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 MOTION *IN LIMINE* NO. 2 TO EXCLUDE REFERENCE TO ALLEGED OSHA VIOLATIONS AND RELATED EVIDENCE**
	)	
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 ("Plaintiff"), respectfully submits this motion *in limine* to exclude from trial any reference to alleged violations of regulations promulgated by either the federal or South Carolina Occupational Safety and Health Administration ("OSHA"), including but not limited to OSHA's citations of Larios's employer, Stevens.

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RELEVANT FACTS

On November 30, 2015, the day after the subject accident, Compliance Officer Christopher Dennison of the South Carolina state OSHA investigated the subject accident that lead to the death

of Larios.[1] CO Dennison went to the scene the day after the accident and met with Mr. Stevens, the employer. CO Dennison also took photos of the scene and took some measurements of the subject palmetto tree and Larios's ladder.[2] CO Dennison did not take the critical measurement of the distance from SCE&G's overhead power lines to where Larios was in the tree. He only took photographs of the tree branches in contact with the power lines.

Six months later, on May 16, 2016, a different OSHA officer issued two OSHA citations to Stevens, the employer (not Larios, the employee and Plaintiff's decedent here).[3] The citations were both based on the acts and omissions of Stevens, as Larios's employer, not any acts or omissions by Larios as employee. The crux of all the citations is that Stevens failed to properly train Larios in matters of work safety and protect him from hazards.

The citations are summarized as follows:

Citation No. 1

In violation of South Carolina Regulation 71-112(A), Stevens failed to:

> (1) ensure that employee Larios was not working in dangerous proximity (within 10 feet) of energized power lines;[4]
>
> > * Note that neither OC Dennison nor anyone else has actually measured whether Larios was within ten feet of the energized primary power line.

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[1] OSHA Narrative Report, attached hereto as **Exhibit A**, at 1.

[2] OSHA Narrative Report (**Ex. A**) at 9.

[3] The OSHA citations to Stevens are attached hereto as **Exhibit B** and are numbered at the bottom "5 of 12" through "12 of 12." The name of the OSHA officer who issued the citations, Anthony Wilks, is shown on page 12.

[4] **Ex. B** at 5 (Citation 01 Items 001).

(2) ensure that employee Larios was properly trained in how to prevent hazards such as working from a ladder with a chainsaw;[5]

* Note that there is no evidence that "working from a ladder with a chainsaw," in and of itself, was the reason Larios had this accident.

Further as to Citation No. 1, in violation of federal regulation 29 CFR 1910.132(d)(1), as adopted pursuant to South Carolina Code section 41-15-220 and South Carolina Regulation 71-108, Stevens failed to:

(3) determine the hazards to Larios of trimming trees without personal protective equipment, such as eye and face protection, head protection, foot protection, and hand protection;[6]

* Note that there is no evidence that any of the personal protective equipment cited by OC Dennison would have prevented Larios's fall and subsequent death. The pathologist who performed the autopsy determined that the cause of death was trauma to the torso.[7]

Citation No. 2

In violation of federal regulation 29 CFR 1910.132(a), as adopted pursuant to South Carolina Code section 41-15-220 and South Carolina Regulation 71-108, Stevens failed to:

(1) provide employee Larios with leg protection with cut-resistant material, to cover from the thigh to the top of the boot, to protect him from contact with a running chainsaw;[8]

* Note that there is no evidence that Larios was cut by the chainsaw.

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[5] **Ex. B** at 6 (Citation 01 Item 002).

[6] **Ex. B** at 7 (Citation 01 Item 004). There is no Item 0003 to Citation No. 1.

[7] Depo. Erin Presnell, M.D., attached hereto as **Exhibit C**, at 17:3–19:12.

[8] **Ex. B** at 9 (Citation 02 Item 001a).

(2) provide employee Larios with eye and face protection from particles that may fly during operation of a chain saw;[9] and

> * Note that there is no evidence that flying particles interfering with Larios's eyes or face had anything to do with his accident.

(3) ensure that employee Larios was wearing a protective helmet.

> * Note that there is no evidence that a protective helmet would have prevented the bodily injuries that caused the death of Larios. The pathologist who performed the autopsy determined that the cause of death was trauma to the torso.

Defendants intend to introduce these OSHA citations as evidence that Stevens, the non-party employer of Larios protected by workers' compensation immunity in this case, was negligent in causing Larios's death. Essentially, Defendants want to argue, as part of an "empty chair" defense, that Stevens was guilty of negligent supervision and training.

LAW AND ARGUMENT

As noted in Plaintiff's Motion *in Limine* No. 1, Defendants have no right to such an empty-chair-employer defense pursuant to *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017). That critical point notwithstanding, whether any particular OSHA regulation applies to the facts of this case is for the Court to determine, based on the evidence submitted at trial, for purposes of charging the jury. A party is not allowed to introduce testimony, expert or otherwise, that a law like an OSHA regulation applies. That would invade the province of the Court. Likewise, testimony that someone violated a law like an OSHA regulation would invade the province of the jury. Such testimony is therefore not admissible.

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[9] **Ex. B** at 11 (Citation 02 Item 001b).

Further, Plaintiff asks the Court to keep in mind that these OSHA violations were allegedly committed by Stevens, not Larios. The Court should not let this trial become sidetracked by a mini-trial of Stevens on the alleged OSHA violations. Everything Defendants want to claim about Stevens in the form of an "empty chair" defense—working too close to the power lines; working without proper equipment; etc.—Defendants are also claiming directly against Larios in the form of a comparative-negligence defense. Defendants do not need Stevens' alleged OSHA violations to put up their defense on these issues, and Defendants do not even present a legitimate legal theory to which Stevens' OSHA violations are relevant. Defendants intend to introduce the alleged OSHA violations in support of a claim that Stevens negligently supervised or trained Larios. In South Carolina, however, a cause of action for negligent supervision or training does not even exist under these facts, so Defendants may not posit that inapplicable theory as an empty-chair defense.

Furthermore, the OSHA citations themselves constitute inadmissible hearsay. They contain "opinions, judgments and conclusions" of OSHA CO Dennison's manager, Anthony Wilks, and are therefore outside of the hearsay exception in Rule 803(8), SCRE ("Public Records and Reports"). Likewise, OSHA citations are civil, regulatory matters, not evidence of a criminal conviction pursuant to Rule 803(22), SCRE. Since no hearsay exception applies, the OSHA citations are inadmissible.

Finally, as noted above, almost all of the OSHA citations to Stevens are not even based on facts relevant to this civil action by Larios for the negligence of SCE&G, PENSCO, and Edisto Realty. The only one with any potential relevance—working within ten feet of an energized line—is not based on a proper foundation since no one actually took a single measurement to confirm that Larios was, in fact, within ten feet of the energized primary line. The citations are all irrelevant and inadmissible pursuant to Rule 402, SCRE.

I. As Explained in Plaintiff's Motion *in Limine* No. 1, Defendants Are Not Entitled to Raise an "Empty Chair" Defense as to Plaintiff's Employer, Stevens, Pursuant to *Machin*, and Therefore All Evidence of OSHA Regulations and Violations Is Irrelevant and Inadmissible.

Plaintiff begs the Court's reference to Plaintiff's Motion *in Limine* No. 1 to exclude Defendants' attempted empty-chair-employer defense pursuant to *Machin*. The OSHA issues raised by Defendants in this case, including OSHA's citations of Stevens, go to the negligent supervision and training claim that Defendants want to lodge against Stevens, a non-party. Since the empty-chair-employer defense does not work under the facts of this case, the OSHA allegations are all irrelevant. The Court should disallow any reference to OSHA regulations and the alleged violations thereof during trial.

II. Introduction of OSHA Regulations and Alleged Violations Through Expert or Lay Testimony Would Impermissibly Invade the Province of the Court and the Jury.

Defendants' primary defense is that there was no electrocution event at all. In the alternative, Defendants argue that if Larios was electrocuted, it was because Larios and Stevens violated the so-called OSHA ten-foot rule. This rule provides, generally, that an unqualified worker should not come within ten feet of a charged power line, either with a part of his body or any extension of himself such as a tool he is holding. Defendants will likely try to have SCE&G's expert, Mr. Jackson, testify regarding which OSHA regulations apply, and how he thinks Stevens and/or Larios violated them. Defendants may also try to introduce such testimony through the OSHA OC Dennison, SCE&G employees, and Plaintiff's engineering expert.

The Court should not allow Defendants to introduce any such evidence, through an expert witness or otherwise. All OSHA regulations are matters of federal law, South Carolina state law, or both. *See* S.C. Code § 41-15-210 (granting authority to the Department of Labor, Licensing, and Regulation to promulgate OSHA rules and regulations "which will have the full force and

effect of law"); Chapter 71, Article 1, of the South Carolina Code of State Regulations ("Occupational Safety & Health"); S.C. Reg. 71-337 (observing that state OSHA regulations are in place of or in supplement to federal OSHA regulations). The applicability of any particular law—be it a statute, a regulation, or a matter of common law—is for the Court and the Court alone to determine. For example, the Court would not allow an accident-reconstruction expert to identify and read to the jury a statute on traffic signs, because allowing testimony on what law governs the case is entirely improper. It would invade the province of the Court.

"In general, expert testimony on issues of law is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003) (agreeing with the Seventh Circuit that Rules 702 and 704 of Evidence "prohibit experts from offering opinions about legal issues that will determine the outcome of a case") (citations omitted); *accord McKnight v. State*, 378 S.C. 33, 56–57, 661 S.E.2d 354, 365–66 (2008) (holding inadmissible the legal opinions of a proffered expert witness); *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (same); *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106–07, 249 S.E.2d 734, 739–40 (1978) (refusing to allow even a law professor to testify to the proper interpretation of a law, which was "within the exclusive province of the court").

It is for the Court to determine which laws apply to the facts of a case, and to instruct the jury as to the content and meaning of such laws. It is for the jury to decide whether a party violated the law as instructed by the Court. *See, e.g.*, *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 295 (6th Cir. 1999) (refusing to allow an engineering expert to testify to whether a provision of a city building code applied, as "interpretation of the city and state building codes is a matter of law for resolution by the court and not a proper subject for testimony from at least that of a non-lawyer"); *In re Initial Pub. Offering Sec. Litig.*, 174 F.Supp.2d 61, 64 (S.D.N.Y. 2001) (observing that "every circuit has explicitly held that experts may not invade the court's province by testifying on issues

of law," and citing opinions from every circuit in the country); *Fishman v. Brooks*, 487 N.E.2d 1377, 1381–82 (Mass. 1986) (holding that "[e]xpert testimony concerning the fact of an ethical violation [by an attorney] is not appropriate, any more than expert testimony is appropriate concerning the violation of, for example, a municipal building code").

Here, whether any particular state or federal OSHA regulation applies to the facts of this case is a matter of law for the Court, and no one else. If the Court were to find any OSHA regulation applicable here, then the Court could decide to charge the jury on that regulation after closing arguments. Counsel could then argue the issue in closing, and it would be within the exclusive province of the jury to determine whether anyone violated the regulation and whether that constitutes evidence of fault. Neither an engineering expert nor any other witness should be permitted to invade the province of the Court or the jury by opining on the applicability of OSHA regulations and whether anyone violated them. If the Court is inclined to find OSHA regulations relevant at all in this case, the Court should allow OSHA to enter the trial only in the proper way. Introducing OSHA law through testimonial and other evidence is not the proper way.

III. DEFENDANTS' OSHA CLAIMS AGAINST STEVENS SUPPORT NOTHING MORE THAN A LEGALLY ILLEGITIMATE CLAIM OF NEGLIGENT SUPERVISION AGAINST STEVENS.

SCE&G, PENSCO, and Edisto Realty want to turn this trial into a mini-trial of Stevens, Larios's employer, for alleged violations of various OSHA regulations. As set forth above and below, for various reasons these alleged OSHA violations are irrelevant, prejudicial, and inadmissible pursuant to Rules 402 and 403, SCRE. This goes for all OSHA violations that Defendants may allege against Stevens, not just those relied on by Mr. Wilks of OSHA in issuing citations to Stevens.

Defendants do not need the OSHA violations to argue that Larios should have been more careful in inspecting the property and making sure it was safe to climb up the ladder into the tree.

Defendants have this comparative negligence argument, and they can and will make it. Defendants would prefer, however, not to be seen by the jury as attacking the decedent. Defendants want to avoid such tawdriness by attacking Larios's employer instead, with the same exact factual allegation regarding proximity to the power line.

Defendants want to sidetrack this trial with a mini-trial on Stevens' alleged OSHA violations. Yet, Defendants want to introduce these alleged OSHA violations in support an empty-chair theory that Stevens negligently supervised Larios. In South Carolina, however, a claim of negligent supervision does not exist against an employer for failure to protect an employee from himself. A claim of negligent supervision, or negligent training, may exist only "where an employer knew or should have known that its employment of a specific person created an undue risk of harm *to the public*." *James v. Kelly Trucking Co.*, 377 S.C. 628, 330–31, 661 S.E.2d 329, 631 (2008); *see also Bank of New York v. Sumter Co.*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010) (holding that a party had no cause of action for negligent supervision where there was no evidence that the employee posed an "undue risk of harm to the public"). Further, for a negligent supervision claim to survive, there must be evidence that the employee "intentionally harms another" person. *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116–117, 420 S.E.2d 495, 496 (1992) (citation omitted). The elements of negligent supervision do not apply to Stevens under the facts of this case. Larios did not intentionally harm anyone, and he was the one who was harmed, not a member of the public.

One can envision a different factual scenario where Larios's work in the tree caused a fire that damaged PENSCO's house. Under that scenario, PENSCO would not have a viable cause of action against Stevens, because the element of intentional harm would be missing. It stands to reason that if there would be no viable cause of action for negligent supervision against Stevens

under that scenario, then Defendants should not be able to raise that same legally deficient theory of negligent supervision as an empty-chair defense. That is all the OSHA violations would give Defendants…a negligent supervision claim that would not survive a motion for summary judgment in a slightly different case.

Defendants may try to recast their legal theory against Stevens as a claim for negligent training, not negligent supervision. That is an exercise in semantics, a distinction without a difference, because in South Carolina a negligent training is encompassed within the claim of negligent supervision. As our federal district court has consistently held for more than a decade, negligent training is not an independently recognized cause of action in South Carolina. *See, e.g.*, *Holcombe v. Helena Chem. Co.*, No. 2:1-cv-2852-PMD, 238 F. Supp. 767, 772 (D.S.C. 2017) (finding that "negligent training is merely a specific negligent supervision theory by another name") (citing *Gainey v. Kingston Plantation*, No. 4:06-3373-RBH, 2008 WL 706916, at *7 n.4 (D.S.C. March 14, 2008) ("It does not appear that South Carolina recognizes a claim for negligent training separate and apart from one for negligent supervision.")).

The district court's finding negligent training to be just a type of negligent supervision is consistent with our Supreme Court's holding in *James*, *supra*, that an employer may be held liable for negligently "hiring, supervising, or training the employee" in "circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public." 377 S.C. at 330–31, 661 S.E.2d at 631. The *James* Court lumped together negligent hiring, supervision and training as one and the same, and then cited only one case—the seminal case on negligent supervision, *Degenhart*, 309 S.C. at 116, 420 S.E.2d at 496—for the existence of that single cause of action. Consequently, whether Defendants call their theory against Stevens "negligent supervision" or "negligent training," the elements are the same and the

claim fails as a matter of law. Defendants should not be able to raise an empty-chair defense on a legal theory that does not apply to the facts of this case.

Significantly, in states that do allow evidence of OSHA regulations in certain cases, the general rule appears to be that OSHA regulations may be used *at most* as evidence of an employer's standard of care. OSHA regulations do not create a separate cause of action, and may not be used as the basis of a claim of negligence *per se*. The limit of their relevance is as evidence of an employer's standard of care, and only when the employer's standard of care is relevant to the case. *See, e.g., Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718, 720 (Tex. App. 1995) (holding that OSHA "has relevance to the standard of care," but "doesn't establish negligence per se, and it does not create a separate cause of action") (citing *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975)); *Falconer v. Penn Maritime, Inc.*, 397 F. Supp. 2d 68, 73 (D. Me. 2005) (observing the majority rule that violation of an OSHA regulation does not constitute negligence *per se*); *Taft v. Derricks*, 613 N.W.2d 190, 196 (Wis. Ct. App. 2001) (observing that "[a]n OSHA violation does not create a private cause of action").

Here, Stevens' standard of care is not relevant to this case, because Defendants' only use of Stevens' standard of care is predicated on a legally deficient theory of negligent supervision. Since the only relevance of the OSHA evidence would be to Stevens' standard of care, the OSHA evidence is entirely irrelevant as well. Further, the risk of confusion and distraction of the jury by a mini-trial of Stevens on an illegitimate legal theory is substantial. The risk of prejudice to Plaintiff is severe. The Court should see Defendants' OSHA claims for the sideshow that they really are, and exclude all of the OSHA-related evidence pursuant to Rules 402 and 403, SCRE.

IV. THE OSHA CITATIONS ARE INADMISSIBLE HEARSAY.

The Court should not permit Defendants to introduce the actual OSHA citations, the documents, into evidence at trial. The allegations in the citations are hearsay, and do not fit the public records exception or any other hearsay exception. Further, while Rule 703, SCREC, allows an expert witness to use inadmissible hearsay to help form his opinions, the expert is not allowed to publish that inadmissible hearsay to the jury. Consequently, Defendants are not allowed to backdoor the hearsay OSHA citations into evidence through their expert witness.

A. The OSHA Citations Are Replete with "Opinions, Judgments, and Conclusions" and Are Therefore Not Admissible Pursuant to the Public Records Exception to Hearsay.

"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct. App. 2014) (citing Rule 802, SCRE). One such exception to the prohibition against hearsay is the public-records exception, which provides in pertinent part:

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

Rule 803(8), SCRE ("Public Records and Reports"). As the Court of Appeals has held, "reports containing opinions, judgments, or conclusions are outside the scope of Rule 803(8)'s public records exception." *Fowler*, 410 S.C. at 411, 764 S.E.2d at 253.

For this reason, the *Fowler* Court excluded from evidence the report prepared by the chief of a fire department who had investigated the cause of a fire. The Court determined that the fire

chief's opinions and conclusions as to the cause of the fire rendered the report inadmissible hearsay not subject to the public-records exception. *Id.* at 412–13, 764 S.E.2d at 253–54. Similarly, in *State v. Morris*, 376 S.C. 189, 207, 656 S.E.2d 359, 368–69 (2008), the Supreme Court excluded the report of a federal bankruptcy examiner that contained inadmissible "investigative opinions, legal analysis, and potential conclusions."

Here, the OSHA citations issued to Stevens are replete with opinions, judgments, and conclusions that Stevens violated certain OSHA regulations. There is little, if any, information in the citations which does not constitute an investigative opinion, judgment, or conclusion. As one federal court has noted, an OSHA citation and its "underlying statements in support are no more than an indictment." *Holder v. Interlake Steamship Co.*, No. 16-cv-343-wmc, 2018 WL1725694, at *10 (D. Wis. 2018). In other words, an OSHA citation is much like a traffic ticket or police report in which the officer opines as to who was at fault in an accident. These are not admissible pursuant to the public-records exception. Rule 803(8), SCRE; *see also* Jessica G. Farley and Brett J. Young, *Untrustworthy and Irrelevant: Why OSHA citations and related materials should not be admissible to prove liability*, 78 No. 2 TEXAS BAR JOURNAL 136, 136 (Feb. 2015) (observing that "[l]ike a criminal indictment or traffic ticket, an OSHA citation lacks indicia of reliability" or trustworthiness which is necessary to support application of of a hearsay exception). The OSHA citations are therefore not admissible pursuant to the public-records exception to hearsay.

In addition, OSHA citations are civil matters. They are not criminal, and an OSHA citation does not constitute a hearsay exception of judgment of previous conviction pursuant to Rule 803(22), SCRE. There is no hearsay exception that applies, and the OSHA citations are therefore inadmissible.

B. Rule 703, SCRE, Does Not Allow Defendants to Backdoor Inadmissible Hearsay into Evidence Through Expert Testimony.

As discussed above, the Court should not allow an expert to testify to the legal issues of the applicability of any particular OSHA regulation or whether anyone violated an OSHA regulation. That would impermissibly invade the province of the Court and the province of the jury.

Moreover, since the OSHA citations are inadmissible hearsay, no expert witness should be permitted to publish the contents of the OSHA citations. Rule 703, SCRE, does allow an expert to rely on inadmissible evidence such as hearsay in forming his opinion, as long as the inadmissible evidence relied upon is of the type typically relied upon by experts in that field. "However, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming his opinion…." *Allegro, Inc. v. Scully*, 400 S.C. 33, 46–47, 733 S.E.2d 114, 122 (Ct. App. 2012); *accord State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (holding that Rule 703 does not "make hearsay automatically admissible simply because it was relied upon by the expert").

Consequently, even if the Court finds that the expert should generally be able to testify about OSHA regulations—which the Court should not do—the expert must still be prohibited from publishing the contents of the citations issued by the South Carolina OSHA division of LLR. As set forth above, the citations themselves are inadmissible hearsay, and the expert should not be permitted to publish their contents, in either verbatim or summary fashion.

V. THE SUBJECT MATTER OF EACH ALLEGED OSHA VIOLATION IS EITHER IRRELEVANT OR WITHOUT THE FOUNDATION NECESSARY FOR ADMISSIBILITY; OR ALTERNATIVELY, ANY PROBATIVE VALUE IS OUTWEIGHED BY THE RISK OF JURY CONFUSION AND PREJUDICE TO PLAINTIFF.

As set forth above, Anthony Wilks of South Carolina OSHA issued to Stevens two citations containing allegations of six OSHA violations by Stevens. Five of the alleged violations are for acts and omissions that are irrelevant to Larios's actual accident that caused his death. The only allegation with any potential relevance was made by the OSHA division of LLR without a requisite factual foundation, and is inadmissible for that reason.

A. The Allegation That Larios Worked Within Ten Feet of a Power Line Lacks the Requisite Factual Foundation for Admissibility. No One Ever Measured the Distance Between Larios's Spot in the Tree and the Primary Power Line.

The OSHA investigator, Compliance Officer Dennison, investigated the scene the day after Larios's accident. CO Dennison's report reveals that he took several measurements, including the height and width of the tree and the height of the ladder, but he did not measure the distance between Larios's position in the palmetto tree and the energized power line that caused the electrocution.[10] Yet, Dennison's manager, Mr. Wilks, somehow cited Stevens for allowing Larios to work within ten feet of an energized power line.[11] To this day, no one has ever taken that measurement, so there is no factual foundation for the allegation that Larios was within ten feet of that power line.

Mr. Wilks did not investigate the scene, and he of course never took any measurements. He has no personal knowledge of the facts. OSHA CO Dennison has no personal knowledge of

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[10] OSHA Narrative Report (**Ex. A**) at 9.

[11] OSHA Citation 01 Item 001 (**Ex. B**) at 1 (page labeled "5 of 12").

the distance to the power line to support the allegation in the OSHA citation. No one ever took the measurement from the tree to the power line, and the tree no longer exists, only a stump.

The OSHA division's allegation that Larios was within ten feet of the primary power line is without any factual foundation, and the Court should exclude that allegation by the OSHA division from coming into evidence. In fact, the Court should not allow anyone to make that allegation, as there is not a single person with the requisite personal knowledge to make it.

B. All of the Other OSHA Citations Are for Alleged Acts and Omissions That Are Entirely Irrelevant to Larios's Accident and Injuries.

The remainder of the allegations in the OSHA citations against Stevens are for acts and omissions that had nothing to do with Larios's accident or injuries.

i. OSHA citation as to use of chainsaw on a ladder

OSHA Citation No. 1, Item 002, alleges that Stevens should not have allowed Larios to use a chainsaw from a twenty-three foot ladder due to the risk of falling.[12] While Stevens perhaps should not allow its employees to use chainsaws on ladders, all of the evidence shows that the fall risk identified by Mr. Wilks of OSHA was not the fall risk that actually happened to Larios. The evidence shows that Larios was tied to the tree, and that after he was shocked he untied himself in an effort to escape the electrical current. His working with a chainsaw from a ladder is not the reason he was shocked. The same electrocution event could have just as easily happened if he were using a handsaw.

This allegation in OSHA Citation No. 1, Item 002, is not relevant to Larios's action against SCE&G, PENSCO, and Edisto Realty. If anything, it is likely to confuse or distract the jury and

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[12] **Ex. B** at 2 (labeled "Page 6 of 12").

cause them to focus on an alleged bad act by Stevens that did not actually cause his employee's accident at issue in this case. The risk of prejudice to Plaintiff is severe, and this allegation by Mr. Wilks of OSHA should be excluded.

ii. OSHA citation as to personal protective equipment

OSHA Citation No. 1, Item 004, alleges that Stevens should have required Larios to use personal protective equipment, such as "eye and face protection, head protection, foot protection, and hand protection."[13] While Stevens perhaps should have done that, the lack of such equipment would not have saved Larios from dying as a result of his fall. The pathologist who performed the autopsy determined that the cause of death was trauma to the torso.[14] This particular allegation by Mr. Wilks of OSHA is entirely irrelevant and should be excluded pursuant to Rule 402, SCRE.

This is another allegation by OSHA that is likely to confuse or distract the jury and cause them to focus on an alleged bad act by Stevens that did not cause Larios's accident. The risk of prejudice to Plaintiff is severe, and this allegation by Mr. Wilks of OSHA should be excluded pursuant to Rule 403, SCRE.

iii. OSHA citation as to leg protection

OSHA Citation No. 2, Item 001a, alleges that Stevens should have required Larios to use "leg protection constructed with cut-resistant material, such as ballistic nylon, to cover the full length of the thigh to the top of the boot on each leg *to protect against contact with a moving chain saw*…."[15] While this also may be true, there is no evidence, or even an allegation, that Larios was

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[13] **Ex. B** at 3 (labeled "Page 7 of 12"). There is no "Item 003." It skips from 002 to 004.

[14] Presnell Depo. (**Ex. C**) at 17:3–19:12.

[15] **Ex. B** at 5 (labeled "Page 9 of 12") (emphasis added).

cut by the chainsaw. This allegation by Mr. Wilks of OSHA should also be excluded pursuant to Rules 402 and 403, SCRE.

iv. Redundant OSHA citation as to eye and face protection

OSHA Citation No. 2, Item 001b, alleges that Stevens should have required Larios to use "eye and face protection from flying particles" while using the chainsaw.[16] This appears duplicative of OSHA Citation No. 1, Item 004, addressed above. Again, there is no evidence or even an allegation that particles flew into Larios's eyes or face, and this is entirely irrelevant and prejudicial. This allegation, too, should be excluded pursuant to Rules 402 and 403, SCRE.

v. Redundant OSHA citation as to protective helmet

Finally, OSHA Citation No. 2, Item 001c, alleges that Stevens should have required Larios to use a protective helmet.[17] This appears duplicative of OSHA Citation No. 1, Item 004, addressed above. Again, there is no evidence or even an allegation that use of a helmet is relevant to Larios's accident or death. The autopsy revealed that Larios died due to trauma to his torso, not his head. This allegation by Mr. Wilks of OSHA is irrelevant and prejudicial, for the reasons cited above. Like the others, this allegation should be excluded pursuant to Rules 402 and 403, SCRE.

CONCLUSION

For the reasons above, Plaintiff respectfully requests that the Court exclude any and all references to OSHA regulations, including the applicability or inapplicability of any particular OSHA regulations as well as evidence of any alleged violations of such regulations.

SIGNATURE OF COUNSEL FOLLOWS ON PAGE 20

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[16] *Id.* at 7 (labeled page "11 of 12").

[17] *Id.* at 8 (labeled page "12 of 12").

Respectfully submitted,

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