

IN THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Amanda Venneman, as Personal  
Representative of the Estate of Lawrence Ray  
Shiner, Jr.,

Plaintiff,

vs.

Palmetto Industrial Services, Inc. and  
Thompson Industrial Services, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2019-CP-10-02148

**ORDER DENYING MOTION FOR JNOV  
AND/OR A NEW TRIAL**

**RECEIVED**

**Jul 10 2024**

**SC Court of Appeals**

This matter comes before the Court on Defendant Palmetto Industrial Services, Inc.’s motion for judgment notwithstanding the verdict (“JNOV”) and/or for a new trial. Plaintiff and Palmetto tried this case to a verdict on May 13–16, 2024. The jury returned a verdict in favor of Plaintiff on both her wrongful death and survival claims. On the survival claim, the jury awarded \$2,500,000 to Plaintiff. On the wrongful death claim, the jury awarded \$2,500,000 to the decedent’s wife’s estate, \$1,500,000 to Amanda Venneman, and \$1,500,000 to Daniel Shiner, for a total wrongful death award of \$5,500,000 to the statutory beneficiaries, and a total verdict of \$8,000,000.

After the verdict, Palmetto timely filed a motion for JNOV and/or a new trial. Palmetto sought a new trial on several grounds, including issues related to the admissibility of expert testimony, the verdict form, the jury instructions, and the admissibility of OSHA regulations. Palmetto also moved for a new trial under the thirteenth juror doctrine. Further, Palmetto moved for JNOV, arguing that the scope of its duty in this case did not require it “to clean, inspect, discover, or warn Kapstone employees of unknown hazards in the upper portions of the boiler”;

that Plaintiff failed to offer sufficient evidence that any alleged breach of duty by Palmetto proximately caused the decedent's death; and that Plaintiff failed to present sufficient evidence that Palmetto took any direct actions or failed to take any action that proximately caused the decedent's death. After considering all the arguments raised by the parties related to Palmetto's motion for JNOV and/or new trial, the Court **DENIES** the motions for the reasons set forth below. The Court has considered all arguments made in these motions and hereby rules on each and every one with this order rejecting each argument and ruling in favor of the Plaintiff via this ruling and denying all grounds and arguments raised by Palmetto.

### **PALMETTO'S MOTION FOR A NEW TRIAL**

The decision to grant or deny a new trial rests within this Court's discretion. *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). In considering a new trial motion, this Court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.*

#### **I. Testimony of Plaintiff's Expert Dr. Lake**

Palmetto argues it is entitled to a new trial because the testimony of Plaintiff's expert Dr. Michael Lake was inadmissible. Palmetto contends Dr. Lake offered "new, previously undisclosed opinions on causation and fault that were offered for the first time on the witness stand" at trial. Palmetto argues it is entitled to a new trial because (1) Dr. Lake's causation opinion was not disclosed before trial and Palmetto was therefore "ambushed" by his trial testimony, and (2) Dr. Lake's "new" opinion was not reliable and he was not qualified to offer it. The Court rejects Palmetto's arguments.

First, the Court finds Palmetto was on notice from Plaintiff's disclosures, Dr. Lake's deposition testimony, and the evidence produced during discovery that Dr. Lake would opine that

Palmetto's actions caused the salt cake avalanche that killed the decedent. Palmetto therefore was not "ambushed" at trial.

Second, Dr. Lake's testimony was admissible, and Palmetto's arguments go to the weight of the testimony, not its admissibility. "The qualification of an expert witness and the admissibility of the expert's testimony are each matters largely within the trial [court's] discretion." *Hamilton v. Reg'l Med. Ctr.*, 440 S.C. 605, 623, 891 S.E.2d 682, 692 (Ct. App. 2023). Moreover, "a challenge to an opinion's reliability generally goes to weight and not admissibility," *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012), and the Supreme Court "has noted that 'vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking shaky but admissible evidence,'" *State v. Council*, 335 S.C. 1, 21–22, 515 S.E.2d 508, 519 (1999) (quoting *State v. Dinkins*, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995)). Palmetto had an opportunity to conduct voir dire of Dr. Lake and ultimately consented that he was qualified as an expert. Regardless, the Court has performed its gatekeeping function and considered the required factors under *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010), and *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999), and found Dr. Lake's testimony reliable and admissible.

Palmetto had the opportunity to cross-examine Dr. Lake at trial and attempt to show the jury that, in Palmetto's view, Dr. Lake's opinions changed between his deposition and trial. Palmetto's arguments that Dr. Lake did not know details about the specifications of the water blasters, the exact amount of water sprayed, the angle at which water was sprayed, or the exact amount of salt cake in the avalanche are also cross-examination topics that go to the weight of Dr. Lake's opinions, not the admissibility.

Dr. Lake explained, from a physical science standpoint, *why* the salt cake avalanche happened and *where* the salt cake avalanche originated. Dr. Lake is indisputably qualified to opine that salt cake is water soluble and that Palmetto's spraying of water on overhead salt cake weakened the bond between the salt cake and the metal interior of the boiler, causing the salt cake avalanche that killed Mr. Shiner. The Court rejects all of Palmetto's arguments as to Dr. Lake's testimony and denies Palmetto's motion for a new trial.

## II. Verdict Form

Palmetto argues it is entitled to a new trial because the verdict form improperly listed the three statutory beneficiaries to the decedent's estate and allowed the jury to award damages for each beneficiary. The Court rejects Palmetto's arguments.

Under South Carolina law, wrongful death and survival are two separate, independent causes of action. Accordingly, the jury is required to allocate damages between the two claims. *See Bennett v. Spartanburg Ry., Gas & Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 190 (1914). Moreover, the jury is required to allocate damages among the parties "respectively for whom and for whose benefit [the] action is brought." S.C. Code Ann. § 15-51-40. The Court therefore finds the verdict form properly allowed the jury to allocate damages to the beneficiaries.

Moreover, the Court finds Palmetto cannot show prejudice. It agreed to have the statutory beneficiaries listed on the verdict form but objected only to the inclusion of a separate damages line for each. Thus, it cannot show that it was prejudiced by the verdict form informing the jury about the number of statutory beneficiaries. Moreover, it cannot show that the jury would have awarded a smaller amount of damages if the verdict form did not contain a line for each beneficiary.

### III. Jury Instructions

Palmetto raises three issues regarding the jury instructions. First, Palmetto argues it was entitled to an intervening cause charge. Second, Palmetto argues the Court erred in charging the jury on the applicable standard of care. Finally, Palmetto argues the Court erred by failing to instruct the jury that Palmetto owed a duty not to exceed the scope of work.

The Court rejects Palmetto's contention that it was entitled to an intervening cause charge. Intervening cause is an affirmative defense which must be pled. *See Small v. Pioneer Mach., Inc.*, 316 S.C. 479, 489, 450 S.E.2d 609, 615 (Ct. App. 1994); *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010). Palmetto did not plead intervening cause in its answer. Although it asserted "Acts or Omissions of Others" and "Negligence of a Third Party" in its answer, those are not affirmative defenses and are different theories than intervening cause. *O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983). Palmetto therefore waived any right to an intervening cause charge. Regardless, because intervening cause is an affirmative defense, Palmetto bears the burden of proving that an intervening cause broke the causal chain. *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000). The Court finds Palmetto failed to meet its burden of proof. Accordingly, Palmetto had no basis on which to request an intervening cause charge.

Palmetto also argues the Court erred by referencing "industry rules and regulations" and "the standard of care recognized by industry associations and organizations dealing with confined space entry" in its jury charge on the standard of care. The Court is required to charge the jury on the current and correct law of South Carolina. *Daves v. Cleary*, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003). South Carolina law is well settled "[t]he standard of care in a given case may be established and defined by the common law, statutes, administrative regulations,

industry standards, or a defendant's own policies and guidelines.” *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006); *Elledge v. Richland/Lexington Sch. Dist. Five*, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002); *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 652, 869 S.E.2d 819, 843 (Ct. App. 2021). This Court's jury charge reflected the current and correct law of South Carolina and is therefore proper as a matter of law.

Finally, the Court finds it properly charged the jury on Palmetto's duty, and Palmetto's request for a charge that it only had a “duty not to exceed the scope of work” is an incomplete and incorrect recitation of South Carolina law. The Court further finds that Palmetto cannot show it suffered any prejudice from the jury charges. The Court denies Palmetto's motion on this ground.

#### **IV. Admissibility of OSHA Regulations**

Palmetto argues it is entitled to a new trial because the Court improperly allowed Plaintiff to make references to OSHA regulations. However, it is well-settled under South Carolina law that OSHA regulations, among many other standards, may be considered as evidence of the standard of care. *See Madison*, 371 S.C. at 140, 638 S.E.2d at 659; *Elledge*, 352 S.C. at 186, 573 S.E.2d at 793; *Jolly*, 435 S.C. at 652, 869 S.E.2d at 843. The admissibility or exclusion of evidence is within this Court's sound discretion, and Palmetto must show prejudice by demonstrating that the jury's verdict was influenced by improperly admitted evidence. *Hanahan v. Simpson*, 326 S.C. 140, 155–56, 485 S.E.2d 903, 911 (1997). The Court finds Palmetto is not entitled to a new trial based on the admission of references to OSHA regulations.

#### **V. Thirteenth Juror Doctrine**

The Court has discretion whether to grant a new trial under the thirteenth juror doctrine. After considering Palmetto's arguments and the evidence presented at trial, the Court declines to exercise its power as the “thirteenth juror” and therefore denies Palmetto's motion.

**PALMETTO'S MOTION FOR JNOV**

A trial court must deny a JNOV motion if the jury's verdict is supported by any evidence. *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). If evidence yields more than one reasonable inference or if inferences to be drawn from the evidence are in doubt, the Court must deny a JNOV motion. *Allegro*, 418 S.C. at 32, 791 S.E.2d at 144. The Court cannot decide credibility issues or resolve conflicts in the testimony or the evidence. *Curcio*, 355 S.C. at 320, 585 S.E.2d at 274. Moreover, the Court must consider the evidence and all reasonable inferences in the light most favorable to Plaintiff as the non-moving party. *Allegro*, 418 S.C. at 32, 791 S.E.2d at 144.

Palmetto argues it is entitled to JNOV because (1) "the scope of duty applicable to this case did not require Palmetto to clean, inspect, discover, or warn Kapstone employees of unknown hazards in the upper portions of the boiler"; (2) "Plaintiff failed to offer sufficient evidence that any alleged breach of duty by Palmetto proximately caused the decedent's death"; and (3) "Plaintiff failed to establish sufficient evidence that Palmetto took any direct actions, or failed to take any action, that proximately caused the decedent's death." The Court rejects each of Palmetto's arguments.

First, Palmetto improperly defines the scope of its own duty. A legal duty can be created by "statute, contract, relationship, status, property interest, or some other special circumstance." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). A defendant's violation of its own policies and procedures is evidence of negligence. See *Peterson v. Nat'l R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005). Palmetto performed industrial cleaning services in a confined space knowing Kapstone employees would enter the

space after Palmetto finished its work. Palmetto had a duty to exercise reasonable and ordinary care in performing its industrial cleaning services.

The evidence at trial established that Palmetto and its employee, Greg Douty, (1) exceeded the scope of work they were required to do; (2) violated industry standards and Palmetto's policies and procedures by spraying the overhead beams when Douty saw salt cake above, rather than exiting the confined space and reporting an overhead hazard; (3) violated Palmetto's policies and procedures by failing to close the confined space entry permit and failing to tell Kapstone to close its confined space entry permit after observing an overhead hazard; and (4) creating a false sense of security for Mr. Shiner and Wayne Amaker by washing away the portion of the overhead hazard that was visible from the drag chain area, thus leading Shiner and Amaker to believe no hazard existed. Plaintiff thus presented evidence that Palmetto breached its duty to exercise reasonable and ordinary care by violating industry standards and its own policies and procedures.

Moreover, Palmetto voluntarily undertook a duty when its employee sprayed Palmetto's water blaster above the drag chain area and increased the risk to the Kapstone employees who Palmetto knew would enter the area after it left and who were relying on Palmetto to perform its work safely and properly. *See Faile v. S.C. Dep't of Juv. Just.*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002); *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006); *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

The Estate presented evidence from which a jury could find that a Palmetto employee's spraying of water inside the boiler compromised the salt cake above the drag chain area, and the arguments Palmetto raises as to breach and proximate cause are all issues of fact to be considered by the jury. *See J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) ("Normally, proximate cause is a question of fact for the jury, and it may be proved by direct or

circumstantial evidence.”). Palmetto owed a duty, and Plaintiff presented evidence from which a reasonable jury could find Palmetto breached its duty and proximately caused the decedent’s death. The Court therefore denies Palmetto’s motion for JNOV.

**CONCLUSION**

After considering all the parties’ arguments and the evidence presented at trial, the Court **DENIES** Palmetto’s motion for JNOV and/or a new trial.

**IT IS SO ORDERED.**

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The Honorable Bentley D. Price  
Circuit Court Judge



Charleston Common Pleas

**Case Caption:** Amanda Venneman , plaintiff, et al VS Palmetto Industrial Services  
Inc , defendant, et al  
**Case Number:** 2019CP1002148  
**Type:** Order/JNOV

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766