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 MOTIONS FOR SUMMARY JUDGMENT**
vs.	)	
South Carolina Electric & Gas Company; PENSCO Trust Company LLC; and Edisto Sales & Rentals Realty, LLC, Defendants.	)	

Plaintiff Tiffany N. Provence, as Special Administrator for the Estate of Jose Refugio Licona Larios, respectfully submits this Memorandum in Opposition to the Motions for Summary Judgment filed by Defendants South Carolina Electric & Gas (hereinafter "SCE&G"), Edisto Sales & Rentals Realty, LLC (hereinafter "Edisto Realty"), and PENSCO Trust Company, LLC (hereinafter "PENSCO").

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FACTS

This case involves claims of negligence, gross negligence, and premises liability for the wrongful death of Jose Refugio Licona Larios (hereinafter "Larios"), which occurred at a residence located at 3402 Myrtle Street, Edisto Island, South Carolina on November 29, 2015. Pls.' Compl. ¶¶ 8, 12. Larios' death was caused when the palm tree that he was trimming at 3402 Myrtle Street contacted a hidden, energized, overhead power line owned by SCE&G, causing Larios to be stunned and thrown from the ladder on which he was standing. Compl. ¶ 12; *See* Ex. 1, Presnell Dep., 16:09–17:11; 20:13–21:02; 43:01–08 (autopsy pathologist

testifying that electrical contact with a power line caused Larios to fall from the ladder). As a result of this electrical contact, Larios fell approximately twenty-five (25) feet to the ground below and died. *Id.*

The property at 3402 Myrtle Street is owned by PENSCO for the benefit of J. Ray Jackson, Sr. (hereinafter "Jackson"). Compl. ¶ 15; PENSCO Ans. ¶ 16. PENSCO is a Colorado corporation that acts as a custodian of assets for self-directed IRAs and business retirement accounts. *See* https://www.pensco.com/. Jackson purchased 3402 Myrtle Street approximately thirty (30) years ago and placed the property in a self-directed IRA, with the intention of moving to the Edisto Island home after his retirement. Ex. 2, Jackson Dep. 11:02–21; 64:05–24. Jackson, who lives in Lake Lure, North Carolina, does not live on or manage the property at 3402 Myrtle Street; instead it is managed by Edisto Realty. Ex. 2, Jackson Dep. 17:16–23. For the purposes of this action, it is undisputed that the property owners are PENSCO *and* Jackson, and that the two are one and the same since the title to the property is held in the name of PENSCO *for the benefit of* Jackson.

Edisto Realty is a property management and vacation rental and sales company that manages roughly 410 rental properties on Edisto Island, South Carolina. Ex. 3, Jane Smoak/Edisto Realty 30(b)(6) Dep., 13:18–25 (hereinafter "Smoak Dep."). In exchange for a standard twenty-percent (20%) commission on each reservation at one of its 410 properties, Edisto Realty handles the day-to-day management of the property and serves as the point of contact for guests staying at the rental properties. Ex. 3, Smoak Dep., 18:03–24. Edisto Realty handles a "long list of daily items" in managing 3402 Myrtle Street, including making the reservations, meeting and greeting customers, visiting the properties, performing housekeeping services between guests, and inspecting the property and readying it for each new renter. *Id.* at

13:06–15. It also conducts inspections of its rental properties to determine if anything is in need of repair and has housekeepers and inspectors on the properties on a regular basis, who will note if there are issues present. *Id.* at 30:01–22. Additionally, Edisto Realty employs maintenance workers to handle work orders if a guest has a problem with a property:

> ***THE DEPONENT: We respond to maintenance issues in the property. If a guest is in the house and has a maintenance issue that they report to our office, then we send one of a maintenance worker*** [sic] ***to take care of the situation***.
>
> BY MR. DUFFY:
> Q. Okay. So sort of reactive, when something is reported, you all get involved?
> ***A. That's correct.***
> Q. Okay. But you don't go out and do a proactive inspection of your properties to make sure they're safe?
> ***A. If we're on the property and we notice a loose step or a loose railing, we will have somebody repair it.***

See Ex. 3, Smoak Dep., 27:16–29:14. With respect to 3402 Myrtle Street, Edisto Realty also receives invoices and pays vendors who perform services on the property, including the landscaping company that employed Larios. *Id.* at 45:14–19.

Mr. Jackson, who lives four hours away, placed 3402 Myrtle Street in the hands of Edisto Realty and its property and rental management staff for the very purpose of monitoring and managing the property, which he relied on Edisto Realty to do:

> Q. And is part of the reason you hired Edisto Realty to manage the property because you were up here and needed somebody to keep an eye on it?
> ***A. Right. I originally started out with another realtor, Atwood, but I transferred with them several years ago because I trusted them.***

Ex. 2, Jackson Dep., 17:16–22.

> Q. And you didn't do any kind of regular routine inspection of the property?
> ***A. I had somebody do that. I went down -- the only time I went there is I went to go to the beach.***
> Q. Who was there doing regular routine inspection of the property?
> ***A. Edisto Realty Company.***
> Q. So you relied on them to make sure the property was safe.
> ***A. That' s correct.***

Id. at 27:23–28:08; 37:23–38:11; 59:01–11 ("Q. And you never did any kind of periodic inspection of the property to determine that it was safe. I think you have answered that, but I want to make sure I'm clear. ***A. No. The only people that did that for me is, I'm told –*** Q. By Edisto, the manager. ***A. Right. And it has always been taken care of.*** Q. They let you know about something. ***A. Yes***.").

The property at 3402 Myrtle Street has approximately thirty-five (35) fully mature palm trees throughout the yard. *Id.* at 94:08–10. Just steps beyond the backyard is a bike path and SCE&G right-of-way. The SCE&G power lines in the right-of-way run through the palm trees situated at the rear of the property when they are at full growth. On November 29, 2015, at approximately 9:30 in the morning, Larios, a local landscaper, was trimming one of the palm trees at 3402 Myrtle Street when he suffered an electrical shock due to a hidden, energized, overhead power line owned by SCE&G that was contacting the palm tree. As a result of the electrical shock, Larios shouted out loudly, fell off the ladder and suffered serious injuries. Pedro Abraham, Larios' co-worker and the lone eye witness to this incident, ran over to Larios, who initially survived the fall, to check his head and immediately asked if he was alright. At that time, Larios responded that he was "O.K." Ex. 4, OSHA_0028–29. Within hours, Larios had died from internal injuries.

The photographs and testimony in this case demonstrate that the SCE&G power line was not readily visible from the property due to the overgrown vegetation that SCE&G failed to keep away from its power line.

(Photo of palm tree Larios was trimming)

(SCE&G power line contacting palm fronds)

For example, Colleton County deputy coroner, Marion Whaley—who immediately investigated the scene for several hours on the afternoon of Sunday, November 29, 2015, along with police and other first responders—did not realize there was a power line or any electrical component in the death until the following Tuesday, when it was revealed by Larios' co-worker that he had seen a burnt palm frond and arc burn on the chainsaw Larios was using. Ex. 5, Whaley Dep., 7:16–8:12; Ex. 6, Carter Dep., 14:01–17 ("The first couple of times I talked to Marion, he didn't say anything about an electrical wire. Because I asked him. I said, Are there any electrical wires around? He said, I don't see any."). On top of that, Jackson, who had been visiting this retirement property for over thirty years, testified that he never even knew the power line was there and had a hard time finding it until ***after*** the entire top of the palm tree had been removed following Larios' death. Ex. 2, Jackson Dep., 29:13–30:20; 37:08–18.

SCE&G has a responsibility to maintain separation between its power lines and adjacent or encroaching trees and vegetation. Exhibit 7, SCE&G Tree Trimming Presentation; *See also* https://www.sceg.com/for-my-home/manage-my-service/landscaping-tree-trimming/tree-trimming-program (video of SCE&G employees stating "We have a responsibility to improve our lines, to keep them trimmed, to keep them clean – the right of ways clean."). SCE&G's

minimum horizonal clearances for vegetation near one of its power lines is 10 feet on either side of its distribution lines. Ex. 8, Walker Dep., 25:16–26:09. It is undisputed that trees encroaching on, and making contact with, SCE&G power lines pose a risk to the public of electrical shock. It is also undisputed that the only way SCE&G can ensure separation exists between its lines and adjacent trees is to ***perform periodic inspections***:

> Q. Okay. You would -- would you – you'd agree with me that it's SCE&G's responsibility to provide separation between its wires and adjacent vegetation?
> MR. PUGH: Object to form.
> ***THE DEPONENT: Yes.***
> BY MR. DUFFY:
> 25 Q. It's not the responsibility of its customers to make sure that SCE&G's lines are clear?
> ***A. No.***
> Q. Okay. All right. And so in order to do that, in order to make sure the lines are clear and make sure there's no safety hazards and there's reliable power, SCE&G's got to do reasonable, periodic inspections of its lines, right?
> ***A. Yes.***

Ex. 9, Mark Branham/SCE&G 30(b)(6) Dep., 29:18–30:10 (hereinafter "Branham Dep.").

While SCE&G acknowledges these responsibilities, it contends that it satisfies those obligations by trimming trees and vegetation in a given area or "circuit," like Edisto Island, once every five (5) years. Ex. 9, Branham Dep., 34:05–20; 38:22–39:11; 50:14–23. Yet SCE&G recognizes that a certain trees or vegetation grow back more rapidly than others, and therefore "mid-cycle trimming" or "spot trimming" may be required in certain circumstances. *Id.* at 32:16–25 ("***A. So you could trim a tree and then the fast growing tree species can potentially be back near the line very quickly***."); 34:12–20 ("Q. Well, but again, I mean, do you agree with me that -- well, you just said, that some vegetation grows pretty quick, right? Some trees do, don't they? ***A. Yes.*** Q. Okay. So some may not hold for whatever cycle you guys have designated for that area, right? ***A. In some cases, that's correct.")***. Despite this knowledge about varying growth rates, SCE&G still adopts a one-size-fits all approach to vegetation management:

> Q. Okay. And that kind of goes into my next question, which is that your vegetation – SCE&G's vegetation management program and cycling has to take into account factors like that, vegetation growth, type, density, all that sort of stuff, right?
> ***A. Yes.***
> Q. Okay. And you guys do take all those factors into consideration, correct?
> ***A. Yes.***
> Q. Okay. Because not all species of tree or vegetation grows at the same rate, right?
> ***A. That's correct.***
> Q. Okay. So you'd agree with me, I think, Mr. Branham, but tell me if you don't, that different trees and different vegetation types, they will require different vegetation management programs or strategies, right?
> ***A. That's not correct. The cycle would be the same for a project, regardless of the tree species.***

Id. at 33:01–21.

According to SCE&G, the last time that it trimmed trees in the area where 3402 Myrtle Street is located was February 15, 2013. Ex. 10, SCE&G (Larios)_0092. Approximately two years and nine months later, Larios was killed when the palm tree he was trimming with a chainsaw came into contact with an energized SCE&G power line. While there is evidence in the case that the *area* or circuit encompassing 3402 Myrtle Street was trimmed in February 2013, there is no evidence that, at that time, SCE&G actually trimmed the palm tree Larios was working on when he was killed. Plaintiff's expert, Ed Brill, testified that he "saw no evidence that this palm tree was trimmed two years prior with any of the palm fronds or branches specifically on the side of the power lines." Ex. 11, Brill Dep., 99:20–100:04. In the time between when SCE&G claims it last trimmed the Edisto Island circuit, and when Larios was killed, there was also no mid-cycle inspection done, and no mid-cycle trimming done at or around 3402 Myrtle Street. Ex. 12, Ehinger Dep., 13:19–15:04. At the time of Larios' electrocution, the SCE&G power lines were physically touching the palm tree he was trimming.

Edisto Realty contends that under its contract with the homeowner, Jackson is solely responsible for ensuring that the property is safe and free of any hazards or defects. Edisto Realty Mot. Sum. J., p. 2. Yet Jackson was relying on Edisto Realty to monitor and maintain the property. Ex. 2, Jackson Dep., 28:03–08. The result of this finger-pointing is that neither Edisto nor Jackson nor PENSCO ever inspected the property—particularly the backyard and the palm trees—to determine the existence of the latent danger posed by a tree growing into a live SCE&G power line. Ex. 3, Smoak Dep., 44:13–20; 47:01–15; Ex. 2, Jackson Dep., 23:08–24:14 (stating that PENSCO has never looked at the property). Because neither the homeowner nor the property manager inspected the property to discover this hazard, neither party took steps to eliminate the hazard or warn of its existence. According to the testimony of Jane Smoak, Edisto Realty's corporate representative:

> Q. Okay. So it [electrical shock from a palm tree contacting a power line] is a risk, you'd agree with that?
> ***A. Yes, it's a risk.***
> Q. Okay. And Edisto didn't go out and inspect the back of the property to determine whether that condition existed, right?
> ***A. No, we did not.***
> Q. And didn't warn Mr. Stevens [landscaping company owner] that hey, this condition exists up here, right?
> ***A. No, we did not.***
> Q. Okay. And didn't – didn't call SCE&G and tell them that this condition existed and needed to be fixed, right?
> ***A. No, we did not.***

Ex. 3, Smoak Dep., 56:18–57:06

On June 7, 2017, Plaintiff filed this wrongful death action against SCE&G, PENSCO, and Edisto Realty, alleging that (1) SCE&G breached its duty to properly maintain and protect the public from its energized power line behind 3403 Myrtle Street (including by not complying with minimum clearances between lines and vegetation); (2) PENSCO and Edisto Realty breached their duty to reasonably discover and then eliminate, or at least warn invitees about, the

latent danger on the property created by a palm tree camouflaging—and contacting—an SCE&G power line; and (3) such breaches were the proximate cause of Larios' injuries and death.

Edisto Realty has now filed a Motion for Summary Judgment stating that it owed no duty to Larios and claiming that under its contract with Jackson—not PENSCO, the homeowner—Edisto Realty was absolved of all responsibility for ensuring that the property was "safe and habitable." Edisto Realty Mot. Sum. J., p. 2. Further to that end, Edisto Realty filed with its Motion a self-serving affidavit of the company owner, Matthew Kizer, which states that Edisto Realty's has "never had any role in directing, supervising, managing, and/or overseeing the work" of the landscaping company where Larios worked at the time of his death. However, Edisto Realty's present motion misconstrues the law and the relevant facts in this case, both of which lead to the conclusion that summary judgment should be denied.

Likewise, SCE&G and PENSCO have filed Motions for Summary Judgment. Both Defendants claim that there is genuine issue of any material fact in this case, and therefore they are entitled to judgment as a matter of law. As addressed in detail below, in this negligence action there is ample evidence that SCE&G and PENSCO breached their duties to Larios, and that their breaches were the direct and proximate cause of Larios' injuries and death.

LEGAL STANDARD

"Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Cunningham ex. rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003); Rule 56(c), SCRCP. When considering a motion for summary judgment, the court views the evidence and all inferences that can be reasonably drawn therefrom in the light most favorable to the non-moving party. *Id.* "[I]f the evidence as a whole is susceptible of more than

one reasonable inference, a jury issue is created and the motion should be denied." *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007).

"[I]n cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (emphasis added). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Etheredge v. Richland Sch. Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998).

ARGUMENT

I. SCE&G'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

To establish negligence in this case against SCE&G, Plaintiff must prove the following three elements: (1) a duty of care owed by SCE&G to Larios; (2) SCE&G's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008) (citing *Hurst v. East Coast Hockey League, Inc.*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006)). As discussed below, the deposition testimony and evidence in this case supports a finding that each of these elements has been established.

a. SCE&G owed a duty to the general public, including Jose Larios, to keep its power lines free and clear of vegetation and trees to ensure that its lines did not pose a safety risk.

As discussed above, SCE&G accepts and acknowledges that it bears the responsibility to keep the public safe by ensuring that its power lines are free and clear of adjacent trees, branches, and other encroaching vegetation. Exhibit 7, SCE&G Tree Trimming Presentation; Ex. 9, Branham Dep., 29:18–30:10. The minimum stated clearances are ten (10) feet on either

side of the primary and neutral distribution lines. Ex. 8, Walker Dep., 25:16–26:09. SCE&G has a self-imposed practice of pruning vegetation and trees around its power lines every five (5) years but recognizes the need to prune trees at a higher frequency depending on different growth patterns. SCE&G also concedes that the only way for it to ensure that its power lines are, in fact, clear of vegetation—like palm branches and fronds—is to perform reasonable, periodic inspections, and to prune accordingly. Ex. 9, Branham Dep., 29:18–30:10. SCE&G is well aware that certain vegetation grows back faster than others, and problems with trees contacting power lines can develop very quickly. *Id.* at 32:16–20 ("Q. Yeah, problems with vegetation encroaching on distribution lines in the right-of-way, those problems develop over time as the vegetation grows, right? ***A. They can actually happen really fast.***"). SCE&G claims that it will perform mid-cycle or spot trimming (in between its regularly scheduled trimming) of certain vegetation that will not "hold" for the five-year cycle and is either causing service interruptions or posing a safety hazard. *Id.* at 34:01–35:13. SCE&G touts its commitment to public safety and informs the public that it is "proactive and prunes trees ***before*** they pose a risk." Exhibit 7, SCE&G Tree Trimming Presentation (emphasis added); Ex. 9, Branham Dep., 68:18–23.

It is therefore undisputed that SCE&G owed a legal duty to the general public, including Larios, to keep its power lines clear of vegetation, to inspect its power lines, and to proactively manage and prevent trees from posing safety hazards by contacting one of SCE&G's power lines.

b. A reasonable jury could conclude that SCE&G breached its duty by failing to keep its power line free and clear of adjacent trees and failing to periodically inspect its power line.

Given the lack of dispute regarding SCE&G's legal duty in this case, what remains is a factual question for the jury: Did SCE&G breach its duty by failing to keep its power line behind

3402 Myrtle Street free and clear of the adjacent palm tree to ensure that the power line did not pose a risk of electrical shock?

Whether a defendant breached its duty of care is a question of fact. *Brooks v. GAF Materials Corp.*, 41 F. Supp. 3d 474, 484 (D.S.C. 2014) (citing *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 320, 605 S.E.2d 12, 15 (2004); *McVey v. Whittington*, 248 S.C. 447, 151 S.E.2d 92, 96 (1966)); *See also Delaney v. United States*, 260 F. Supp. 3d 505, 512 (D.S.C. 2017) ("[T]he question of breach of duty is a factual question best left for the jury.").

As is clear from the photographs produced in this case, SCE&G failed to keep its power line free and clear of the adjacent palm tree, which was in direct contact with SCE&G's line. *See* Ex. 9, Branham Dep., 74:17–76:03.

In addition to the obvious contact between the adjacent palm tree and the SCE&G power line behind 3402 Myrtle Street, the facts of this case are that SCE&G failed to inspect this power line at any point between February 2013 and November 2015 when this incident occurred. Ex. 12, Ehinger Dep., 13:19–15:04. Instead, SCE&G claims that it performs its inspections once

every five years, in connection with its regularly scheduled cycle trimming. Ex. 9, Branham Dep., 35:14–19 ("Q. How often does SCE&G visually inspect its distribution lines in the right-of-way to determine if mid cycle or spot trimming is needed? ***A. So our inspections for a project occur every five years after it's pruned.***"); 37:09–12 ("Q. So other than if somebody who's in the field for SCE&G spots something visually, other than that, visual inspections, routine visual inspections aren't employed by SCE&G as part of its vegetation management program? ***A. For a particular project, the inspection would occur after the five-year trim, but during mid cycles we do not do a full inspection on the lines.***"). In addition, SCE&G did not conduct any mid-cycle trimming or service on the palm trees at 3402 Myrtle Street between February 2013 and the date Larios was killed. Ex. 12, Ehinger Dep., 14:23–15:04; Ex. 13, SCE&G Ans. to Pl.'s Interrogatory No. 16. In looking at photographs of the palm tree Larios was trimming, which were taken on or about the date of his death, SCE&G's corporate representative testified that the tree was contacting SCE&G's line but that it may have grown back in mid-cycle:

> Q. Okay. And that is, you'd agree with me, that that line, that power line depicted in OSHA 115, which is Exhibit 4 to your deposition, that is not ten feet from the adjacent vegetation, correct?
> **A. Correct.**
> Q. Okay. So this would be an example of minimum clearance that had not been met as far as trimming back vegetation from this particular line in this location?
> MR. PUGH: Object to the form.
> ***THE DEPONENT: I guess it depends on when the picture was actually taken.***
> BY MR. DUFFY:
> Q. Well, why would it depend on that? I mean, this is an example of minimum clearance is not complied with, is it not?
> ***A. Yeah, I just don't know what the clearance was like after the cycle prune. Because this vegetation could have grown back in, you know, mid cycle.***
> Q. Sure. And that would be -- this is exactly sort of the scenario you were talking about where vegetation can grow back mid cycle and won't hold for the whole cycle; is that right?
> ***A. That's correct.***

Ex. 9, Branham Dep., 57:15–58:17.

The actions—or lack thereof—by SCE&G fly in the face of what SCE&G knows to be true about the dangers of trees and vegetation growing near its power lines. SCE&G knows that certain vegetation won't hold for the five-year cycle and that trees can grow back and make contact with their power lines very quickly. *Id.* at 32:10–25. SCE&G knows that this jeopardizes safety. It knows that vegetation growing into its power lines can threaten the safety of the public and that trees and branches coming into contact with live SCE&G power lines can cause electrical shock. *Id.* at 25:16–26:08. The fact that SCE&G, even when armed with this knowledge, failed to inspect or conduct ***any*** mid-cycle trimming behind 3402 Myrtle Street, is more than sufficient for a reasonable jury to conclude that SCE&G breached its duty to the public and to Larios.

At a minimum, the evidence discussed above (which goes well beyond a "mere scintilla") establishes that there is a genuine dispute of material fact concerning whether SCE&G's acts or omissions were reasonable under the circumstances, and whether SCE&G should have either inspected and/or conducted mid-cycle trimming at or around 3402 Myrtle Street prior to November 29, 2015. For that reason, SCE&G's Motion for Summary Judgment should be denied and a jury should be permitted to weigh the evidence at trial.

c. A reasonable jury could conclude SCE&G's failure to keep its power line behind 3402 Myrtle Street free and clear of vegetation was the legal and proximate cause of Jose Larios' wrongful death.

With regard to liability for a negligent act, proximate cause is the efficient, or direct, cause which brings about the injuries complained of. *Burnette v. Augusta Coca-Cola Bottling Co.*, 157 S.C. 359, 154 S.E. 645 (1930). "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *Goode v. St.*

Stephens United Methodist Church, 329 S.C. 433, 447, 494 S.E.2d 827, 834 (Ct. App. 1997). "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).

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). "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 evidence is clear that Larios' electrocution and death was a foreseeable consequence of SCE&G's failure to keep its power lines free and clear from vegetation behind 3402 Myrtle Street. SCE&G recognizes the risks posed by overgrown trees and vegetation in proximity to its power lines, and in fact, public safety is the number one reason that SCE&G performs vegetation management in the first place. Dr. Erin Presnell, the pathologist at the Medical University of South Carolina who performed the autopsy on Larios, noted that had Larios not been electrocuted when the palm tree he was trimming contacted SCEG's power line, he would not

have fallen off his ladder and died. Ex. 1, Presnell Dep., 16:09–17:11; 20:13–21:02; 43:01–08. Ultimately, Dr. Presnell concluded that electrical contact with a power line was a "contributory" cause of Larios' death for that very reason. *Id.* at 42:23–43:08. The logical conclusion—and one that any reasonable juror could reach—is that, had SCE&G not breached its duty to the public and Larios by failing to keep its power line clear, Larios would not have died. For that reason, SCE&G's Motion for Summary Judgment should be denied.

d. A reasonable jury could conclude that Larios suffered conscious pain and suffering, and therefore Plaintiff's survival claim should be submitted to the jury.

In its Motion for Summary Judgment, SCE&G argues that Plaintiff has failed to establish "by requisite medical testimony that [Larios] experienced conscious pain and suffering prior to his death." SCE&G Mot. Sum. J., p. 2. Because there is sufficient evidence that Larios did, in fact, survive the electrical shock and subsequent fall, this component of SCE&G's Motion should be denied and the issue should be submitted to the jury.

In South Carolina, "[i]f there is *any* evidence from which a jury could reasonably conclude a decedent experienced conscious pain and suffering, the issue ***must*** be submitted to the jury." *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 432, 412 S.E.2d 425, 431 (Ct. App. 1991) (emphasis added); *Smalls v. South Carolina Department of Education*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000). It is well settled that under this "any evidence" standard, even "weak" evidence is sufficient. *Croft v. Hall*, 208 S.C. 187, 37 S.E.2d 537 (1946). The "any evidence" standard is equivalent to a "scintilla of evidence." *Hancock, supra.* Furthermore, in this analysis, the evidence—even if only a scintilla exists—must be viewed in the light most favorable to the nonmoving party. *Vereen*, 306 S.C. at 425, 412 S.E.2d at 427. If that evidence

is susceptible to more than one reasonable inference, the evidence is sufficient to support the survival cause of action. *Id.*, 306 S.C. at 432, 412 S.E.2d at 431.

Here, the only eye witness to Larios' electrocution and fall was Pedro Abraham, Larios' co-worker who was assisting him on November 29, 2015. Abraham told investigators that, as a result of the electrical shock, Larios shouted out loudly before he fell off the ladder to the ground below. Abraham ran over to Larios to check his head and immediately asked Larios if he was alright, to which Larios responded he was "O.K." Ex. 4, OSHA_0028–29. This is clear evidence that Larios initially survived the electrical shock and subsequent fall. Mr. Abraham's deposition is scheduled for Tuesday, August 20, 2019, but even without such testimony there is already more than sufficient evidence to submit the issue of conscious pain and suffering, and thus Plaintiff's survival claim, to the jury.

For the foregoing reasons, SCE&G's Motion for Summary Judgment should be denied.

II. EDISTO REALTY'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

To establish negligence in this premises liability action against Edisto Realty, Plaintiff must prove the following three elements: (1) a duty of care owed by Edisto to Larios; (2) Edisto Realty's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008) (citing *Hurst v. East Coast Hockey League, Inc.*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006)). As discussed below, the deposition testimony and other evidence in this case supports a finding that each of these elements has been established.

a. Edisto Realty, as the manager of property on which Jose Larios was killed by a hidden defect, owed Jose Larios—an invitee—the highest duty under the law to discover risks and to warn of, or eliminate, foreseeable and unreasonable dangers.

The nature and scope of duty in a premises liability action is determined based upon the status or classification of the person injured at the time of his or her injury. *Sims v. Giles*, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). "South Carolina recognizes four classes of persons present on the property of another: adult trespassers, invitees, licensees, and children." *Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.*, 317 S.C. 200, 203, 452 S.E.2d 619, 620 (Ct. App. 1994).

"The highest duty of care is that owed to an invitee, who enters the property at the express or implied invitation of the property owner."[1] *Hoover v. Broome*, 324 S.C. 531, 535, 479 S.E.2d 62, 64 (Ct. App. 1996); *see also Gutteridge v. A.P. Green Services, Inc.*, 2002 PA Super 198, 804 A.2d 643 (Pa. Super. Ct. 2002) ("The duty of care owed to a business invitee or business visitor is the highest duty owed to any entrant upon land; the landowner must protect the invitee not only against known dangers, but also against those which might be discovered with reasonable care."). "A landowner owes an invitee a duty of due care to *discover risks* and to warn of or eliminate foreseeable unreasonable risks." *Wintersteen v. Food Lion, Inc.*, 336 S.C. 132, 137, 518 S.E.2d 828, 830 (Ct. App. 1999), *aff'd*, 344 S.C. 32, 542 S.E.2d 728 (2001) (emphasis added). The duty owed to an invitee differs from the duty owed to a mere licensee "in that [a landowner] has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee." *Singleton*, 377 S.C. at 201, 659 S.E.2d at 204 (internal quotations omitted). However, "[u]nlike a licensee, an invitee enters the premises with

[1] An invitee is further defined by the fact that "his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." *Sims*, 343 S.C. at 716–17, 541 S.E.2d at 862.

the ***implied assurance of preparation*** *and reasonable care* for his protection and safety while he is there." *Id.* at 202, 659 S.E.2d at 205 (emphasis added).

Edisto Realty's role as property manager or rental manager rather than owner of 3402 Myrtle Street does not insulate it from liability in this case.

> [A] party who operates a premises but is neither an owner nor a lessee may also have a duty of reasonable care with respect to an allegedly dangerous condition. ***Such liability depends upon control, rather than ownership, of the premises***. In considering whether an individual has exercised such control of the premises so as to impose a duty to reasonably inspect the premises, a court will generally consider the individual's power or authority to ***manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property.***

Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652, 655–56 (D.S.C. 2006).

It is clear from the evidence that Edisto Realty exercises significant authority to manage, superintend, administer and oversee the property at 3402 Myrtle Street. It handles a "long list of daily items" for its properties, including taking reservations, housekeeping, inspecting the properties and readying them for new renters, maintenance and repairs, responding to guest inquires and issues, and so on. Ex. 3, Smoak Dep., 13:06–15; 30:01–22; 27:16–29:14. PENSCO and Jackson, the homeowners, hired Edisto Realty for that very purpose—to keep an eye on and monitor the property, and to inform Jackson of any issues. Ex. 2, Jackson Dep., 27:23–28:08; 37:23–38:11; 59:01–11. Additionally, Edisto Realty received invoices and made payments to the landscaping company that serviced 3402 Myrtle Street. Ex. 3, Smoak Dep., 45:14–19.

As the manager of the property, Edisto Realty had a duty to take reasonable steps to make sure the property was free of dangerous, hidden defects ***for any invitee***, not just Larios and the landscaping crew. This includes the countless guests and renters that have stayed at 3402 Myrtle Street (or any of Edisto Realty's 409 other properties on Edisto Island) over the years. Moreover, Edisto Realty had every reason to know that Larios or his co-workers would be on the

property, since Edisto Realty had paid more than ten (10) invoices to the landscaping company in the year before Larios' death. Ex. 14, Edisto Realty Vendor Invoice Analysis. Edisto Realty clearly owed a duty to invitees, like Larios, to reasonably inspect, discover and ultimately eliminate—or at least warn about—the existence of latent dangers at 3402 Myrtle Street, which it failed to do.

Edisto Realty argues that it owed no legal duty to Larios, simply because it did not coordinate the hiring and scope of work of the landscaping crew on Sunday, November 29, 2015. It also contends that it is absolved of any duty to Larios because of its contract with Jackson. Edisto Realty's Mot. Sum. J., p. 2. This misconstrues the law, which places a duty on Edisto Realty, regardless of its contract with Jackson. *See Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004) (holding that a tortfeasor's liability exists independently of a contract with a third-party, and rests upon the tortfeasor's duty to exercise due care to avoid damage or injury to foreseeable plaintiffs).

It is undisputed that Larios was an invitee at 3402 Myrtle Street when he was killed. Larios was on the property as part of a two-man crew hired to perform landscaping work, including trimming palm trees, and was there with the express or implied invitation of PENSCO, the owner, and Edisto Realty, the manager. No evidence has been set forth, nor has it been argued, that Larios was not an invitee. As the entity with control and oversight of the day-to-day management of the property, Edisto Realty owed him the highest duty under the law to affirmatively inspect for and discover unreasonable hazards on the property, and to warn of or eliminate those hazards.

b. A reasonable jury could conclude that Edisto Realty breached its duty to Jose Larios by failing to reasonably inspect and discover the risk on the property posed by an overgrown palm tree camouflaging—and contacting—an energized, overhead power line.

Because there is no dispute regarding Larios' status as an invitee—and thus the scope of Edisto Realty's duty is clear—the factual question a jury must determine is whether Edisto Realty knew, *or should have known* of the hazard that was posed by the palm tree on 3402 Myrtle Street that was concealing and contacting an energized SCE&G power line.

Whether a defendant breached its duty of care is a question of fact. *Brooks v. GAF Materials Corp.*, 41 F. Supp. 3d 474, 484 (D.S.C. 2014) (citing *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 320, 605 S.E.2d 12, 15 (2004); *McVey v. Whittington*, 248 S.C. 447, 151 S.E.2d 92, 96 (1966)); *see also Delaney v. United States*, 260 F. Supp. 3d 505, 512 (D.S.C. 2017) ("[T]he question of breach of duty is a factual question best left for the jury.").

In this case, the factual dispute centers on the issue of constructive notice. *See Kindig v. Whole Foods Mkt. Grp., Inc.*, 930 F. Supp. 2d 48, 51 (D.D.C. 2013) ("As a general rule, issues of constructive notice are 'peculiarly within the province of juries.'"). In a premises liability context, the occupier or manager of property is deemed to be on constructive notice of a particular defect on the property when it has existed "for a sufficient time and [the property owner] would have discovered and removed it had [he] used ordinary care." *Wintersteen*, 336 S.C. at 136, 518 S.E.2d at 830; *Wimberly v. Winn-Dixie Greenville, Inc.*, 165 S.E.2d 627, 630 (S.C. 1969) (explaining that constructive notice asks "whether there was evidence from which the jury might reasonably infer that the defendant, by the exercise of reasonable diligence, should have known of" the danger that harmed the plaintiff).

Edisto Realty's office is less than two miles away from 3402 Myrtle Street. *See* https://www.google.com/maps, Edisto Sales & Rentals Realty⟶3402 Myrtle Street. Edisto

Realty's rental department has thirteen (13) full-time employees, Ex. 3, Smoak Dep., 11:09–14, housekeepers, inspectors, and maintenance workers. Edisto Realty has managed 3402 Myrtle as part of its rental management program since at least 2012, and Edisto Realty handles the day-to-day management of the property for the absentee-owner, who visited the property only once a year. Ex. 2, Jackson Dep., 17:13–22. Jackson relied on Edisto Realty for that very reason; he was located four hours away and wanted Edisto to keep an eye on the property. *Id*. Edisto Realty also undertakes the responsibility to either repair, or alert its homeowners of the need to repair, various items like faulty steps or railings. Ex. 3, Smoak Dep., 27:16–29:14. Despite this undertaking—for which it is compensated with a 20% commission—Edisto Realty attempts to narrowly draw the bounds of its responsibility, apparently arguing that it stops with a faulty step or railing but does not extend to other hidden dangers, like a palm tree growing into a power line.

From all of this evidence, taken together, a reasonably jury could easily infer that Edisto Realty—if it had exercised reasonable diligence—could have and should have discovered the overgrown palm trees contacting the power line in the back yard, and either eliminated that dangerous condition, or at least warned Larios and others about it. Therefore, Edisto Realty's Motion for Summary Judgment should be denied, and a jury should be permitted to weigh the evidence at trial.

c. A reasonably jury could conclude that Edisto Realty's failure to inspect and discover the unreasonable risk posed by the power line in the palm trees, and failure to eliminate or warn of its existence was the legal and proximate cause of Larios' death.

Here, as with SCE&G's Motion for Summary Judgment, the issue of proximate cause is one best left for the jury. *Hughes*, 269 S.C. at 398–99, 237 S.E.2d at 757. This is not the "rare or exceptional" case in which proximate cause may be decided as a matter of law. *See Gause*, 403 S.C. 140, 742 S.E.2d 644.

As the South Carolina Supreme Court noted in another premises liability case, in which the plaintiff fainted and fell backward into a breakable mirror in a medical clinic's reception area:

> The presence of the mirror on the premises was not merely a condition involved in the plaintiff's receiving his injuries, as contended by the defendant. The plaintiff's particular injuries would not have resulted except for the maintenance of the mirror on the premises. ***If the defendant had not breached its duty of reasonable care which it owed to the plaintiff by properly inspecting and taking adequate safeguards to prevent injury resulting from forceful contact with the mirror, the plaintiff would not have been injured as he was.*** The evidence, therefore, was sufficient to permit the jury to find that the mirror constituted a proximate cause of the plaintiff's injuries.

Hughes, 269 S.C. at 399, 237 S.E.2d at 757 (emphasis added).

Edisto Realty derives a profit from managing a large portfolio of rental properties, marketing those properties to the vacationing public, and preparing those properties for each renter's stay week in, week out. Imagine if one of Edisto Realty's renters checked into 3402 Myrtle Street, and as they walked up the steps to the front door, a railing gave way, causing the guest to plummet to the ground and break a leg. Edisto Realty, who inspected the house, cleaned it, prepared it in every way immediately prior to that guest's arrival, would not be insulated from liability for its failure to eliminate or warn of that hazardous condition. Larios, a business invitee on the property managed by Edisto Realty, is no different than the renter under the law. The duties of Edisto Realty remain the same in both instances: properly inspecting and taking adequate safeguards to prevent injury from latent dangers.

Had Edisto Realty not breached his duty of reasonable care by properly inspecting the property (including the backyard), the dangerous condition of a palm tree cloaking a power line would have been detected and remedied (or at least warned about), and Larios would not have

been killed. Thus, the causal link between Edisto Realty's failure to discover the latent, defective power line amidst the palm tree, and Larios' resulting death, is evident.

III. PENSCO'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

On August 15, 2019—five days before the pretrial hearing scheduled by the Court—PENSCO filed a two-page Motion for Summary Judgment, the basis of which is impossible to determine from the face of the Motion. PENSCO's Motion for Summary Judgment should be denied because (1) it fails to state with particularity the basis for the motion, and (2) there are countless genuine issues of material fact with respect to PENSCO's liability for Larios' death.

a. PENSCO has failed to state the grounds for its Motion as required by the South Carolina Rules of Civil Procedure.

Rule 7(b)(1) of the South Carolina Rules of Civil Procedure requires that motions "shall state with particularity the grounds therefor[.]" *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). "By requiring notice to the court and the opposing party of the basis for the motion, Rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly." *Id.* (internal quotation marks omitted). Accordingly, "when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly." *Id.* (internal quotation marks omitted). For example, an otherwise defective motion under Rule 7(b)(1) has been upheld where a detailed memorandum in support of the motion, setting out its grounds, was served ***at the same time the written motion was served***. *Chastain v. Hiltabidle*, 381 S.C. 508, 517-18, 673 S.E.2d 826, 831 (Ct. App. 2009). As with any motion, factual material supporting a motion for summary judgment is ordinarily required to be served with the motion, not later. *See* Rule 6(d), SCRCP.

PENSCO has failed to state with any particularity the basis for its Motion for Summary Judgment. According to PENSCO: "Stated plainly, notwithstanding ample opportunity to do so, Plaintiffs [sic] are unable to adequately satisfy the elements of the negligence analysis, as explicated by our state's appellate tribunals, as it pertains to PENSCO." Plaintiff is unable to divine from that statement—or any other language in PENSCO's two-page, boilerplate Motion—the grounds upon which PENSCO claims it is entitled to be dismissed from this action as a matter of law. As of the timing of filing of this Memorandum, PENSCO has not filed or served any memorandum setting out the grounds for PENSCO's Motion. For that reason, PENSCO's Motion is improper and should be denied.

b. As the owner of 3402 Myrtle Street, PENSCO breached its duty to Larios, an invitee, by failing to take any steps to discover and then eliminate—or warn of—latent dangers on its property, and Larios died as a result.

As outlined in detail above, PENSCO is the owner of the property located at 3402 Myrtle Street where Larios' wrongful death occurred. While PENSCO owns the home in a self-directed IRA for the benefit of Jackson, as a matter of law, the ownership of the property is not in dispute. Compl. ¶ 15; PENSCO Ans. ¶ 16.

The law makes clear what is expected of a property owner with regard to adequately safeguarding its property for invitees. "A landowner owes an invitee a duty of due care to *discover risks* and to warn of or eliminate foreseeable unreasonable risks." *Wintersteen*, 336 S.C. at 137, 518 S.E.2d at 830 (emphasis added). The duty owed to an invitee differs from the duty owed to a mere licensee "in that [a landowner] has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee." *Singleton*, 377 S.C. at 201, 659 S.E.2d at 204 (internal quotations omitted). However, "[u]nlike a licensee,

an invitee enters the premises with the ***implied assurance of preparation*** *and reasonable care* for his protection and safety while he is there." *Id.* at 202, 659 S.E.2d at 205 (emphasis added).

The evidence in this case is that PENSCO has never taken any action, measure, or step to discover, eliminate, or warn of foreseeable risks on its property at 3402 Myrtle Street. Ex. 2, Jackson Dep., 23:08–17; 57:15–59:11. This fact alone is enough for a reasonable jury to conclude that PENSCO breached its duty as a property owner to exercise "due care to discover risks" on the property. PENSCO cannot escape liability by claiming it delegated its legal obligations to Edisto Realty. As the power of the property, PENSCO's duty to Larios was non-delegable, and PENSCO is responsible for its abject failure to discover and eliminate, or warn of, the unreasonable, latent danger on its property that caused Larios' death.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Defendants' Motions for Summary Judgment and allow this case to be tried on the merits during the week of August 26, 2019.

YARBOROUGH APPLEGATE LLC

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