was then uploaded

to the MAIT hard drive. (T. 277-284) Counsel for the Defendant moved to have the video admitted into evidence at trial. Counsel for the Plaintiff objected to the admission of the video. The Court conducted a lengthy and detailed *in camera* hearing, after which it determined that the video was admissible. (T. 177-258)

During the *in camera* hearing, Trooper Kelly Anderson, employee of the South Carolina Department of Public Safety (“DPS”) testified that she brought to the courtroom, at the request of the defense, a disc that included the information taken off of the DPS hard drive. (T. 177-183) Trooper Anderson testified that she made a copy onto a disc from the DPS hard drive and explained that it contained an exact copy of the video recorded by Trooper Duncan on August 20, 2013. (T. 177-183) She reviewed the disc and it contained what she described as coming off the DPS hard drive. (T. 177-183)

Matt Cagle also testified during the *in camera* hearing. He testified that he operated the facility in August 2013, at which time he had cameras mounted that focused on Highway 76 from his business. (T. 192-193) He stated that he mounted the cameras and that they captured traffic flowing up and down Highway 76. (T. 193) He testified that he reviewed the recording to determine what had happened to his fence and that the equipment recorded in real time and on the date indicated. 194-195) Mr. Cagle described the relevant part of the video beginning at the time marked 10:57 and stated that the system only records video, not audio. (T. 194-195) He further testified that the camera records in exact real time and that it has a timer and a date stamp. (T. 196) He also testified that he installed the equipment himself in the early part of 2013 and that he maintains the equipment. (T. 197-198) He explained that the cameras record on a Lorex EC02 recording system onto a DVR with a hard drive inside. (T. 198-199) He testified that the hard drive cannot be physically removed and that it is located in the building in the main office. There

is a monitor for the system that is mounted in the office, and the system can be reviewed using a mouse or a remote. (T. 198) He explained that the device runs continuously twenty four hours, seven days a week and that there has been no problem with the monitor nor had anyone tampered in any way or altered the equipment between the time of the incident and the time Officer Duncan came to the facility to record the video from the monitor. (T. 206-213) He testified that there had been no obliterating of the images on the video, only that there had been a glare created when the video was copied. (T. 206-213) He testified that the video plays continuously in real time and that Channel 5 records images going toward Clinton and that Channel 6 records images going toward Laurens. (T. 206-213)

With regard to Trooper Duncan's recording of the video, Mr. Cagle testified that Trooper Duncan brought a tripod to the facility and set up a camcorder to record the video images from the monitor. (T. 211-212) He also testified that there had been no alteration or change to anything having to do with the system between the time he discovered the damage to his fence and the time that Trooper Duncan recorded the surveillance video. (T. 206-213) He confirmed that the surveillance video which was viewed during the *in camera* hearing was an accurate representation of the duplication of what was on his monitor. (T. 220-221) He further testified that the images shown on the disc from Channels 5 and 6 of the video equipment accurately portrayed and represented images that were on his recording system when Trooper Duncan went to his place of business. (T. 220-221) He explained that after a certain period of time, the system will loop and record over previous recordings. (T. 212)

Trooper Al Duncan also testified during the *in camera* hearing as to his recording of the surveillance video. (T. 222-251) Trooper Duncan was employed with the South Carolina Highway Patrol at the time of the incident, but he retired in 2017. (T. 223) At the time of the

incident, he was a member of the Multidisciplinary Accident Investigation Team, which he had joined in 2008. (T. 224) Trooper Duncan testified that he went to the facility on August 20, 2013 and met with Mr. Cagle. (T. 225) When he reviewed the video footage, he realized that there were cameras facing the direction of the collision. (T. 225) After discovering that Mr. Cagle did not believe there was a way to get the video off of the hard drive system onto a disc or thumb drive, Trooper Duncan set up a camcorder on a tripod in front of the monitor of Mr. Cagle's surveillance system and recorded the parameters of the time frame of the collision to capture evidence from the video to preserve it and keep it from being lost. (T. 225) Trooper Duncan recorded images from the camera on Channels 5 and 6 off Mr. Cagle's monitor at the facility. (T. 225-227) Trooper Duncan explained that he did not need to capture everything prior to the time frame relevant to the collision and that it would not have been appropriate to record information that would be useless to his investigation because of constraints on data storage on the DPS hard drive. (T. 227-228) He further explained that Mr. Cagle fast forwarded the video to the relevant time frame while he was recording the monitor and that he started recording prior to the exact portion of the video that was relevant to the investigation. (T. 228) Trooper Duncan explained to the Court that what the Plaintiff's attorney had referred to as "skips" in the video actually involved the fast forwarding of the video to reach the relevant portion that he was trying to capture. (T. 227-228)

Trooper Duncan also testified that he recorded the surveillance video on a Sony hand held DVD recorder and that it did not record on a tape, SD card or disc, but rather, it recorded to a hard drive within the camcorder and that information was taken back to the office, loaded onto his computer and saved into the M drive of the MAIT Team hard drive. (T. 229) It was saved as evidence of the investigation of the collision and was saved into a secure hard drive system. (T. 229) Trooper Duncan stated that the disc received as evidence fairly represented the recording

made from Mr. Cagle's monitor as to the events related to the incident. (T. 230-234) In reviewing Channel 5 of the recording, Trooper Duncan explained it was a constant recording and it was an exact picture of what was taken off of Mr. Cagle's monitor. (T. 230-232) He explained that the recordings from Channels 5 and 6 were an accurate portrayal of the images he recorded onto his camcorder and stored in the MAIT Team hard drive and that there had been no edits. (T. 230-232) He also confirmed that no images were removed from the video and that the video was a complete recording from the time the recording began until it stopped. (T. 233). He confirmed that there was no sound on the surveillance video and verified that the equipment he used to record the images was reliable. (T. 233)

Trooper Duncan also confirmed that all transfers made from his camcorder to his computer and from his computer to the DPS hard drive were personally transferred by him. (T. 232, 236) In response to questions from the trial court, Trooper Duncan testified that, "I know that what I saw on the video lines up with the information that I had about the crash at the time and I found out as I continued on with the investigation." (T. 247). He further testified that although the time references on the Accident Report may not be entirely accurate, "from what I saw, the information gathered in that video reflects perfectly the evidence that's on the roadway and what took place in the crash." (T. 250) The trial court admitted the video into evidence after the *in camera* hearing. (T. 257-258)

Both Mr. Cagle and Trooper Duncan also testified before the jury at the trial of this matter. Mr. Cagle testified that the surveillance video beginning at 10:57:23 was recording in real time. (T. 262-263) He testified that his recording system was a Lorex EC02 and that it did not record on a physical cassette or tape that could be removed. (T. 264-265) He confirmed that there had been no problems with the equipment and that the images on the video were a clear and accurate

representation of the recording on his system and what he viewed after the collision occurred. (T. 265-268) Mr. Cagle also testified that the time shown on the video had been correct since he installed the recording system in 2013. (T. 273) He also explained that, while Trooper Duncan was recording the video playing on the monitor, he had fast forwarded the surveillance video that Trooper Duncan was recording to the point that Trooper Duncan wanted to start recording in real time. (T. 273-274)

Trooper Duncan explained to the jury that he went to Mr. Cagle's business to record the video from Mr. Cagle's monitor to preserve the evidence he needed for the investigation into the collision involving Deputy Holmes and Ms. King. (T. 277-278, 287) He explained that Mr. Cagle expressed that he was not familiar with how to transfer the information from his recording system onto a thumb drive or any type of card. (T. 277-278) He stated that he set up his camcorder and recorded surveillance video playing from Mr. Cagle's monitor. (T. 277-278) He testified that he recorded the evidence that was relevant and important in his investigation and had Mr. Cagle fast forward the video to a point prior to the relevant part of the video and then the video was played in real time to collect the information he needed for his investigation. (T. 281-282) He also confirmed that the video footage from 10:00 p.m. to 11:00 p.m. was recorded in real time. (T. 282) Corporal Duncan also explained that he loaded the video from his camcorder directly into the hard drive of the MAIT team and confirmed the video was not edited after it was taken. (T. 282-283) He also confirmed that the video played at trial was an accurate depiction and representation of what he recorded from his equipment. (T. 283-284) He further testified that the video he recorded was accurate, that there were no breaks, interruptions, alterations or changes and that the video was reliable. (T. 283-284, 297-298) Corporal Duncan also explained that discrepancies can exist between times noted on an accident report and a video. (T. 294-295)

The trial court ruled that the video was admissible. (T. 257-258) Before closing arguments, the trial court ruled that counsel could comment on what was depicted in the video but could not add to it. (T. 363-366) Counsel for the Defendant showed the video during his closing argument and commented on it within the parameters of the trial court's ruling. (T. 399-422)

ARGUMENT

I. STANDARD OF REVIEW

The grant or denial of a motion for a new trial rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989); *see also Boozer v. Boozer*, 300 S.C. 282, 283, 387 S.E.2d 674, 675 (Ct. App. 1988) (stating the court of appeals has no power to review circuit court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297.

The standard of review when adjudicating the denial of a motion for JNOV is constrained by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Welch v. Epstein*, 342 S.C. 279, 299–300, 536 S.E.2d 408, 418–19 (Ct. App. 2000). Additionally, the trial court must deny a JNOV motion when the evidence yields more than one inference or its inference is in doubt. *Id.* An appellate court will reverse the trial court only when no evidence supports the ruling below. *Id.* When considering a JNOV motion, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Id.* A motion for JNOV may be granted only if no reasonable jury could

have reached the challenged verdict. *Id.* The jury's verdict should be affirmed if any evidence exists that sustains the factual findings implicit in its decision. *Id.*

Furthermore, “the admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling should not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.*

II. The Plaintiff is not entitled to a new trial because the trial court properly admitted the surveillance video into evidence, and the surveillance video was relevant to the issues in the case and was not unfairly prejudicial to the Plaintiff.

A. The surveillance video was properly authenticated.

The Plaintiff contends that the surveillance video exhibit was not properly authenticated under Rule 901, SCRE, because it was materially different from the original. (Appellant’s Initial Brief, p. 12). She contends that it “does not qualify as an admissible ‘print’ or ‘duplicate’ of the Original, under Rules 1001, 1002, and 1003, SCRE because Trooper Duncan’s image is added, while 99.99% of the Original is omitted from the Video.” (Appellant’s Brief p. 12.) She contends that the method in copying the video was unreliable because it produced a vastly incomplete copy and there were other omissions resulting from fast forwarding during the copying of the video. She also claims that the time stamp begins twenty minutes after the collisions, and therefore causes the video to be irrelevant and confusing, which constitutes a “circumstance” under Rule 1003, “making it ‘unfair to admit the duplicate’ into evidence.” (Appellant’s Initial Brief, 12-13).

The Plaintiff further claims that the video exhibit is not an accurate reproduction because of the omissions due to only recording fifteen minutes of the twenty-four hours the original captured and fast forwarding through some parts while copying the original, which caused breaks,

interruptions and alterations. (Appellant's Initial, Brief, 13, 15). She further maintains that the unresolved time discrepancy of when the collisions occurred bars authentication. (Id. 16).

- i. **The surveillance video was admissible under Rules 1001, 1002, 1003, and 1004 of the South Carolina Rules of Evidence, and there is no genuine question as to the authenticity of the original or circumstances making it unfair to admit the duplicate in lieu of the original; therefore, the surveillance video was properly admitted into evidence.**

The video shows important events relative to the two collisions in this case. The Plaintiff wants to keep the video out of evidence because the depictions on it are harmful to her case. Contrary to the Plaintiff's arguments, the video recorded by Trooper Duncan satisfies the Rules 1001, 1002 and 1003 of the South Carolina Rules of Evidence. Rule 1001 provides that an original of a photograph includes the negative or any print therefrom. The Rule further states that if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original". The video recorded by Trooper Duncan is a print of the images shown on Mr. Cagle's Recycling Center surveillance video monitor.

Rule 1001 defines "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or *electronic re-recording*, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original. Rule 101, SCRE (emphasis added). The recording of the surveillance video is a re-recording of the original recorded by Trooper Duncan using his camcorder that was set up on a tripod to record the portion of the video that was relevant to the collisions and damage to the fence.

Rule 1003 provides that "a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003, SCRE. Rule 1002

provides that to prove the content of a writing, recording or photograph, the original is required except as otherwise provided by the rules or by a statute. Four exceptions to the requirement of the original are found in Rule 1004, which provides in relevant part that the original is not required if “(1) all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (2) no original can be obtained by any available judicial process or procedure. . . .” Rule 1004, SCRE.

The Plaintiff’s arguments that the video does not satisfy these Rules are wholly without merit. The video was taken to preserve evidence of a collision involving a Sheriff’s deputy. The video was made by a member of the M.A.I.T. team. Although his method of taking the video may not have been sophisticated, it was certainly reliable. It is irrelevant that Trooper Duncan’s image can be seen on the video. His image is not in the roadway and does not obstruct the viewer from seeing what is happening on Highway 76. It is also irrelevant that the video only captures a small portion of the entire twenty-four hours of the original or that the original is fast forwarded while being recorded. The purpose of the video was to capture evidence that began with the collision involving Deputy Holmes and Ms. King. There was no need to record the entire video. The Plaintiff has failed to state the benefit of having the entire video would have provided her because there is no benefit. All of the relevant images from the night of the collisions were captured in real time on the video, and it was an accurate reproduction of the original. The breaks and skips that were caused by fast forwarding while the video was recording were easily explainable to the jury. The Plaintiff’s argument that “the Video is obviously not an accurate portrayal of the events on the road, because none of the vehicles could be identified from that portrayal” is wrong. The Plaintiff’s vehicle is clearly seen crossing over the median and two lanes of traffic and coming to a rest in the fence of the recycling facility.

The Plaintiff's argument that the time stamp beginning twenty minutes after the collision is a circumstance under Rule 1003 that makes it unfair to admit the video into evidence is also baseless. The relevant parts of the video that were played for the jury were in real time. There were sixty seconds to each minute. At no point during the trial did the Plaintiff produce any evidence that the time stamp on the video was incorrect. However, even if it was twenty minutes fast, it would not be irrelevant or cause confusion such that it would be a circumstance making it unfair to admit it into evidence. The date on the video was correct, and it showed events that happened that evening that were corroborated by witness testimony, i.e., the Plaintiff's car crossed the median and two lanes before crashing into and damaging the fence of the recycling center. Moreover, there was no evidence produced that a separate incident occurred in the exact same manner at a different time on the day or night of the incident at issue in this case. Accordingly, any time discrepancy on the time stamp would not have created confusion or caused the video to be irrelevant.

Furthermore, the original was never in possession of the Defendant, and it is no longer available because the surveillance system at the recycling facility automatically tapes over footage after a certain time period. The original is also not obtainable or available through judicial process or procedure. Moreover, as the record clearly indicates, the original was never in the possession of the Laurens County Sheriff's Office. The appellant has failed to set forth any genuine question in regard to the authenticity of the original and for the reasons set forth below, the appellant has further failed to set forth any circumstances that would make the admission of the duplicate unfair. Accordingly, the duplicate video satisfies Rules 1001, 1002, 1003 and 1004 of the South Carolina Rules of Evidence and was properly admitted into evidence.

ii. The video was authenticated under Rule 901 of the South Carolina Rules of Evidence.

The Plaintiff restates the foregoing arguments to persuade the Court that the video did not satisfy the authentication requirements in Rule 901 of the South Carolina Rules of Evidence. The Rule provides that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Rule 901, SCRE. It further provides that authentication may be made by testimony that a matter is what it is claimed to be and prior case law indicates that evidence in support of authentication can be direct or circumstantial. *Id.* See also, *Winburn v. Minnesota Mutual Life Ins. Co.*, 261 S.C. 568, 201 S.E.2d 372 (1973); *State v. Wilson*, 246 S.C. 580, 145 S.E.2d 20 (1965).

At trial, the surveillance video was properly authenticated by witness testimony that the video was what it claimed to be. The Court held an in-camera hearing on Tuesday, April 17, 2018. Trooper Kelly Anderson testified that at the request of defense counsel, she brought to Court a disc that contained information taken directly from the Department of Public Safety hard drive. (T. 177-180) The next day, the Court continued the in-camera hearing and heard testimony from Matt Cagle, who operated the recycling facility in August 2013 where the surveillance video was recorded. (T. 191-192) Mr. Cagle testified that on August 15, 2013, there were eight (8) working cameras. Mr. Cagle mounted the cameras himself and two of them captured traffic flowing up and down Highway 76 so that he could monitor the two gates going into the scrap yard. (T. 193-194) Mr. Cagle testified that when he came into work on August 16, 2013, the scrap yard fence was laying on the ground and he spoke to a trooper who told him what happened. (T. 194) Mr. Cagle reviewed his surveillance system and rewound it to see what happened to the fence. (T. 194) Mr. Cagle testified that he saw a car with sparks flying from under the front end that ran into his fence.

(T. 195) Mr. Cagle explained to the Court that the surveillance footage records to the system hard drive, not to a cassette, and it records over itself about every six months. (T. 211-212) Mr. Cagle further testified that the surveillance video is time stamped in real time and that the surveillance video exhibit was a recording of what played on his surveillance monitor and that no alteration of the video occurred between the time he noticed the damage to his fence and the time Trooper Duncan recorded it with his camcorder. (T. 195-213) Mr. Cagle, as the operator of the business, the person who installed and maintained the surveillance camera, and who was present when Trooper Duncan recorded the monitor, clearly had personal knowledge about the system with which to testify that the re-recording was a duplicate of his surveillance monitor and that the re-recording was what it purported to be.

Furthermore, Trooper Al Duncan testified in camera and in front of the jury. Trooper Duncan personally went to the recycling center, spoke with Mr. Cagle and viewed the footage from his surveillance system. (T. 225) Mr. Cagle indicated to Trooper Duncan that he was not familiar with a way to get the data from the hard drive of the surveillance system onto any kind of disk or thumb drive, so in order to preserve the evidence, Trooper Duncan set up his camcorder on the tripod in front of the monitor of Mr. Cagle's surveillance system. (T. 225) Thus, the original was simply not obtainable due to no fault of the respondent. *See*, Rule 1004, SCRE.

Trooper Duncan testified that his reflection is seen in the re-recording because there was no way to get it out but that in no way obscures the view of what was happening on Hwy 76. (T. 225-226) Trooper Duncan indicated that the beginning of the recording skips a bit because Mr. Cagle fast forwarded to the relevant time frame because recording the entire 24/7 surveillance video would be useless to the investigation. (T. 227-228) Trooper Duncan recorded the relevant time frame from beginning to end without stopping during that time frame. (T. 230-231) Trooper

Duncan testified that the surveillance video exhibit was a true and accurate representation of what he recorded on his camcorder when he went to Mr. Cagle's business. (T. 232) Trooper Duncan removed the background audio that was not part of the surveillance video, which was talking in the room during the re-recording, and further testified that removing background audio not part of the original recording is a customary practice of the MAIT team. (T. 232-233) He confirmed nothing was cut or taken out of the surveillance video. (T. 233-234) Trooper Duncan testified that the re-recording of the surveillance video taken by his camcorder was automatically added to the mainframe of the MAIT team and that no one edited the video in any way and that the exhibit brought to trial was an exact copy of the re-recording he took with his camcorder at Matt Cagle's recycling center. (T. 234)

The Plaintiff argues that the time stamp on the video is twenty minutes faster than the actual time of the events. She contends that the time discrepancy bars authentication of the video citing *United States v. Oriach*, 222 Fed. Appx. 312, 315-16 (4th Cir. 2007). *Oriach* is distinguishable from this case. In *Oriach*, the Court found that the testimony of a police detective was insufficient to authenticate photographs taken from a surveillance videotape showing a drug defendant, his co-conspirator and the vehicle in which they were travelling as to the date and time of the drug deal because the detective could not testify from personal knowledge that the photographs were taken at the specified date and time and the date and time stamp on the video equipment was incorrect. *Id.* Although the Court in *Oriach* found that the District Court erred in admitting the photographic exhibits as having been taken on the specified date and time without proper authentication, it determined the error to be harmless because the date of the photograph was cumulative to testimony about when the drugs were purchased, and the time was not material to the charge. *Id.* at 316.

In this case, however, it is undisputed that the date stamp on the video is correct. The collisions occurred on August 15, 2013, and the date stamp on the video is August 15, 2013. There has been no evidence to prove that the time stamp on the video is incorrect. However, even if it is incorrect by twenty minutes, the alleged time discrepancy on the time stamp is not material to the fact that the collisions occurred. Moreover, witness testimony regarding the manner in which the collisions occurred corroborated images that the video depicts. The Plaintiff testified that her vehicle veered to the left, crossed the median and the two opposite lanes of traffic and came to rest at the fence. This is clearly shown on the video. Even if the time stamp on the video is twenty minutes fast, which is denied, it not material because the video shows events described by witnesses occurring on the undisputed date of the incidents. Any alleged time discrepancy does not bar authentication of the video under the circumstances in this case.

The Plaintiff's reliance on *State v. Brown*, 424 S.C. 479, 489, 818 S.E.2d 735, 740-41 (2018) in support of her argument that the video was not authenticate because it was inaccurate is similarly misplaced. In *Brown*, the trial court admitted records from the global positioning system (GPS) on a probationer's ankle monitor as evidence of his location at the time of a robbery. *Id.* at 486, 739. The South Carolina Supreme Court found that the GPS records were not authenticated by the probation agent's testimony that the records were accurate because "we use it in court all of the time." *Id.* at 487, 739. The Court provided that in order to authenticate the records, the State was required to present evidence describing the process or system used to produce the GPS records and to show the process or system produced an accurate result. *Id.* at 490, 781.

The Court noted that the method used to authenticate the evidence was pursuant to "Rule 901(b)(9) process or system: evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." The Plaintiff argues that the

video in this case falls under the process or system category of authentication and the evidence derived from it was inaccurate because the original video was not in proper working order since the time stamp was allegedly fast by twenty minutes. (Appellant's Initial Brief, 17-18). The Plaintiff's attempt to liken the video in this case to the GPS records in *Brown* is not compelling. The video was not authenticated as a process or system. It was authenticated by witness testimony. Again, the Plaintiff has produced no evidence to show the time stamp on Mr. Cagle's equipment was incorrect. Even if it was, which is denied, the Plaintiff has failed to show that the images on the video were inaccurate. The accuracy of the images in the video was corroborated by witness testimony, including the Plaintiff herself. The Plaintiff has not shown that the video was not authenticated. Therefore, the ruling of the trial court should be affirmed.

B. The video admitted into evidence was relevant to the contested issues in the case and it was not prejudicial to the Plaintiff.

i. The surveillance video was relevant to the contested issues in the case.

The surveillance video is admissible pursuant to Rules 401, 402, and 403 of the South Carolina Rules of Evidence. Rule 401 defines relevant evidence as any evidence which has the tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. Pursuant to Rules 402 and 403, all relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In the present case, the surveillance video clearly had significant probative value in this case. The surveillance video provided information concerning the position of the vehicles, the timing of the two collisions, the condition of the roadway, and whether the vehicles lights were

on, which were all highly contested issues at trial. Therefore, any evidence making those issues more or less probable is clearly relevant and admissible. There is no evidence that the video provided any danger of any unfair prejudice, confusion, or in any way misled the jury. The jury was free to give the video whatever weight it felt necessary including completely disregarding it because of the alleged “poor quality.”

ii. The Plaintiff has not shown that the video was prejudicial to the verdict.

The appellant argues that the surveillance video is prejudicial because it contains only a few minutes of the 24/7 surveillance footage, it does not show the point of impact of the two wrecks, it is of poor quality because it is hazy, black and white images, Trooper Duncan’s reflection can be seen, and the time stamp is inaccurate. (Appellant’s Initial Brief, pp. 14, 16, 18-19).

iii. The playback speed of all relevant events is accurate and in real time.

Contrary to appellant’s allegations, the playback speed of all relevant events was accurate and in real time. Plaintiff seems to take issue with the fact that as Mr. Cagle and Trooper Duncan testified, they rewound the surveillance recording and fast forwarded closer to the time when Ms. Watts’s vehicle can be seen crossing the road and hitting the fence. Upon information and belief, Mr. Cagle testified that he rewound the surveillance video then fast forwarded it closer to the relevant time period. Specifically, the Channel 5 video was left alone to play out beginning at 10:54:42 pm and the Channel 6 video was left alone to play at 10:54:40 pm. Trooper Duncan testified that this was done to conserve space on the MAIT team hard drive.

Trooper Duncan was recording Mr. Cagle’s video of the incident for purposes of his investigation into the collision between Deputy Holmes and Ms. King. There was no need to preserve what was recorded the entire day before the incident for the investigation. There was also

no need to have recorded the entire day before the incident for the present case. The relevant incidents in the present case were the two collisions, and the re-recording captured events that occurred relative to the two collisions. The events that occurred relative to the two collisions were re-recorded in real time. The time clock at the top of the screen from 10:54:42 pm on Channel 5 and 10:54:40 pm on Channel 6 through the remainder of the videos, shows that there are sixty (60) seconds in each minute; therefore, the playback speed concerning all relevant events is accurate and in real time.

- iv. The video did not show the entirety of both the crashes in issue, but it did show relevant facts surrounding the crashes in issue, i.e. whether lights were on, and it did show most of the collision between the Plaintiff and Ms. King. It also provided relevant, accurate, and truthful evidence as to the time of events.**

The surveillance video does not show the actual impact of the first accident nor the initial impact of the second accident. However, the video does show important events relative to the two collisions. Immediately before the collision between Deputy Holmes and Ms. King, Deputy Holmes made a U-turn. At approximately 10:58:07 p.m. the video clearly shows headlights that swung wide and became stationary at 10:58:09 p.m. It can be deduced from the video that the first collision occurred then. Another important fact that was not in dispute is that the Plaintiff's car crossed the median and the two opposite lanes of traffic and running into the fence immediately after hitting the back of Ms. King's car. The video later shows sparks when the vehicles collided and clearly shows a vehicle crossing over the median and opposite lanes of traffic and hitting the fence at 10:58:47-49. The delay between the collisions can be deduced from the video footage showing the time stamps of the events relative to the two collision.

It further showed relevant and critical evidence to dispute the Plaintiff's testimony. The Plaintiff argued that there were no lights on when she hit Ms. King's car. She stated that if there

were lights on, she should, would, and could have seen them, but she did not see any lights. The video clearly shows that there are numerous lights on various vehicles before and at the time the Plaintiff's vehicle is shown crossing the highway and hitting a fence. The video also shows other cars passing the first collision without incident. Accordingly, the video provided relevant, truthful and accurate evidence as to important facts relative to the two collisions.

v. The surveillance video fairly and accurately represented the time between when lights became stationary and when the appellant's vehicle hit Ms. King's vehicle and crossed the road.

As noted above, the video accurately represents the time between when lights can be seen swinging wide (10:58:07) and then become stationary (10:58:09) and when Ms. Watts's vehicle pushes Ms. King's vehicle forward, and then crosses and leaves the roadway (10:58:47-49). As the testimony indicated, the video was playing in real time and sixty seconds were in each minute; therefore, the video fairly and accurately represented the time. The video confirms that there was an approximate gap of 41 seconds between the two collisions. This was an important and highly contested issue in this case, and that evidence clearly contradicts the appellant's claim that the collision occurred 2-10 seconds apart on a dark road with no lights.

vi. The image was of sufficient quality and the probative value outweighed any prejudice.

The Plaintiff argues that the video in this case is prejudicial, relying on *United States v. Williams*, 271 F.R.D. 1, 3-4 (D.D.C.) and *Burchfield v. CSX Transportation, Inc.*, 636 F.3d 1330 (11th Cir. 2011). In addition to the fact that those cases are not controlling authority in the present case, there is a critical distinction in those cases – neither of the videos in those cases were an actual depiction of the events. The video in *Williams* was a “recreation of events as they supposedly occurred.” *Id.* at 2. Similarly, the video in *Burchfield* was made by a consulting expert after the incident occurred and was based on certain assumptions about how the incident occurred.

Id. at 1335. Importantly, however, the video in this case shows an actual depiction of certain important events that occurred immediately before, after and during the two collisions. This distinction is fatal to the Plaintiff's argument.

The Plaintiff also argues that the video in this case is prejudicial because it "invites the jury to speculate that the Video is significant to what is unknown because it is not on the Video." (Appellant's Initial Brief, p. 23). There is no speculation with regard to any aspect of the video in this case. The jury was not invited to figure out what was not on the video. The video clearly shows certain events. The jury was free to interpret the video on its own, just as the parties were free to argue their positions of what the video shows and/or does not show. The jury was free to determine the weight of the video. The image was a surveillance video from a local business not a high definition blockbuster motion picture; however the video clearly shows evidence to dispute the Plaintiff's biggest arguments in the case, that of whether lights were on and present at the time Ms. Watts was in an accident and how much time there was between the two collisions. The jury was free to completely disregard the video in its entirety if it was of such poor quality. Therefore, the probative value of the video clearly outweighs any possible prejudice the appellant is trying to allege.

C. Witness testimony corroborates the surveillance video.

Testimony from Deputy Holmes corroborated the surveillance video. Deputy Holmes testified via video deposition that he was making a U-turn on Hwy. 76 when the vehicle behind him, Ms. King's vehicle, made contact with his left rear quarter panel and spun him around approximately 180 degrees so he came to a stop in the center of the paved median facing the opposite direction, towards Laurens and Ms. King's vehicle came to a stop facing towards Clinton. (Holmes Dep., p. 16-29.) Deputy Holmes testified that both he and Ms. King had their lights on.

Deputy Holmes further testified that Ms. Watts then hit Ms. King's vehicle and came to rest in the fence of the recycling center.

The surveillance video shows lights swinging wide in corroboration with Deputy Holmes's testimony that he performed a U-turn and then the lights become stationary showing that he stopped. In addition, the surveillance video shows Ms. Watts's vehicle crossing the roadway and coming to rest in the recycling center fence as Holmes testified. Therefore, the surveillance video is corroborated by witness testimony that the vehicles had lights on, which directly contradicts the appellant's position.

There was corroborating testimony of everything that was depicted in the video. "There is no reversible error in the admission of evidence that is cumulative to other evidence that is properly admitted." *State v. Griffin*, 339 S.C. 74, 778-78, 528 S.E.2d 668, 670 (2000). The Plaintiff has not shown that the trial court abused its discretion in admitting the video into evidence, and therefore, the trial court's ruling should be affirmed.

III. The Plaintiff is not entitled to a new trial because defense counsel's closing argument was proper and did not unfairly prejudice the outcome of the trial, and the trial judge did not err in allowing defense counsel's comments during closing argument or when it denied Plaintiff's motion for a new trial on the basis of alleged unfair testimony resulting from the commentary.

A. The comments made regarding the surveillance video during defense counsel's closing argument were proper.

The Plaintiff maintains she is entitled to a new trial because defense counsel made an improper closing argument concerning the video. (App. Initial Brief p. 26) The Plaintiff is not entitled to a new trial because the defense counsel's closing argument to the jury was proper. The United States Supreme Court stated that closing argument is intended "to sharpen and clarify the issues for resolution by the trier of fact." *Herring v. N.Y.*, 422 U.S. 853, 862 (1975). The Court further stated that "it is only after all of the evidence is in that counsel for the parties are in a

position to present their respective versions of the case as a whole. Only then can they draw the inferences from all the testimony and point out the weaknesses of their adversaries' position." *Id.* In doing so, attorneys are not limited to comments related exclusively to the evidence, but they are "given wide latitude in drawing reasonable inferences from the evidence." *Lesley v. American Sec. Ins. Co.*, 261 S.C. 178, 199 S.E.2d 82 (1973); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991)

The Plaintiff contends that defense counsel's closing argument unfairly prejudiced the outcome of the trial arguing that defense improperly commented about facts that were not depicted in the video and that he repeatedly invited the jury to speculate as to those facts. (App. Initial Brief., pp. 26, 29, 33) She also takes issue with Defense counsel's analogizing the jury to radiologists and detectives arguing that it suggested to the jury "that their duty was to uncover evidence that was not on the Video." (App. Initial Brief., p. 31) Neither of these arguments have merit.

The trial court directed counsel regarding the use of the video during closing arguments stating: "Whatever the video shows, you can certainly argue that as they can, but if the video does not show something, then you certainly cannot – because it almost would be testifying, and certainly you cannot do that So I'll allow you to argue what is on the video, but if it's not on the video, you can't add to it." (T. pp. 363-346) The trial court also advised that it was "not going to allow [defense counsel] to get to tell them this 41 seconds difference. They can reach their own conclusions." (T. p. 364)

The Plaintiff argues that the facts not depicted in the video about which Defense counsel repeatedly invited the jury to speculate are: (1) the placement and distance between the Holmes, King and Watts vehicles before and after the first impact; (2) length of time between impacts; (3)

the general lighting conditions on the road; (4) the presence of vehicle lights at the time of the impacts; and (5) the color of the lights visible at the time of the impacts. (Appellant Initial Brief, pp. 26-27). She also argues that Defense counsel implied to the jury that if it looked closely enough to the video it would see on the video that she caused the wreck. (App. Initial Brief, p. 27) This is a mischaracterization of defense counsel's comments to the jury and use of the video during closing argument.

Defense counsel's comments and use of the video make up a small portion of his entire closing argument. (T. pp. 415-420) During the time defense counsel commented about the video, he repeatedly told the jury to decide for themselves what they see on the video. He states: "Now there are two eyes here. Y'all are going to be 24 eyes. Okay. Go with your eyes. Don't go with mine. But I do want to ask you to consider what I'm going to tell you or show you on this surveillance video." (T. p. 415) He further invites the jury to look and see if they can see lights which would be evidence of vehicles moving up and down 76 stop. (T. p. 417) He invited the jury to "look and see if you see any lights stop or become stationary. And that might be around 58:09." (T. p. 417) He further asks the jury to "make your determination as to whether or not you see vehicles drive in this direction from Clinton --- from Laurens, I'm sorry, toward Clinton passing those stationary blue lights. How many vehicles do you see passing those stationary blue lights?" (T. p. 417) He asked the jury to look at section 10:58:46 through 49 and "see if you find anything worthwhile or evidence that would indicate to you that Mrs. Watts' vehicle veers off from this roadway and strikes a fence." (T. p. 417) With regard to the length of time between impacts, defense counsel told the jury to "go with your calculations about the time delay between what this video shows as what appears to be the collision involving Barton Holmes and Ms. King and then the later collision involving Ms. Watts." (T. p. 419) Further regarding the time delay

between the collisions, defense counsel told the jury, “you figure out when that is.” (T. p. 419) He also told the jury to “look at it again with your trained eyes, 24 eyes. You may see fine things much different than me. I invite you to do that.” (T. p. 419)

There is absolutely nothing improper about the statements defense counsel in his closing argument regarding the video. The comments defense counsel made about the video were comments about images that can plainly be seen on the video. Further, with regard to the time delay between the two collisions, it is undisputed that the first collision between Deputy Holmes and Ms. King occurred when Deputy Holmes made a U-turn. The video clearly shows headlights panning to the side. (Defendant’s Trial Exhibit 6 – Video) It is also undisputed that the collision between Ms. King and the Plaintiff occurred immediately before the Plaintiff’s car veered across the median, two lanes of traffic and came to a stop after hitting the chain link fence of the recycling facility. A car is clearly seen on the video crossing the median, two lanes and hitting the fence. (Defendant’s Trial Exhibit 6 – Video) It is easy to calculate the seconds between the two defining events to deduce the time delay between the two collisions. Defense counsel never told the jury the number of seconds he calculated to be the delay.

It is well established that attorneys are allowed and expected to argue in their closing. Considerable latitude is given to counsel in an effort to draw inferences and deductions from the evidence, and this latitude allows counsel to state his or her own version of the testimony and to comment on the weight it should be given. *See Lesley v. American Sec. Ins. Co.*, 261 S.C. 178, 199 S.E.2d 82 (1973); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991). Contrary to the Plaintiff’s argument, defense counsel did not invite the jury to speculate about facts not depicted in the video, defense counsel simply asked the jury to look at the video and determine what they saw on it. The events defense counsel pointed out could either be seen on the video or they could

not be seen. No speculation was required in determining if an event was or was not seen. Furthermore, plaintiff's counsel had the opportunity to address and refute the defense counsel's statements about the video in his rebuttal closing argument. Defense counsel's statements in his closing did not go beyond the latitude provided under the law nor did they go beyond the trial court's ruling regarding what could be said about the video.

In her appeal, the Plaintiff for the first time argues that defense counsel's closing argument was improper because he appealed to the jury's emotions, personal beliefs, intuitions, passion, biases and prejudices by suggesting they had special skills, presumably in comparing them to radiologists and detectives. (Appellate Initial Brief, p. 31) This appeal is also the first time the Plaintiff argues that: (1) no expert testimony was offered to interpret the video; (2) no lay witnesses identified any vehicle on the video; and (3) no other evidence was offered from which the jury could make an inference that the Holmes, King or Watts' vehicles were depicted there. (Appellate Initial Brief, p. 28) It is well settled that an issue cannot be raised for the first time on appeal. "At a minimum, issue preservation requires that an issue be raised to and ruled on by the trial judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review." *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 6954 (2014). The Plaintiff, through her counsel, submitted a Motion for New Trial. After arguments were heard on her motion, the trial court allowed the parties to submit supplemental memoranda. The foregoing arguments were not raised in either of the Plaintiff's Motion or Supplemental Memorandum of Law nor were they raised during the hearing on the Plaintiff's Motion for New Trial, or in the Alternate, Judgement NOV. (See Plaintiff's Notice of Motion and Motion for New Trial or Judgment NOV) (See also,

Plaintiff's Supplemental Memorandum of Law Supporting Her Motion for a New Trial under Rules 59 and 60); (Transcript of Record on Plaintiff's Motion for New Trial) Accordingly, the Plaintiff cannot raise these issues for the first time on appeal.

To the extent the Court disagrees, defense counsel's comparison of the jury to radiologists and detectives is not a meritorious ground for a new trial. Counsel often use analogies during closing argument. *See generally, Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004). The Plaintiff argues that by defense counsel comparing the jury to detectives, he "improperly suggested that their duty was to uncover evidence that was not on the Video." (Appellate Initial Brief, p. 31) This argument is far-reaching. In comparing the jury to detectives, defense counsel stated it "they were looking for the truth, and that is what we want. I want the truth. Whatever it is, I want the truth." (T. 418) This in no way appeals to the jury's emotions, personal beliefs and the like nor does it suggest that they uncover something that was not on the video nor does it impact the burden of proof.

In addition, to the extent the Court disagrees that the Plaintiff is prohibited from arguing in this appeal that no lay witnesses identified any vehicle on the video and that no other evidence was offered from which the jury could make an inference that the Holmes, King or Watts' vehicles were depicted on the video, the testimony of the witnesses absolutely corroborated the depictions on the video and any inferences from it. The Plaintiff flatly testified that after she hit Ms. King's car, her care veered to the left, went across the median and lane on the other side of the road and stopped when she hit an iron pole "on that place across there." (T. p. 151). The Plaintiff's witness, Joe Williams, testified that he saw the Plaintiff hit something and then he saw her headlights go toward the fence. (T. p. 120) He also testified that he drove by and came back and she was still sitting 'over there by the fence.' (T. p. 121). Deputy Holmes and Ms. King also testified regarding

their collision and the placement of their vehicles on Highway 76 on the night of the incident. There was plenty of evidence offered from which the jury could infer that the Holmes, King and Watts' vehicles were depicted in the video. The Plaintiff has not shown that defense counsel's comments about the video during closing argument were improper. Accordingly, the trial court's order should be affirmed.

B. The Plaintiff is not entitled to a new trial because the trial judge correctly found there was no prejudice in defense counsel's comments and any remarks by defense counsel did not deprive the Plaintiff of a fair trial.

The appellant argues the trial judge "erred each time it allowed the defense to make improper comments in closing argument and failed to give an immediate curative instruction." (Appellant's Initial Brief p. 34) "It has long been settled that closing arguments and objections thereto are left largely to the sound discretion of the trial judge who is on scene and in a much better position than an appellate court to judge what is improper argument under the circumstances." *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 599, 344 S.E.2d 157, 164 (Ct. App. 1986); *Lesley v. Am. Sec. Ins. Co.*, 261 S.C. 178, 199 S.E.2d 82 (1973). "To warrant reversal, the appellant 'must show both the error of the ruling and resulting prejudice.'" *Burroughs v. Worsham*, 352 S.C. 382, 371, 574 S.E.2d 215, 221 (Ct. App. 2002) (citing *Recco Tape and Label Co. v. Barfield*, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994)). The trial judge correctly responded to each of plaintiff's objections during defense counsel's closing argument. In addition, the plaintiff was provided the same latitude and the opportunity to rebut defense counsel's closing argument.

The Plaintiff objected twice during defense counsel's closing argument. Plaintiff's counsel made his first objection stating, "Your Honor, we object to this testimony of Mr. Harter about the video." (T. p. 416) The trial court responded, "he can argue the video so long as he does not add

anything to what the video may depict.” (T. p. 416). The Plaintiff suggests that the objection was made to the following comments by defense counsel:

Now, Barton Holmes and Ms. King all say that Barton Holmes did a U-turn. And if he did a U-turn, you could maybe see or expect where his lights would go. So Barton Holmes, according – if he had his lights on would be traveling in Lane Number 1 and make a turn that would have taken him back in the direction or faced his vehicle back in the direction of Laurens. I invite you to look at this video on Channel 5 and pay attention to what is happening before. You see lights, I’m going to suggest, moving in each direction on 76. Lights moving. At some point in time, and I’m going to suggest to you it might be right around 58:07 that the video might show you some evidence that would indicate that there was lights that panned around in this direction and made possibly a U—turn. But you decide that.

(T. 416).

Although in her Initial Brief, the Plaintiff restates defense counsel’s full closing regarding the video until the second objection, it appears the Plaintiff only objected to statements defense counsel made while the video was playing:

Mr. Harter: But I offer this to you as evidence that I submit would indicate that there were lights on out there, there was a significant time delay between these two impacts, that other vehicles move through the area without any difficulty, and that Mrs. Watts’ vehicle sometime, multiple seconds later, you figure out when that is, she collides with the King vehicle. And if I could, I’d like to pick up with maybe segment around 58. I’m sorry. Pick up around 57 – 57. And we’re just going to play it. Just going to play it.

(WHEREUPON, Defendant’s Exhibit Number 6, a video, was played in open court)

Mr. Harter: Vehicle movement, lights.

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

Mr. Harter: 58:07 coming up.

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

Mr. Harter: Lights stationary.

Mr. Bryan: Your Honor, we had specific directions about comments.

The Court: Again, he cannot add anything that is not depicted on the video.

Mr. Harter: I won't. We won't. We aren't.

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

Mr. Harter: 47 is coming up.

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

Mr. Harter: Stop.

(T. pp. 419-420)

The Plaintiff has not shown that the trial court erred in its ruling to Plaintiff's counsel two objections. The trial court's ruling regarding the use of the video during closing arguments was that arguments could be made regarding what the video showed, but nothing could be added to what was not depicted on the video. (T. 363-364) When Plaintiff's counsel objected, the trial court restated its prior ruling. (T. pp. 416, 420) Defense counsel's statements to which Plaintiff's counsel objected did not go beyond the parameters set forth by the trial court's ruling. In both instances, defense counsel commented on what was clearly depicted in the video. Accordingly, the trial court did not err in its rulings on Plaintiff's counsel's two objections.

Moreover, the Plaintiff has not shown that she was prejudiced by the trial court's rulings requiring a reversal. The Plaintiff maintains that "by failing to sustain Plaintiff's objection, the court signaled its approval of these invitations to speculate and for the jury to use its non—existent radiologist/detective "*Where's Waldo*" powers to see what is not there. This is reversible error." (App. Initial Brief, p. 32) The Plaintiff's argument fails for three reasons. First, the Plaintiff did not object to defense counsel's analogy of the jury to radiologists or detectives. Accordingly, she has not preserved that issue on appeal. Second, defense counsel's statements to which the objections were made accurately

represented images that were on the video. Further, the jury could see what was depicted on the video and could decide if what was represented to be on the video was actually on the video. Lastly, the Plaintiff's reliance on *State v. Sweet*, 342 S.C. 342, 351, 536 S.E.2d 91, 95 (Ct. App. 2000) for the argument that the trial court committed reversible error for failing to sustain the Plaintiff's objections is misplaced. In *Sweet*, the Court determined the Solicitor's comment on Sweet's failure to testify "should have been immediately addressed upon his objection either by the judge granting a mistrial or issuing a curative instruction." *Id.* at 352, 96. The Court stated that, even though the Solicitor's comment during closing argument about the defendant's failure to testify constituted an impermissible comment, "such comments do not necessarily mandate reversal of conviction." *Id.* at 348, 94. The Court explained that "any alleged impropriety must be examined on appeal in light of the entire record." *Id.* It determined that Sweet had been denied a fair trial because it could not find the comment to be harmless "given that the State's case was not particularly strong." *Id.* at 349, 94. *Sweet* is not applicable to the present case. In *Sweet*, the solicitor's comment regarding the defendant's failure to testify was impermissible as a matter of criminal trial procedure. In the present case, the Plaintiff has failed to show that defense counsel's comments were improper. Furthermore, not that it was necessary; however, even in the event it is deemed to have been appropriate, appellant, upon information and belief, never requested a curative instruction. *See, Brown v. Stewart*, 348 S.C. 33, 52, 557 S.E.2d 676, 686 (Ct. App. 2001) (holding appellant failed to preserve the issue of an improper closing argument, where, after the court sustained appellant's objection, appellant did not request a curative instruction or move to strike).

Even if the Plaintiff could establish that defense counsel's comments were improper, which is denied, she has not established that she was prejudiced by the comments. The Plaintiff has not shown that the comments about the video or the video itself effected the outcome of the trial. Defense counsel spent merely one-fourth of the entire closing argument discussing what was depicted on the video. (T. pp. 415-420) Furthermore, only a snippet of the video was shown during defense counsel's closing argument. (T. pp. 419-420) While the jury requested to review the video during deliberations, there is no evidence regarding the weight the jury gave to defense counsel's comments about the video in making its final decision regarding liability.

It is likely that the jury determined the testimony of Deputy Holmes and Ms. King were more credible than the testimony of the Plaintiff and Mr. Williams. It is also likely that the jury could have believed the Plaintiff caused the accident because she admitted to looking down before hitting Ms. King's car. (T., p. 150) The jury also could have believed that common sense would dictate that Deputy Holmes and Ms. King had their headlights and taillights on after their accident occurred as argued by defense counsel. (T. p. 406) The jury could have also been persuaded by defense counsel's argument that, if the two collision occurred two seconds apart, anyone who was alert and paying attention would have seen lights and would have seen the first collision, and the Plaintiff denied seeing either. (T. pp. 409-410) The Plaintiff cannot show that the jury gave more weight to defense counsel's comments about the video, which she describes as "extremely hazy," than it did to the other persuasive arguments made by defense counsel.

Moreover, Plaintiff's counsel was given an opportunity to rebut defense counsel's comments about the video during his rebuttal closing argument. However, he simply stated, "now, this video you've seen does not capture the first accident and it captures very little of the second accident." (T. p. 424) Plaintiff's counsel admits in his own closing argument that at least some of

the second accident is captured on the video. The Plaintiff has not shown that she has been prejudiced by the trial court's overruling of her two objections to defense counsel's statements about the video. The trial court did not abuse its discretion in finding that "there was no prejudice in defense counsel's closing arguments and any remarks by counsel did not deprive the Plaintiff of a fair trial." Accordingly, the trial court's ruling should be affirmed.

CONCLUSION

In view of the arguments and authorities set forth above and in The Honorable Judge Hocker's Order dated August 6, 2019, and defendant's responses to plaintiff's post-trial motions, the respondents respectfully submit that appellant's appeal is without merit and should be denied and the trial court's Order should be affirmed and the jury verdict upheld.

Respectfully submitted,

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September 8, 2020

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LAURENS COUNTY

Donald B. Hocker, Circuit Court Judge

Appellate Case No: 2019-001514

Martha Foster Watts,

Plaintiff - Appellant

v.

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

Defendant - Respondent

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents certifies that the Respondent's Amended Initial Brief filed electronically on September 8, 2020 complies with Rule 208 of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

I certify that I have served the **Amended Initial Brief** of the Respondent, Ricky W. Chastain, Sheriff Laurens County, on the Appellant, Martha Foster Watts, by electronic mail and by depositing a copy of same in the U.S. Mail, postage prepaid, this 8th day of September, 2020, to her counsel listed below.

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