THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM YORK COUNTY
Court Of Common Pleas

The Honorable William A McKinnon, Circuit Court Judge

Appellate Case No. 2024-001299

ESTATE OF THOMAS SULLIVAN, ...RESPONDENT,

V.

DOLGENCORP, LLC D/B/A DOLLAR GENERAL CORPORATION, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DEISCRETION IN DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT?

2. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOWITHSTANDING THE VERDICT?

3. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL ABSOLUTE?

4. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL NISI REMITTITUR?

In this case, Thomas Sullivan, a business invitee of the Dollar General store located in Rock Hill, South Carolina (the "Store") was severely injured as a result of a poorly maintained, curled, dirty, unsecured/sliding mat that Dollar General had placed in the foyer of the Dollar General Store. The Dollar General video surveillance captured Mr. Sullivan's movements as he entered the store unassisted, purchased merchandise and began his exit. Mr. Sullivan experienced no problems until he encountered the back edge of the defective Dollar General mat. The Dollar General video surveillance showed that Mr. Sullivan was thrown from the foyer of the store to the cement pavement outside as the poorly maintained, unsecured mat slid forward and buckled. Due to the severity of the fall, Mr. Sullivan broke his hip and sustained other injuries. He was transported directly from the Dollar General store to Piedmont Hospital by EMS. Appellants denied all liability and damages. The jury found Dollar General was solely liable for the dangerous condition of the rug as shown in the Dollar General video surveillance and the injuries sustained by Mr. Sullivan from the fall.

STATEMENT OF THE CASE

Prior to his death, Thomas Sullivan commenced the subject lawsuit to recover damages for personal injuries suffered from a fall at the Appellant's Dollar General Store. After his death, the lawsuit was continued by his surviving sister Martha Sullivan Ballew, as the personal representative for the estate of Thomas Sullivan. The trial court granted the Appellant's pretrial motion prohibiting Respondent from introducing any testimony or evidence regarding the suicide of Mr. Sullivan and prohibiting all statements made by Mr. Sullivan to his sister Martha Sullivan Ballew regarding the condition of the Dollar General mat that Mr. Sullivan stated caused the fall.

On June 10, 2019, the decedent Thomas Sullivan entered the Dollar General Store located on East Main Street in Rock Hill, South Carolina to purchase several items. *See* June 17, 2024, Transcript at pg. 42. Thomas Sullivan, a Vietnam veteran was 68 years old at the time of the accident. He was driven to the Dollar General by David Riley who witnessed a portion of the accident and remained at the store with Mr. Sullivan until the EMS transport arrived to take Mr. Sullivan to the hospital following the accident at Dollar General. David Riley testified that Mr. Sullivan had no problem walking into the Dollar General store and did not require assistance. *See* June 17, 2024, Transcript, pgs. 42-43.

The accident occurred as Mr. Sullivan was exiting the store after his purchases at Dollar General. In the foyer of the store at the exit, Appellant had placed a poorly maintained, dirty, curled, unsecured/sliding rug of indeterminate age in the pathway of all customers exiting and entering the store. *See* June 17, 2024, Transcript, pgs. 52-54. Mr. Sullivan tripped over this defective, dangerous rug as he exited the Dollar General.

Eyewitness David Riley testified that the Dollar General rug was "thin, flimsy, dirty and faded." *See* June 17, 2024, Trancript at 52. He further testified that the Dollar General rug was unsecured and slid during the accident. *See* June 17, 2024, Transcript at pg. 53. Based on his personal observations at the scene, David Riley testified that the poor condition of the mat/rug caused Mr. Sullivan's fall. *See* June 17, 2024, Transcript at pg. 54. Further, David Riley stated Mr. Sullivan (in an excited utterance immediately following the fall) also indicated that the defective rug caused his fall. *See* June 17, 2024, Transcript pgs. 50-51.

Dollar General produced in discovery a two-hour video surveillance and video clips relating to the accident. These videos were submitted into evidence by stipulation of the parties. During opening arguments, and during witness testimony, Appellant and Respondent utilized

relevant portions of the Dollar General videos of the accident. Throughout the trial, the jury was able to observe the defective condition of the Dollar General mat/rug and the circumstances surrounding Mr. Sullivan's fall on the courtroom monitors and on the individual viewing screens located inside the jury box.

The Respondent retained Robert McNealy, an expert in the field of flooring, including mats and rugs and walkway safety and inspection to opine on the condition of the mat, applicable Dollar General and national and federal mat/rug maintenance, inspection and safety standards. Mr. McNealy's qualifications included over 19 years of experience in flooring, walkway safety and rug/mat inspection and national and federal safety standards, and over 10 different certifications relating to these areas. *See* June 18, 2024, Transcript pgs. 4-8. The trial judge properly admitted Mr. McNealy as an expert in the field of flooring, including mat and rugs and walkway safety. *See* June 18, 2024, Transcript, pgs. 8-9. In support of Mr. McNealy's qualification and expertise, the Respondent successfully moved to admit the expert's CV (Exhibit 7) into evidence. *See* June 18, 2024, Transcript at pg. 9.

The expert testimony of Robert McNealy supported the eyewitness testimony of David Riley and Mr. Sullivan that the poorly maintained, dirty, curled, unsecured/sliding rug caused the accident. *See e.g.*, June 18, 2024, Transcript, pgs. 18, 24, 29-30. Based on Mr. McNealy's experience in mat inspection and safety, he concluded the Dollar General rug was "**dangerous**" due to the numerous defects as shown in the Dollar General video surveillance. *See* e.g., June 18, 2024, Transcript, pgs. 18, 24, 29-30.

Based on his prior experience, review of Dollar General policies, depositions and documents, national safety standards and viewing the Appellant's two-hour video surveillance and video clips relating to the accident, Mr. McNealy opined that the rug/mat was not cleaned or

maintained or inspected properly, had a curled edge, and was unsecured/sliding. *See e.g.*, June 18, 2024, Transcript, pgs. 9-11. Mr. McNeely testified that based on industry standards, properly maintained, clean "mats should never slide." *See* June 18, 2024, Transcript at pg. 10.

Respondent then provided and asked Mr. McNeely to review Plaintiff's Exhibit 8, produced by Appellant in discovery and previously reviewed by the Respondent's expert. *See* June 18, 2024, Transcript at pg. 11. Robert McNealy explained that Exhibit 8 included the description of the subject Dollar General mat and the manufacturer's instructions for proper cleaning of the Dollar General mats. *See* June 18, 2024, Trancript, pgs. 11-12. The expert testified that based on Exhibit 8, the expert's experience in mat maintenance and inspection, the testimony of the Dollar General store manager and the Dollar General video surveillance, that Dollar General was not following the manufacturer's instructions for proper cleaning and maintenance of the store's mats. *See* June 18, 2024, Transcript at pg. 12. The expert then described how improper cleaning and poor maintenance contributed to and caused the dirty condition, sliding and curling of the rug that caused Mr. Sullivan's fall as shown in the Dollar General video surveillance. *See* June 18, 2024, Transcript, pgs. 12-15.

Relevant portions of the Dollar General full video surveillance were then published to the jury to validate and provide visual proof of the observations made by Respondent's expert. *See* June 18, 2024, Transcript, pgs. 15-18. As the expert provided his comments, the jury was able to review the Dollar General surveillance video on the courtroom monitors and the individual monitors provided in the jury box.

Respondent then provided and asked Mr. McNeely to review Plaintiff's Exhibit 9 produced by Appellant in discovery and previously reviewed by the Respondent's expert. The expert described Exhibit 9 as Dollar General's internal policy regarding cleaning and

maintenance of floors and mats. *See* June 18, 2024, Transcript at pg. 19. Robert McNealy indicated that the document confirmed Dollar General was aware of the danger caused by failure to properly clean and maintain mats/rugs. *See* June 18, 2024, Transcript at pg. 19.

The Respondent's expert then described the industry standards regarding timing and frequency of floor and mat inspections. *See* June 18, 2024, Transcript at pg. 20. He concluded based on testimony of Dollar General employee Laura Myers, Dollar General was not in compliance with the industry standard. *See* June 18, 2024, Transcript, pgs. 21-22.

Mr. McNeely testified that the Dollar General rug movement/migration that caused Mr. Sullivan's fall violated the standards of the Americans With Disabilities Act (ADA). *See* June 18, 2024, Transcript, pgs. 24-25. The expert explained that the ADA requires that all walkway surfaces be "firm, fixed and stable....And when it comes to mats that means the mat shouldn't move when you walk on it." *See* June 18, 2024, Transcript at pg. 24.

The Appellant's counsel did not object at any time to the testimony provided by Respondent's expert regarding the dangerous condition of the Dollar General mat/rug that caused Mr. Sullivan's fall. Moreover, the Dollar General video surveillance was utilized throughout Mr. McNeely's testimony to validate the expert's observations and analysis. Further the expert testimony and evidence provided by the expert was consistent with the eyewitness testimony of Dave Riley who observed the Dollar General mat at the scene on the date of the accident.

Dollar General did not retain or produce the actual rug involved in the Sullivan accident. Therefore, neither Appellant's expert nor Respondent's expert examined the actual rug. On cross examination, Respondent's expert confirmed that he visited the Dollar General accident location prior to providing his trial testimony. Additionally, Appellant's and Respondent's experts were retained after the death of Mr. Sullivan, and no contemporaneous site visit was

completed by either expert. Both experts relied primarily upon their prior expertise, documents produced in discovery and the Dollar General video surveillance in forming their opinions.

Respondent's additional witnesses, Martha Sullivan Ballew, the surviving sister of Thomas Sullivan and Dr. Edward Brown of Ortho Carolina provided testimony regarding the medical records, medical billing and devasting effects of the Dollar General accident on Mr. Sullivan's health and activities of daily living.

Ms. Sullivan Ballew testified that her brother had no prior history of falling and was able to live independently prior to the fall. *See* June 17, 2024, Transcript, pgs. 27-28. She testified that due to the Dollar General fall Mr. Sullivan suffered a loss of mobility and had to use a walker from the time of the accident until his death. *See* June 17, 2024, Transcript at pg. 29. She further testified due to the fall and severe injuries, Mr. Sullivan lost hope and was unable to resume activities of daily living including gardening, walking and caring for his pets. *See* June 24, 2024 Transcript at pg. 29-30. This testimony confirmed David Riley's testimony that Mr. Sullivan was suffering no difficulties prior to the Dollar General fall and experienced a significant loss of mobility that left him unable to resume his activities of daily living and hobbies. *See* June 17, 2024, Transcript, pgs. 41, 55-56.

Ms. Sullivan Ballew testified that as personal representative of the estate she reviewed the affidavits and billing provided by all medical providers relating to her brother's treatment from the accident. *See* June 17, 2024, Transcript, pgs. 30-36. She confirmed the accuracy of the affidavits and certified billing records. The Sullivan medical bills totaled $115,636.00. The affidavits and medical billing were admitted into evidence without objection. *See* June 17, 2024, Transcript at pg. 36.

Dr. Edward Brown of OrthoCarolina was admitted as an expert in orthopedic surgery by consent of Appellant and Respondent. *See* June 17, 2024, Transcript at pg. 69. Dr. Brown testified by videotape that Mr. Sullivan fractured his left hip due to the Dollar General fall and underwent immediate surgery. *See* June 17, 2024, Transcript, pgs. 83-84. He reviewed the medical records and confirmed that all the medical treatment and injuries suffered by Mr. Sullivan were directly related to the Dollar General fall and reasonable and necessary for Mr. Sullivan's treatment. *See* June 17, 2024, Transcript, pgs.84. He further testified that based on the Dollar General videotape of the accident, Mr. Sullivan was physically and medically capable of walking without falling prior to the accident. *See* June 24, 2024, Transcript, pgs. 80-81. Dr. Brown testified that Mr. Sullivan demonstrated in the video tape his ability to lift his foot and walk across other mats in the store until he encountered the rug that Respondent alleged caused the fall. *See* June 17, 2024, Transcript, pgs. 80-81.

Dr. Brown's testimony confirmed the testimony of Martha Sullivan Ballew and David Riley that the fall and the injuries sustained had a significant negative impact on Mr. Sullivan's mobility and activities of daily living. See June 17, 2024, Transcript at pg. 88. Dr. Brown admitted that during his first deposition, he had opined that the mat was lifted and contributed to Mr. Sullivan's fall and later sought to modify his opinion. *See* June 17, 2024, Transcript at pg. 78. Dr. Brown repeatedly admitted he had *no* expertise regarding mats or walkway safety. *See* June 17, 2024, Transcript, pgs. 91-93. Both parties agreed that Dr. Brown's area of expertise was solely in orthopedic surgery. Dr. Brown agreed that despite the gait impairment (from 20 years prior to the Dollar General accident), Mr. Sullivan was physically and medically able to walk over the Dollar General mats until he encountered the second rug which Respondent alleged caused the accident. *See* June 17, 2024, Transcript at pg. 93. The full video tape of the

testimony of Dr. Brown was admitted into evidence without objection. *See* June 17, 2024, Transcript at pg. 94.

The testimony given by Appellant's two witnesses Laura Myers and expert Brian Boggess confirmed Respondent's allegations regarding Dollar General's lack of training, lack of procedures, lack of inspection, lack of maintenance, and lack of any logs or written documentation that the Dollar General rugs were ever maintained, cleaned, or properly inspected. All of these deficiencies contributed to the dangerous condition of the Dollar General mat that caused Mr. Sullivan's accident and injuries.

Defense witness Laura Myers admitted Dollar General did not provide her or other employees with any training in mat/rug inspection. *See* June 18, 2024, Transcript at pg. 60-62, 66-67. She testified that no meetings, videos, manuals or other materials are provided by Dollar General regarding mat inspection or safety. *See* June 18, 2024, Transcript at pg. 62. On the date of the accident, she testified she was working as a cashier, customer service representative, stocker, and inspector for Dollar General, but had no primary responsibility for mat/rug inspection and no specific training. *See* June 18, 2024, Transcript at pg. 60-62,67. The Respondent's expert testified that the Dollar General's employees' lack of training, inadequacy and infrequency of inspections was troubling and contributed to the severe state of disrepair of the Dollar General mat that caused the accident. *See* June 18, 2024, Transcript, pgs. 35-36.

Laura Myers further admitted Dollar General did not require any written checklists or documentation or proof that any employee cleaned or inspected any Dollar General rug or mat *ever*. *See* June 18, 2024, Transcript at pg. 62-63. She further admitted she had no memory of whether she actually inspected the Dollar General mat on the date of the accident, and Dollar General had no video surveillance or documents or log to prove any cleaning or inspection was

done. *See* June 18, 2024, Transcript at pg. 63-65. The Respondent's expert testified that this lack of training, documentation, logs or records was also troubling and contributed to and caused the dangerous condition of the Dollar General mat that caused Mr. Sullivan's fall. *See* June 18, 2024, Transcript, pgs. 34-37.

Laura Myers admitted that Dollar General never trained her or other employees on how to detect if a rug/mat was curled or sliding. *See* June 18, 2024, Transcript at pg. 66-67. She also admitted that in five years of employment with Dollar General, she had never seen Dollar General replace a damaged rug. *See* June 18, 2024, Transcript at pg. 67. Ms. Myers' testimony provided overwhelming evidence supporting Respondent's allegations that Dollar General failed to clean, maintain, properly inspect rugs, or train employees to detect, prevent or remove dangerous mats that create trip and fall hazards and injuries for customers like Thomas Sullivan.

The testimony of Laura Myers revealed that she did not have the ability or training to detect the issues that Respondent has alleged caused the Sullivan accident. Laura Myers admitted that Dollar General did not train her or any employees to detect or correct safety hazards caused by sliding or migrating mats. *See* June 18, 2024, Transcript at pg. 66. She admitted Dollar General did not train her or any other employees to check for curling of mats. *See* June 18, 2024, Transcript at pg. 67. She admitted that without this training she would have no way of knowing that the problem existed. *See* June 18, 2024, Transcript at pg. 66.

Respondent's expert testified that proper training and inspections would have the revealed the defects in the Dollar General mat that caused the accident. *See* June 18, 2024, Transcript at pg. 37. He commented that **"based on the testimony of Laura Myers, they were looking for one of the potential problems, which is whether or not the mat is flat or not. And there are other issues that create a hazard."** *See* June 18, 2024, Transcript at pg. 37.

Appellant's brief and Laura Myers' testimony reveal the truth of the Respondent's expert statement. Appellant's brief and Laura Myers testimony fixate on whether or not the Dollar General mat was flat or not. Other issues regarding mat safety and trip and fall hazards are ignored, including the deficiencies that caused Mr. Sullivan's fall.

Likewise, the testimony of Appellant's expert Brian Boggess revealed his lack of expertise or experience in mat safety, inspection or procedures or in the gait analysis that was the topic of his opinion. Mr. Boggess testified that his primary expert experience was in vehicular accident reconstruction, and he had no certifications or direct experience in mat inspections and/or safety, and no professional affiliation with organizations in these areas *See* June 18, 2024, Transcript, pgs. 81-82. He testified that he did not prepare any written report to support his conclusions or opinions. *See* June 18, 2024, Transcript at pg.84.

Mr. Boggess reluctantly admitted that Dollar General's own policies stated that dirty mats decrease effectiveness and that Dollar General mats should be replaced when edges curl for customer safety. *See* June 18, 2024, Transcript at pg. 87. Mr. Boggess reluctantly admitted that Dollar General did not provide him with any logs or written records to prove inspections or maintenance were ever done. *See* June 18, 2024, Transcript at pg. 87. Laura Myers admitted that the documents simply do not exist with Dollar General. *See* June 18, 2024, Transcript, pgs. 63-64. Like Ms. Myers, it is unlikely that Mr. Boggess would be able to detect any of the deficiencies that Respondent's expert identified as the cause of the Sullivan accident. Mr. Boggess testimony lacked credibility due to his lack of experience and lack of support for any of his opinions and conclusions, and his admission that Dollar General had not provided any records to support his statements.

In summary, the Dollar General video surveillance, Respondent's expert and lay

witnesses, medical records and billing and the admissions of Appellant's own witnesses provide overwhelming evidence supporting each element of Respondent's claim. In light of this substantial evidence, the jury verdict and trial court rulings were proper and should be upheld.

STANDARD FOR REVIEW

The appellate court utilizes a highly differential standard of review in examining jury trial verdicts and trial court rulings regarding the denial of motions for directed verdict, judgment notwithstanding the verdict or new trial. "[O]n appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record shows there is no evidence which reasonably supports the jury finding." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E. 2d 486, 495 (Ct. App. 2006)(citations omitted.) *See also Curcio v. Caterpillar, Inc.*, 355 S.C. 316,320, 585 S.E. 2d 272, 274 (2003)(jury verdict must be upheld unless no evidence reasonable supports the jury findings. (citations omitted). Additionally, the jury has the authority to decide credibility issues and resolve conflicts in the testimony and evidence." *Curcio*, 355 S.C. at 320, 585 S. E. 2d at 274. "[N]either an appellate court , nor the trial court has authority to decide credibility issues or resolve conflicts in the evidence." *Id.*

In reviewing a motion for directed verdict or a judgment notwithstanding the verdict, an appellate court must use the same standard used by the trial court. *Id.* The Court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party, and reversal is not appropriate where the evidence yields more than one inference, or its inference is in doubt. *Daves v. Cleary,* 355 S.C. 216, 229, 584 S.E. 2d 423, 429-430 (S.C. App. 2003).

The trial court's decision to deny or grant a new trial will not be disturbed on appeal absent proof an abuse of discretion. *Wright*, 372 S.C. at 36, 640 S.E.2d 505. "[A]n abuse of discretion occurs when the trial court's findings are wholly unsupported by the evidence, or the conclusions reached are controlled by an error of law." *Id.*

ARGUMENT

Based on substantial evidence presented by Respondent, the jury correctly concluded that Dollar General failed to keep its store premises in a reasonably safe condition and breached its duty of care owed to business invitee, Thomas Sullivan. A merchant owes customers a duty to exercise ordinary care to keep the premises in a reasonably safe condition. *See e.g., Cook v. Food Lion, Inc.* 328 S.C. 324, 491 S.E. 2d 690 (Ct. App. 1997); *Walker v. Walmart East Stores*, LP, 2018 WL 11433001 (D.S.C. 2018).

Dollar General breached this duty of care. As a result of Dollar General's negligence, Thomas Sullivan suffered severe injuries, including a broken hip, which required immediate surgery. He incurred significant medical bills and continued to suffer loss of mobility from the fall at Dollar General until the day of his death. The injuries from the fall had a devastating effect on his activities of daily living and life. *See* Respondent's Brief at pg.6. Therefore, the jury verdict was not excessive, and Appellant's request for new trial remittitur was properly denied by the trial court.

A. Appellant is Liable As A Matter of Law.

In this case, the parties agreed that Mr. Sullivan was a customer and invitee of Dollar General. Under South Carolina law, the premises owner has an affirmative duty to use reasonable care to prevent an invitee from suffering bodily injury. Although the owner is not an insurer of safety, the owner owes the invitee a duty to exercise reasonable care to keep the

premises in a reasonably safe condition. *Cook*, 328 S.C. at 327, 491 S. E. 2d at 691 (citing *Denton v. Winn-Dixie Greenville, Inc.* 312 S.C. 119, 120, 439 S.E. 2d 292,293 (Ct. App. 1993).

Respondent's expert explicitly testified that the Dollar General mat was dangerous due to numerous defects. *See* Respondent's Brief, pgs. 3-5. The Respondent utilized the Dollar General surveillance video, the eyewitness testimony of David Riley, the excited utterance of Thomas Sullivan, the testimony of Respondent's expert Robert Neely, and the admissions of Appellant's employee Laura Myer and Appellant's expert to prove the actionable negligence of Appellant caused Mr. Sullivan's accident and injuries. *See* Respondent's Brief pgs. 2-5, 8-10. All of this evidence supported the Respondent's expert's opinion.

The *defective condition* of the Dollar General rug was not open and obvious to Dollar General's customers. Therefore, Appellant cannot rely on the open and obvious rule to escape liability or shift blame to Mr. Sullivan, a business invitee at the Dollar General store. In *Pecko v. Target Corporation*, 2021 WL 62579 at 3 (D.S.C. 2021), the court noted that "the open and obvious danger rule, has an exception, where the premises owner should reasonably anticipate that invitees may be distracted or will not discover the danger." Both the distraction element and the fact that Dollar General should have reasonably anticipated that Mr. Sullivan would not discover the danger makes the open and obvious rule inapplicable in this case. However, it is unnecessary to apply the exception because the defective condition of the Dollar General rug was not open and obvious to Mr. Sullivan or any customers.

1. Respondent presented substantial evidence that Appellant created a dangerous condition and caused Respondent's injury.

The Respondent proved at trial that Dollar General created a dangerous condition by placing

a floor mat with multiple defects in the pathway of Mr. Sullivan and all of Dollar General's customers. Respondent's expert explicitly testified that the Dollar General mat was dangerous due to numerous defects. *See* Respondent's Brief, pgs. 3-6. The Respondent utilized the Dollar General surveillance video, the eyewitness testimony of David Riley, the excited utterance of Thomas Sullivan, the testimony of Respondent's expert Robert Neely, and the admissions of Appellant's employee Laura Myer and Appellant's expert to prove the actionable negligence of Appellant caused Mr. Sullivan's accident and injuries. *See* Respondent's Brief pgs. 2-8. All of this evidence supported the Respondent's expert's opinion.

The Appellant's disagreement with the evidence presented by Respondent does not negate the evidence or provide a legal basis for overturning the verdict. A reasonable jury could credit Respondent's version of the facts and find that Dollar General created a dangerous condition. See *Pecko*, 2021 WL 62579 at 3. Appellant makes the illogical argument that a defective mat that creates a trip and fall hazard for customers is not necessarily dangerous.

Many of the cases cited by Appellant support Respondent's position regarding Dollar General's liability in this case. The remaining cases involving foreign substances and natural conditions are simply not applicable. Here, Dollar General created the dangerous condition.

The *Cook* case establishes that a premises owner is liable to the customer for injuries caused by defective mats placed at the exit doors of its establishment. *Cook v. Food Lion, Inc, 328 S.C. 324, 491 S.E. 2d 690* (Ct. App. 1998). The case does not require the customer to prove that the exact dangerous condition that affected the rug in *Cook* must be established by every plaintiff. Here, the Respondent established that the condition of the mat was dangerous through the evidence referenced above. *See* Respondent's Brief, pgs. 2-5, 8-10. Here, the amount of evidence of the dangerous condition presented by Respondent exceeds that presented in *Cook*.

" In negligence cases, internal policies or self-imposed rules are often admissible as relevant on the issue of failure to exercise due care." *Pecko*, 2021 WL 62579 at 3. In addition to the Dollar General video surveillance, the Respondent's eyewitness testimony, the Respondent's expert's testimony and the admissions of Appellant's witnesses, Respondent also established that the danger was recognized in Dollar General's own standard operating procedures. Here, the Appellant's expert and the Respondent's expert testified that Dollar General internal policies stated that failure to clean mats and curling of mats created a safety hazard for customers. *See* Respondent's Brief, pgs. 4-5 (Respondent's expert); *See* Respondent's Brief at pg. 10 (Appellant's expert). Appellant's argument that the dirty condition of the Dollar General rug is irrelevant contradicts Dollar General's own statements in its policy manuals and the expert testimony in this case.

Under South Carolina law, industry standards and regulations are applicable on the issue of breach of the standard of care regardless of whether specifically adopted by the merchant. See *Elledge v. Richardson Lexington School District Five*, 341 S.C. 473, 477-479, 534 S.E. 2d 289, 291 (Ct. App 2000). To further establish the dangerous condition of the Dollar General rug, Respondent presented evidence of Dollar General's failure to comply with industry standards and federal laws regarding mat safety. *See* Respondent's Brief at pg. 5. Robert McNealy testified that Dollar General's poorly maintained, dirty, curled, unsecured/sliding mat created a dangerous trip and fall hazard and violated industry mat safety and inspection standards and the Americans With Disability Act. In summary, the overwhelming evidence presented by Respondent on the dangerous condition of the Dollar General mat is more than sufficient to uphold the jury verdict and the trial court's denial of Appellant's directed verdict and post-trial motions.

2. Appellant erroneously analyzes the applicable notice standard.

The *Cook* case refutes Appellant's arguments regarding the applicable notice requirement. *Cook*, 328 S.C. 324, 491 S.E. 2d 690. In *Cook*, the plaintiff fell on a floor mat which Food Lion admittedly placed on the floor for its customers. The Court stated that to "prove negligence, the plaintiff must show ***either*** that the defendant or defendant's employees created the condition, **or** that the defendant had "notice" of it. Id. at 327 (emphasis added). When the defendant allegedly "created the dangerous condition by placing the mats by the exit doors," the Court stated "it was not necessary for the plaintiff to show that the defendant had notice of the defective condition prior to the plaintiff's fall. Id. at 328.

Here, as in Cook, the Respondent alleges that Appellant created the dangerous condition. Dollar General placed the poorly maintained, dirty, curled, unsecured/sliding rug on the floor at the exit and failed to inspect, clean, maintain or remove or warn of the danger. Appellant cannot create a dangerous condition and then claim that Appellant had no notice.

Here, because Dollar General created the dangerous condition, no showing of notice is required. *Walker*, 2018 WL 11433001 at 4. Additionally, here there is an issue of fact based on Dollar General's failure to inspect the rug. Appellant 's employee Laura Myers admitted Dollar General never trained employees to inspect Dollar General rugs for curls or sliding or migration of unsecured rugs and neither created or maintained logs or written records regarding maintenance or inspection of Dollar General rugs. *See* June 18, 2024, Transcript at pgs. 64, 66-67. The Respondent alleged and presented proof that Dollar General failed to conduct a reasonable inspection. As in the *Walke*r case, Dollar General's failure to inspect the rug [for defects] shows the defendant had no plan or procedure in place to discover [the defect]." *Walker*,

2018 WL 11433001 at 4. The *Walker* court concluded: " In summary, the Defendant placed the mat at issue on the floor and failed to inspect it for damage. There is evidence that Defendant created the hazardous condition-here, no showing of notice is required." *Id.*

Appellant's arguments based on *Sellers v. JC Penny Corp*, 2011 WL 5105470 (D.S.C. 2011) are inappropriate in this case based on the facts and applicable notice requirements. In *Sellers* there was no video surveillance or photos to prove the *existence* of the rug or to show any danger or defect associated with the defendant's rug. Therefore, the plaintiff was unable to provide sufficient proof of the dangerous condition. Here, the Dollar General surveillance video, the eyewitness testimony of David Riley, the expert testimony of Robert McNealy and the admissions of Appellant's witnesses establish the dangerous condition of the rug. The *Walker* court concluded that " the notice requirement set forth in *Sellers* is simply not necessary" when the defendant created the condition by placing the mat at the store exit as in *Cook*. *Id.* at 4. Under the correct standard, as set forth in *Cook* and *Walker*, Respondent is entitled to recovery as set forth in the jury verdict and trial court rulings.

3. The dangerous condition of the Dollar General mat was not open and obvious or reasonably discoverable by Mr. Sullivan.

The central issue in this case was the condition of the rug. The "open and obvious" argument made by Appellant is based solely on Appellant's focus on the rug and whether Mr. Sullivan saw the rug. The focus is properly on the *dangerous condition* of the rug, not the existence of the rug. However, the defective *condition* of the rug was not open and obvious. Here, Appellant admits that Dollar General placed the damaged rug in its foyer. However, Appellant attempts to shift responsibility for inspection of the Dollar General rug to Mr. Sullivan and suggests that Mr. Sullivan had the responsibility to inspect the Dollar General rug for

defects. These blame shifting tactics of Appellant are based on an erroneous application of premises liability principles.

Assuming the open and obvious rule was applicable, the exceptions to the rule establish that Dollar General remains liable for the dangerous condition. In *Pecko v. Target Corporation*, 2021 WL 62579 (D.S.C. 2021), the court noted that "the open and obvious danger rule, has an exception, where the premises owner should reasonably anticipate that invitees may be *distracted* or *will not discover the danger*." (emphasis added). The Court in *Pecko* concluded that "a reasonable jury could further find that [the premises owner] should have reasonably anticipated that invitees like *Pecko* may be distracted by their shopping, such that the open and obvious does not apply." *Id.* at 3. Both circumstances noted in Pecko make the open and obvious exception inapplicable in this case. Mr. Sullivan was a business invitee like the plaintiff in *Pecko* and Dollar General should have reasonably anticipated that shoppers would be distracted and would not discover the dangerous mat in the foyer of the store. Further, Mr. Sullivan had no ability or training to inspect the Dollar General rug. Here, the admissions of Dollar General's employee proved Dollar General had not trained its own employees on how to inspect and remove dangerous mats. *See* Respondent's Brief, at pg.9.

Applying the exception, Dollar General should have reasonably anticipated that Mr. Sullivan might be distracted and that he would not discover the danger created by Dollar General's failure to properly inspect the premises. *See also*, *Hancock v. Mid-South Management Co, Inc.*, 381 SC 326, 331, 673 S.E. 2d 801, 803 (2009)(even if the merchant's premises is in a state of disrepair, " a jury could determine that Respondent should have anticipated that such a condition may cause an invitee to fall and injure themselves."). Here, the open and obvious exception is inapplicable because the *defective condition* of the Dollar General

rug was not open and obvious. Moreover, the trip and fall injury accident that Mr. Sullivan experienced is exactly the type of accident Dollar General should have anticipated when the damaged mat was placed in the pathway of its customers.

4. The jury correctly determined that Appellant was solely responsible for the dangerous condition, the accident and the injuries caused to Respondent

The South Carolina Supreme Court has held that "comparison of a plaintiff's negligence with that of the defendant is a question for the jury to decide. *Creech v. South Carolina Wildlife and Marine Resources Dept.*, 328 S.C. 24, 33, 491 S.E. 2d 571,575 (1977). Further, when the jury could reasonably have drawn many different conclusions regarding the relative fault of the parties, "a directed verdict is wholly inappropriate." *Id.*

The Dollar General surveillance video showed that Mr. Sullivan was able to walk into the store, shop for groceries and walk without falling until he encountered the defective Dollar General rug that caused his fall. Medical records and testimony established that Mr. Sullivan suffered from a stroke **20 years** prior to the Dollar General accident that impaired his gait. Moreover, Dr. Brown testified that Mr. Sullivan was physically and medically able to walk without falling and demonstrated this ability in the Dollar General video surveillance, regardless of the twenty year old gait impairment. *See* June 17, 2024, Transcript at pg. 80, 94.

Mr. Sullivan's sister and David Riley testified that Mr. Sullivan lived independently and was able to walk without assistance until he was severely injured by the fall at Dollar General. (June 17, 2024, Transcript at pg. 28-29 41-43). Based on these facts, the issue of comparative negligence was properly left to the determination of the jury. The substantial evidence presented by Respondent that Dollar General created the dangerous condition and caused the fall is more

than sufficient to support the jury's determination that Dollar General was solely responsible for the accident.

B. Appellant has failed to meet the standard required for a new trial.

Appellant has failed to state any recognized legal basis for a new trial in this case. Absent an abuse of discretion, the trial judge's decision to grant or deny a new trial, deny remittitur and determine the admissibility of expert testimony should be upheld. Based on the broad discretion granted to the trial judge and the substantial evidence presented by Respondent, none of the extraordinary remedies Appellant requests are warranted.

1. The thirteenth juror doctrine does not warrant reversal.

Courts rarely reverse the trial court's denial of a new trial under the thirteenth juror doctrine. On appeal, the court's "standard of review is limited to whether any evidence supports the trial court's decision;" and the appellate court "must view the evidence and all reasonable inferences therefrom in favor of the trial court's ruling." *Parker v. Evening Post Publishing*, 317 S.C. 236, 247, 452 S.E. 2d 640, 646 (Ct. App. 1994). To reverse the trial court's ruling the appellate court must conclude that the moving party was entitled to a directed verdict at trial. *Id.*

As discussed above, in this case, substantial evidence supports the jury verdict. The evidence supporting the jury verdict includes, without limitation, the Dollar General surveillance video, the eyewitness testimony of David Riley, the excited utterance of Thomas Sullivan, the expert testimony of Robert McNealy, the medical testimony of Dr. Brown and the admissions of Appellant's employee Laura Myers and Appellant's expert Brian Boggess. Therefore, Appellant's invocation of the thirteenth juror doctrine is inappropriate. *See also*, *Curtis v. Blake*, 392 S.C. 494, 505, 709 S.E 2d 79 (Ct. App. 2011)(holding that the appellate court's narrow

scope of review and determination that evidence supported the jury's decision justified upholding the trial court ruling denying a new trial).

Appellant bases its arguments solely on Appellant's view of the facts. When the parties disagree on what the surveillance video shows, the jury is empowered to make a determination as to what caused the fall and injury. *Walker*, 2018 WL 11433001 at 2. Here, the jury determined based on the evidence presented by Respondent that Dollar General was solely liable for Mr. Sullivan's fall and injuries. Accordingly, the jury verdict and trial court affirmations should be upheld.

2. The trial court properly allowed the testimony of Respondent's expert.

The qualification of an expert and the admissibility of an expert's testimony are matters within the discretion of the trial judge. *Daves v. Cleary*, 355 S. C. at 228, 584 S. E. 2d at 429 (citing *Lee v. Suess*, 318 S.C. 283, 285, 457 S.E. 2d 344, 345 (1995). An appellate court will not reverse the trial court's decision regarding expert qualifications, absent an abuse of discretion. *Watson v. Ford Motor Co.*, 389 S.C. 434, 450, 699 S.E. 2d 169, 176 (2010).

One of the central issues in this case was the condition of the Dollar General rug that caused Mr. Sullivan's accident and injuries. With approximately twenty years of expertise in mat/walkway safety, inspections and applicable industry standards and regulations, Robert McNealy was highly qualified to provide an expert opinion in this case. Mr. McNealy's expert opinion in this case was based on his twenty years of experience and acquisition of "scientific, technical and other specialized knowledge" that was used to assist the jury in understanding the proper maintenance, inspection, industry standards and Dollar General's policies relating to the Dollar General mat involved in the case. *See* Rule 702 SCRE.

In this case, Appellant raised no objections in pretrial motions or at trial regarding Mr.

McNealy's qualifications as an expert. Instead, Appellant's counsel made a self-serving determination that Respondent did not need an expert because the video surveillance was available to the jury. There is no case law or statute that supports Appellant's rationale for excluding expert testimony because video surveillance is available to the jury. Under this faulty rationale, Appellant's own expert would have been excluded because the Dollar General video was available for viewing by the jury.

The *Watson* case cited by Appellant does *not* support Appellant's position. In *Watson*, the experts were excluded because they had no prior professional experience, skill, training or knowledge working on cruise control systems and/or in the automobile industry prior to attempting to offer testimony on these matters in the litigation. *Watson v. Ford Motor Co.*, 389 S.C. at 447, 450, 699 S.E. 2d at 176, 177 (2010). Here, it is undisputed that Mr. McNealy had approximately 20 years of prior experience in mat safety, inspections, maintenance, and applicable industry standards.

South Carolina evidentiary rules permit parties to establish their case through any combination of physical, testimonial and expert testimony. Here Respondent used the expert testimony of Robert Nealy, the Dollar General video surveillance, the eyewitness testimony of David Riley, the testimony of Martha Sullivan Ballew and Dr. Edward Brown and the admissions of Appellant's employee and expert as supporting evidence.

Appellant does not cite any South Carolina case or statutory support for exclusion of Respondent's expert's testimony. Instead, Appellant cites two *Texas* cases that are inapplicable and arguably wrongly decided. The trial judge concluded that neither of these *Texas* cases provided any legal support for exclusion of Respondent's expert's testimony. Moreover, Appellant made no objection to any content of the testimony during the trial.

After hearing testimony regarding Robert McNealy's extensive training, inspections, certifications, experience and qualifications regarding flooring, mats, rugs and walkways, the trial court found that Mr. McNealy was qualified to offer expert opinions in these areas. Respondent offered into evidence the extensive curriculum vitae (CV) of Robert McNealy in further support of his expert qualifications. Here, there was no abuse of discretion in allowing the testimony of Robert McNealy. The Court properly fulfilled its gatekeeper responsibilities. and properly denied Appellant's new trial motion on this basis.

3. The trial court properly determined remitter is inappropriate in this case.

The jury's determination of damages is entitled to "substantial deference." *Wright v. Craft*, 372 S. C. 1, 35, 640 S.E. 2d 486, 505 (Ct. App. 2006). " Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages." *Id.* (citing *Proctor v. Dep't of Health and Envntl Control*, 368 S.C. 279, 320, 628 S.E. 2d 496, 518 (Ct. App. 2006)). Here, Respondent submitted into evidence medical billing affidavits showing Thomas Sullivan incurred over $115,000.00 in medical bills directly related to his injuries from the Dollar General fall. The testimony of the personal representative of the estate and Dr. Edward Brown was presented to confirm that all the expenses were reasonable and necessary and directly related to the accident. Additionally, Mr. Sullivan's sister and David Riley testified that due to the Dollar General fall injuries, Mr. Sullivan endured pain and suffering, substantial interference with activities of daily living, was unable to resume gardening and caring for his pets and was forced to use a walker from the date of his injury until the date of his death. *See* Respondent's Brief at pg.6.

In this case, Mr. Sullivan's injuries were severe, and the medical bills were significant.

The devastating impact of the Dollar General fall on Mr. Sullivan's mobility and life lasted from the date of the fall until his death. Accordingly, the jury verdict of $296,000.00 was reasonable. "A new trial should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the 'result of caprice, passion, prejudice, partiality, corruption or other improper motives." *Wright* , 372 S.C. at 35, 640 S.E. 2d at 505 (citing *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E. 2d 682, 686 (Ct. App. 2000) (citations omitted). Here the trial judge correctly determined that the verdict was neither grossly excessive or shocking based on the evidence presented by Respondent. Accordingly, the trial judge properly denied Appellant's new trial motion remittitur.

4. Respondent is entitled to interest accrual and costs based on Respondent's Rule 68 SCRCP Offer of Judgment

In addition to the jury verdict of $296,000.00, Respondent is entitled to interest accrual and costs pursuant to Rule 68 of the South Carolina Rules of Civil Procedure. On March 9, 2023, Respondent filed an Offer Of Judgment of $150,000.00 pursuant to Rule 68. The Offer of Judgment was not accepted by the Appellant. Pursuant to Rule 68, based on the jury verdict of $296,000.00 that exceeds the Offer of Judgment, Respondent is entitled to recover any administrative, filing, or other court costs from the date of the offer until the entry of the judgment; and eight percent interest compounded on the amount of the jury verdict from the date of the offer, March 9, 2023, to the entry of judgment.

CONCLUSION

For the reasons stated herein, Respondent requests that the Court affirm the jury verdict, grant interest and costs to Respondent pursuant to Rule 68 of the South Carolina Rules of Civil Procedure and deny Appellant's motions for a new trial.

RESPECTFULLY SUBMITTED,

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