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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000754
Civil Action No. 2020-CP-2481

Stefani Eddins,. ..... Respondent,

v.

Tall Sam I Am, LLC d/b/a Tabbuli,..... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Petitioner Tall Sam I Am, LLC d/b/a Tabbuli filed a timely Petition for Rehearing on July 17, 2024, pursuant to the South Carolina Appellate Court Rules. Rule 240, SCACR. Counsel certifies that the South Carolina Court of Appeals issued its Order denying Petitioner Tall Sam I Am's Petition for Rehearing and for a Rehearing *en banc* on September 20, 2024. Within thirty (30) days of the Appellate Court's final order and in compliance with Rule 242 of the South Carolina Appellate Court Rules, Petitioner requested and received from the Supreme Court of South Carolina, by order dated October 21, 2024, an extension providing Petitioner until November 5, 2024 to serve and file its petition for writ of ceriorari and appendix. The content of this petition complies with the South Carolina Appellate Court Rules. Rule 242(d), SCACR. The Court of Appeals' Order is in conflict with prior decisions of the Supreme Court of South Carolina regarding duty, breach, proximate cause, and the admissibility of expert testimony. Rule 242(b)(3), SCACR.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the trial court's entry of summary judgment where the trial court properly found that the Respondent failed to establish a duty owed by Petitioner to Respondent?
2. Did the Court of Appeals err in reversing the trial court's entry of summary judgment where the trial court properly found that the Respondent failed to present any evidence that Petitioner breached any duty to Respondent?
3. Did the Court of Appeals err in reversing the trial court's entry of summary judgment where the trial court properly found that Respondent failed to present any evidence that any alleged negligence by Petitioner caused Respondent's alleged damages?
4. Did the Court of Appeals err in overlooking the inadmissibility of the expert testimony upon which it solely relies?

STATEMENT OF THE CASE

Petitioner Tall Sam I Am, LLC d/b/a Tabbuli appeals the Court of Appeals' Order reversing the circuit court's grant of summary judgment to Petitioner because the Court of Appeals' Order is in conflict with the jurisprudence of the Supreme Court of South Carolina regarding duty, breach, proximate cause, and the admissibility of expert testimony.

A. Procedural History

Respondent Stefani Eddins filed the Complaint in this action on June 5, 2020, against Petitioner Tall Sam I Am, LLC d/b/a Tabbuli for negligence seeking damages for injuries allegedly sustained in a July 20, 2017 incident at Petitioner's restaurant. Petitioner was served with the Complaint on June 9, 2020, and served its Answer on June 26, 2020. Respondent filed an Amended Complaint on September 2, 2020.

Following extensive discovery and numerous depositions, Petitioner filed a Motion for Summary Judgment on March 21, 2022, and a Memorandum in Support of Defendant's Motion for Summary Judgment on April 20, 2022. Respondent filed her Response to Defendant's Motion for Summary Judgment on April 20, 2022. The Honorable Bentley D. Price heard the parties' arguments on Petitioner's Motion for Summary Judgment on April 21, 2022, and granted summary judgment to Petitioner in a detailed Order filed May 24, 2022. Respondent did not file any motion for reconsideration of the Court's Order granting summary judgment.

Respondent filed her notice of appeal on June 1, 2022. Following mutual briefing by the parties, the Court of Appeals issued its order reversing the circuit court's grant of summary judgment and remanding the case on July 3, 2024. Petitioner's motions for rehearing were denied on September 20, 2024.

B. Factual Background

This is a negligence action in which the Circuit Court granted summary judgment after Petitioner indicated that Respondent, with substantial evidentiary gaps, seeks to hold Petitioner liable as the absolute insurer of its patrons' safety, and moreover that Respondent seeks to hold Petitioner liable for the acts of an independent contractor.

On July 20, 2017, at 10:20 p.m., a temporary portable stage light fell on Respondent's head while she was attending a fashion show at Petitioner's restaurant. (R.p. 15 (Complaint)). Respondent testified that she and her fiancé Ashley Haynes arrived at Petitioner's restaurant around 9:00 p.m. on the night of the incident and were initially seated in the front of the restaurant. (R.p. 294 (Eddins Dep. 23:1-17)). Respondent further testified that waitstaff then informed the two of a fashion show that was to occur shortly on the restaurant's back patio, and the two moved to a couch facing a stage in the back of the restaurant. (Id.). The couch was located adjacent to a structural roof pillar, onto which a large concert speaker had been attached. The light in question was possibly placed on top of this speaker. (See, e.g., R.p. 3 (Summary Judgment Order at 2); R.p. 398 (Photograph SWB 000066, depicting a possibly similar arrangement)). Respondent estimated that she had been sitting on the couch for approximately forty-five minutes before the light fell. (R.p. 298 (Eddins Dep. 27:12-13)). Respondent admitted that she has no knowledge of why the light fell, how it was attached, whether it was secured, who owned the light, or who installed the light. (R.p. 298–99 (Eddins Dep. 27:20–28:6)). Respondent further admitted that she did not see the light at any point before it fell. (R.p. 290 (Eddins Dep. 27:14–16)). Haynes testified identically. (R.p. 370 (Haynes Dep. 17:5–14)).

Respondent's expert Mark Williams does not know specifically why the light fell, and he speculated about a wide variety of potential causes, including "a bird," "an earthquake," or

"someone. . . touch[ing] it in a manner to cause it to become unstable." (R.p. 154 (Williams Dep. 79:3–4); R.p. 145 (id. at 44:12); R.p. 157 (id. at 92:22–93:2)). Ultimately, in the "absence of evidence" of what caused the light to fall, Mr. Williams concluded that "it fell because gravity exists." (R.p. 157 (Williams Dep. 92:12, 16; 93:2–3)). Petitioner's manager, Cait Chapin, was likewise unable to say why the light fell, testifying "I don't even know how the light fell in the first place[,] [s]o my investigation didn't really go anywhere because I couldn't find answers." (R.p. 223 (Chapin Dep. 71:4–7)). Ultimately, Ms. Chapin, who was deposed only in her individual capacity as manager of Petitioner's restaurant, was also forced to speculate that the light was able to fall because "[i]t was not secured properly[;] [t]hat's all I can come up with." (R.p. 228 (Chapin Dep. 92:4–5)).

Petitioner's Rule 30(b)(6) designee testified that the DJ on the night of the incident was an independent contractor. (R.p. 255 (Diehl Dep. 87:9–18); R.p. 262 (id. at 114:2–116:2); R.p. 268 (id. at 139:20–140:1). This DJ set up their own lights, including the light that fell in this case. (See, e.g., R.p. 211 (Chapin Dep. 23:9-11); R.p. 257 (Deihl Dep. 96:4–9); R.p. 261 (id. at 110:17–19); R.p. 262 (id. at 116:12–117:6); R.p. 211 (id. at 25:4–22). Although the Petitioner could object if its representatives "saw something in the set-up they did not like," the Petitioner lacked authority to unilaterally change the DJ's set-up. (R.p. 211 (Chapin Dep. 24:4-24)). Petitioner did not "in any. . . way control the work of the DJ's"; "the DJ brought [the light] in with him that night and took it home with him when he left." (R.p. 262 (Diehl Dep. 116:12–21); R.p. 252–53 (id. at 77:22–78:2); R.p. 252 (id. at 77:4–14)). Respondent's own expert acknowledged that a restaurant does not just "go grabbing [a DJ's] stuff." (R.p. 185 (Rivenbark Dep. 68:3-12)). In sum, the secure set-up of the light was "the duty and responsibility of the DJ that was there that night." (R.p. 248 (Diehl Dep. 60:18–61:8); R.p. 255 (id. at 87:15–18)).

Respondent's two expert witnesses provided testimony related to the set-up of the light. Respondent's first expert—already mentioned above—is forensic architect Mark Williams. Mr. Williams admitted at deposition that he does not know the manufacturer of the light in question, whether it was included with any safety devices designed to secure it to a base, what installation or usage instructions were included with this particular light, the weight of the light, what kind of lightbulb was installed, whether music was playing through the speaker, or whether the light was in the same condition when it fell as when it was installed. (R.p. 144 (Williams Dep. 39:13–40:10); R.p. 145 (id. at 42:13-18); R.p. 146 (id. at 48:18–24); R.p. 147 (id. at 52:18–21); R.p 153 (id. at 74:1–2); R.p. 157 (id. at 92:23–93:2)). Williams was likewise unsure of the industry standard regarding the usage of these types of lights by DJs:

> Q. Actually, we can agree on that. I'm right there with you. Do you know if any other DJs in the Charleston area use these same kind of lights?
>
> A. I don't have any knowledge about other DJs.

(R.p. 153 (Williams Dep. 75:20–23)). Williams further admitted that he has no knowledge of how several of his cited sources pertain to the industry standard for temporary restaurant lighting in Charleston:

> Q. Do you know of any restaurant in Charleston that has researched lighting facts sheets from lighting manufacturers from the United Kingdom from 30 years ago prior to bringing in temporary lighting?
>
> A. I do not.

(E.g., R.p. 160 (Williams Dep. 103:14–19)). The lack of background research Williams completed in researching his sources was notably demonstrated in the following exchange:

> Q. What do you know about the backgrounds of the authors of this handbook?

A. I don't.

Q. Do you know if they were safety professionals?

A. I don't know about the backgrounds.

Q. What research was this based on?

A. Can't answer that.

Q. Do you know if it's even peer—sorry. Go ahead.

A. I don't know the answer to that.

Q. Do you know if this publication's been peer reviewed? Do you know if this publication is generally accepted in the industry?

A. I can't say yes or no.

(R.p. 160 (Williams Dep. 105:1–14)).

Williams was also unable to point to a single building, fire, or electrical code section applicable and binding in Charleston, South Carolina that Petitioner violated, and admitted that it would be "preposterous" to get a code inspector to review the temporary lighting in question. (R.p. 154 (Williams Dep. 80:22–81:6)). Indeed, Williams did not even know whether the various code sections included in his file materials were the most recently adopted versions—or whether Charleston County had adopted one cited body of code at all. (R.p. 150 (Williams Dep. 64:1–3); R.p. 158 (id. at 96:14–97:1); R.p. 153 (id. at 75:24–76:3) ("Q: Do you know if Charleston County has adopted the 2015 IPMC [International Property Maintenance Code]? A: I don't know, but I doubt it.")). Williams could not even remember whether he has ever previously been retained in a case dealing with how a lighting fixture was secured. (R.p. 164 (Williams Dep. 119:10–13)). As related above, Williams could only guess as to what caused the light to fall:

Q. How is the wire a potential probable cause of the light falling? What evidence do you see in this case that indicates that the wire in any way contributed to the light falling?

> A. I didn't say I saw evidence. I said in the absence of evidence, the way that you would approach this is to analyze the probable causes of something happening, a differential diagnosis. So, why the—if you ask me why did it fall, I would say it fell because gravity exists. So, the real pertinent question here is what made it unstable? Because you used the word stationary earlier, so I mean, I could give you examples off the top of my head that are rationale (sic) and I could give you some that are kind of absurd. I could say that maybe a bird landed on it or there was an earthquake, or I could say that someone in some way interacted with the cable or the cord or someone interacted with the actual light fixture itself and touched it in a manner to cause it to become unstable. Neither of us has any evidence to point to, to say that's what happened. All I can do is say here's a list of probable events, and then rank them according to what's most probable or improbable.
>
> Q. Right. Right. And so, as far as the wiring itself though, the cord of the light, do you have any opinions on whether that existed in a hazardous condition?
>
> A. I don't have any information to say yes or no. I only see a picture of it. If the cable was draped in a manner where it came down next to somebody who walked by and they could have brushed against it, then that's not safe. But, you know, we don't—you and I don't have the level of information and facts here that we'd like to have that we normally get in other types of cases. So, we have—

(R.p. 157 (Williams Dep. 92:7–93:19) (emphasis added)).

In summary, Williams lacked any evidence and was forced to rely on speculation. Thus, Williams concluded, in circular fashion, that the light fell because it was not properly secured and that the light was not properly secured because it fell:

> Q. Okay. What evidence do you have that says anyone violated a manufacturer's recommendation for this specific light?
>
> A. Well, we've gone over this before. You can ask me how do I know it wasn't properly secured, and I said I'm familiar with the technical data sheets and I'm familiar with what it takes to anchor it and make it safe and the redundant chain with the cable. So, if you take all that action and you do all of that, then this wouldn't have happened. . . .

(R.p. 158 (Williams Dep. 95:10–20)).

> A. The intent is that fixtures shall be securely fastened in place. It's one short sentence. It seems self-evident to me what it means. If it had been secured in place, then it wouldn't have fallen and struck her in the head.

(R.p. 158 (Williams Dep. 97:10–14) (emphasis added)).

Plaintiff's second retained expert witness, Mr. James Rivenbark, owns several restaurants and runs a restaurant operation consulting business (R.p. 172 (Rivenbark Dep. 14:3–12)). He had never previously consulted in litigation or testified as a retained expert. (R.p. 195 (Rivenbark Dep. 108:18-20)). He has no background in engineering, lighting design, installation, or maintenance:

> Q. As far as lighting design, the installation, maintenance, you don't know anything about that, right?
>
> A. Huh-uh. When somebody walks in with lights, things like that, I'm concerned about, you know, "Where's you GFI outlet?" things like that.

(R.p. 182 (Rivenbark Dep. 56:2–6)). He admitted that he knows "very little" about stage lighting. (R.p. 182 (Rivenbark Dep. 55:15–17)).

Mr. Rivenbark testified that in his capacity as a restaurant owner and manager, he has hired musical acts and DJs to play for events, and that he was unable to recall a single instance on which he had requested such a contractor to install their lighting in a different way. (R.p. 182 (Rivenbark Dep. 56:14–19)). Moreover, Mr. Rivenbark testified that he has never heard of anyone in the restaurant industry removing a DJ's equipment because it was unsafe. (R.p. 201 (Rivenbark Dep. 133:3–7)). Mr. Rivenbark further admitted that the procedure he would follow to render the premises in his restaurants safe in a situation like this would be to keep a lookout for obvious hazards in equipment set up by independent contractors, discuss that situation with

the contractor in question, and expect them to remedy the situation—not his restaurant personnel. (R.p. 182 (Rivenbark Dep. 54:13–55:2); see also R.p. 185 (id. at 67:1) ("No, I'm not going to touch their stuff.")). Mr. Rivenbark concurred that he had no knowledge of how the light was secured prior to falling. (R.p. 185 (Rivenbark Dep. 69:13)). Finally, Mr. Rivenbark was unable to point to any alleged actions by Defendant or its personnel that violated an industry standard, regulation, or code in any way causally related to the light falling:

> Q. One based on that. What safety rules did the placement of this light prior to its falling violate? What specific rules did it violate?
>
> A. What's the list of rules? I mean, I don't—you're asking me to create a rule. The light was placed above a table, so that table—it's a temporary light above the table. I don't have a list of safety rules, per se, but—
>
> [Respondent's counsel]: All right. That's all I got.

(R.p. 202 (Rivenbark Dep. 136:8–19)).

ARGUMENTS

The Circuit Court granted Tall Sam I Am summary judgment as to Respondent's claims for negligence. "In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages." See Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). Likewise, "[t]o establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." Roe v. Bibby, 410 S.C. 287, 296, 763 S.E.2d 645, 650 (Ct. App. 2014).

I. RESPONDENT FAILED TO ESTABLISH A DUTY OWED BY PETITIONER IN RELATION TO THE UNDERLYING INCIDENT.

"It has long been the law in South Carolina that a merchant is not an insurer of the safety of his customer but owes them only the duty of exercising ordinary care to keep the premises in reasonably safe condition." Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); see also Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971); Hunter v. Dixie Home Stores, 232 S.C. 139, 143, 101 S.E.2d 262, 264 (1957); Wintersteen v. Food Lion, Inc., 336 S.C. 132, 135-136, 516 S.E.2d 828, 829 (1999); Cook v. Food Lion, Inc., 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct. App. 1997). Accordingly, South Carolina law requires proof of a dangerous or defective condition as a prerequisite for the imposition of premises liability upon a business owner. E.g., Shain v. Leiserv, Inc., 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct. App. 1997); Scott v. Cedar Fair Entm't Co., No. Civ. A 0:11-00910, 2012 WL 5306222, at *6 (D.S.C. Oct. 26, 2012). Beyond establishing the existence of a dangerous or defective condition, a plaintiff must show: (1) that the dangerous or defective condition was created by the business owner, or (2) that the business owner had actual or constructive notice of the dangerous or defective condition and failed to remove it. Wintersteen v. Food Lion, Inc., 336 S.C. 132, 136, 518 S.E.2d 828, 829–30 (Ct. App. 1999), aff'd, 344 S.C. 32, 542 S.E.2d 728 (2001) (citing Pennington, 252 S.C. at 178, 165 S.E.2d at 696).

As is discussed in Section II below, Respondent cannot establish a dangerous or defective condition, that the Petitioner created such a condition, or that Petitioner had actual or constructive notice of such a condition. Respondent attempts to circumvent this failure by inventing some higher standard on Petitioner. However, Respondent's efforts were properly rejected by the Circuit Court because Respondent (1) presented unreliable expert testimony as to industry standards relating to lighting and seating in restaurants in her attempt to show Petitioner

created or had notice of a dangerous condition, and (2) impermissibly attempted to impose, via expert testimony, an absolute duty on Petitioner to keep its patrons safe.

A. Testimony of Respondent's experts as to duty was unreliable and thus inadmissible to support Respondent's opposition to summary judgment.

"The rule governing summary judgment provides that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Dawkins v. Fields, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003) (citations and emphasis removed). Rule 702, SCRE provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Elaborating on this general Rule, the South Carolina Supreme Court has held that "[t]he trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." Watson v. Ford Motor Co., 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010). First, the trial court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Id. Second, "while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." Id. Third, "the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. Notably, "[e]xpert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability." Id.

As explained above (see supra pages 4–9), Respondent retained two expert witnesses: forensic architect Mark Williams and restaurant owner/consultant James Rivenbark. Mr. Williams' testimony focused on the installation of the light, but his testimony proved to be markedly unreliable. Mr. Williams asserted that the industry standard for installing the subject light was to use a bracket and safety chain and to barrier the light from any patrons in case it fell. Despite these assertions, Mr. Williams admitted at his deposition that he did not know the manufacturer of the subject light, did not know for certain whether it came with a safety chain, did not know what means would have been included with it for attaching it to a base, did not know what installation or usage instructions were included with the light, did not know the weight of the light, and did not know what kind of lightbulb it contained. (R.p. 144 (Williams Dep. 39:13–40:10); R.p. 144 (id. at 41:13–20); R.p. 144–45 (id. at 41:21–42:22); R.p. 146 (id. at 48:18–24); R.p. 147 (id. at 52:18–21)). Further, Mr. Williams admitted that he was unsure of the industry standard regarding usage of stage lights by DJs (R.p. 153 (Williams Dep. 75:20–23)), had no knowledge of how several of his cited sources pertain to the industry standard for temporary restaurant lighting in Charleston (e.g., R.p. 160 (id. at 103:14–19)), and could not vouch for the scholarly nature of at least one of his cited sources (R.p. 160 (id. at 105:1–14)).

Additionally, despite Mr. Williams' reliance on various building, fire, and electrical code sections in his file materials and deposition, Mr. Williams was unable to say what code sections applicable and binding in Charleston, South Carolina the Petitioner violated; whether the code versions he cited were the most recently adopted versions; or indeed whether Charleston County had adopted one cited body of code at all. (R.p. 150 (Williams Dep. 64:1–3); R.p. 158 (id. at 96:24–97:1); R.p. 153 (id. at 75:24–76:3) ("Q: Do you know if Charleston County has adopted the 2015 IPMC [International Property Maintenance Code]? A: I don't know, but I doubt it.")).

He further admitted that it would be "preposterous" to get a code inspector to review the light in question. (R.p. 154 (Williams Dep. 80:22–81:6)). When asked near the end of his deposition whether he had ever previously been retained in a case dealing with how a light fixture was secured, Mr. Williams indicated he did not remember. (R.p. 164 (Williams Dep. 119:10–13)).

Given his lack of any reliable bases for his opinions regarding the industry standard for installation of the subject light, Mr. Williams' testimony that Petitioner had a duty to secure the light with a bracket and redundant safety chain and to barrier the light from patrons in case it fell is not reliable. As a result, it is not competent evidence to support Respondent's burden to establish the Petitioner's duty of care in the present case. See In re Eleanor McCarthy Lenahan Tr. under agreement Dated July 12, 2001, 428 S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019) (quoting Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.")).

Respondent's second retained expert witness, Mr. James Rivenbark, owns several restaurants and runs a restaurant operation consulting business (R.p. 172 (Rivenbark Dep. 14: 3–12)). Mr. Rivenbark testified that Petitioner had a duty not to seat Respondent beneath temporary lighting and that the light should have been discovered to be dangerous and taken down by Petitioner's staff before the incident occurred. Prior to this case, Mr. Rivenbark had never consulted in litigation or testified as a retained expert. (R.p. 195 (Rivenbark Dep. 108:18–20)). He has no background in engineering, lighting design, installation, or maintenance, and he admitted that he knows "very little" about stage lighting. (R.p. 182 (Rivenbark Dep. 56:2–6); R.p. 182 (id. at 55:15–17)). Mr. Rivenbark testified that in his capacity as a restaurant owner and manager, he has hired musical acts and DJs to play for events, and that he was unable to recall a

single instance on which he had requested such a contractor to install their lighting in a different way. (R.p. 182 (Rivenbark Dep. 56:14–19)). Moreover, Mr. Rivenbark testified that he has never heard of anyone in the restaurant industry removing a DJ's equipment because it was unsafe. (R.p. 201 (Rivenbark Dep. 133:3–7)). Mr. Rivenbark further admitted that the procedure he would follow to render the premises in his restaurants safe in a situation like this would be to keep a lookout for obvious hazards in equipment set up by independent contractors, discuss that situation with the contractor in question, and expect them to remedy the situation—not his restaurant personnel. (R.p. 182 (Rivenbark Dep. 54:13–55:2); see also R.p. 185 (id. at 67:1 "No, I'm not going to touch their stuff.")). Mr. Rivenbark concurred that he had no knowledge of how the light was secured prior to falling. (R.p. 185 (Rivenbark Dep. 69:13)). Finally, Mr. Rivenbark was unable to point to any alleged actions of Petitioner or its personnel that violated an industry standard, regulation, or code related to the placement of the light. (R.p. 202 (Rivenbark Dep. 136:8–19)).

Given his lack of experience, qualifications, and especially given his lack of background in and knowledge of stage lighting design and installation, Mr. Rivenbark was not qualified to provide testimony as to the standard of care relating to the placement and installation of the light in this case. As a result, his testimony as to the duty of care was not reliable, as further demonstrated by its substance, and it is therefore not competent evidence to support Respondent's burden to establish the Petitioner's duty of care with regard to the subject light. See In re Eleanor McCarthy Lenahan, 428 S.C. at 605.

B. Respondent's attempt to impose a duty on Petitioner to provide an absolutely safe premises is controverted by South Carolina law.

As already mentioned above, "It has long been the law in South Carolina that a merchant is not an insurer of the safety of his customer but owes them only the duty of exercising

ordinary care to keep the premises in reasonably safe condition." Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969); see also Anderson v. Winn-Dixie Greenville, Inc., 257 S.C. 75, 77, 184 S.E.2d 77, 77 (1971); Hunter v. Dixie Home Stores, 232 S.C. 139, 143, 101 S.E.2d 262, 264 (1957); Wintersteen v. Food Lion, Inc., 336 S.C. 132, 135-136, 516 S.E.2d 828, 829 (1999); Cook v. Food Lion, Inc., 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct. App. 1997).

Whereas South Carolina case law clearly limits the duty on Petitioner to exercise ordinary care to keep its premises in reasonably safe condition, Respondent attempts to impose an absolute duty on Petitioner to keep its premises safe. James Rivenbark, Respondent's expert on restaurant management, testified that

> I mean, it's pretty—I think it's pretty cut and dry. I can't believe it's gone on this long. I mean, you know, someone is responsible for what goes on in a restaurant as far as being the operator/owner of the restaurant, what happens there. A light fell and hit someone in the head. My opinion is that the restaurant's responsible.

(R.p. 173 (Rivenbark Dep. 21:1–7)). When Respondent's counsel asked Mr. Rivenbark later in his deposition about the duties allegedly violated by Petitioner, Mr. Rivenbark maintained this absolute-safety, strict-liability position:

> Q. I want to go over some of your testimony that you mentioned earlier. Does a restaurant have control over everything in the restaurant, regardless of who brings it in?
>
> A. Yeah.
>
> Q. Does a restaurant have a duty to make sure that whatever is brought into its restaurant is safe and not injurious to patrons?
>
> A. Yes.

(R.p. 198 (Rivenbark Dep. 120:24–121:7)). This testimony—that everything in the restaurant was necessarily under Petitioner's control and that Petitioner had an unmitigated duty to ensure

patrons were not harmed by anything in the restaurant—sets the bar of Petitioner's duty to patrons impermissibly high and contradicts South Carolina's long-settled law that a merchant is not the insurer of the safety of his customer. Because Respondent failed to establish the duties of care to which she attempted to hold Petitioner, the Circuit Court properly granted summary judgment.

II. RESPONDENT FAILED TO ESTABLISH ANY BREACH BY PETITIONER OF A DUTY OWED TO RESPONDENT.

South Carolina law requires proof of a dangerous or defective condition as a prerequisite for the imposition of premises liability upon a business owner. E.g., Shain v. Leiserv, Inc., 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct. App. 1997); Scott v. Cedar Fair Entm't Co., No. Civ. A 0:11-00910, 2012 WL 5306222, at *6 (D.S.C. Oct. 26, 2012). Beyond establishing the existence of a dangerous or defective condition, a plaintiff must show: (1) that the dangerous or defective condition was created by the business owner, or (2) that the business owner had actual or constructive notice of the dangerous or defective condition and failed to remove it. Wintersteen v. Food Lion, Inc., 336 S.C. 132, 136, 518 S.E.2d 828, 829–30 (Ct. App. 1999), aff'd, 344 S.C. 32, 542 S.E.2d 728 (2001) (citing Pennington, 252 S.C. at 178, 165 S.E.2d at 696).

A. Respondent failed to produce probative evidence that the light constituted a dangerous condition.

As related in the prior section, Respondent's attempt to prove that the industry standard for temporary portable stage light installation requires use of a bracket, chain, and a barrier was based on unreliable and thus inadmissible expert testimony. However, even assuming that Respondent had established her desired standard of care with regard to the installation of the light, Respondent provided no probative evidence to show that standard was breached. Aside from the bare fact that the light fell, Respondent was unable to produce any evidence that the

light was not secured with a bracket and chain, as discussed at length in Section III. (See infra, regarding Respondent's res ipsa loquitur theory of causation). Further, although Respondent argued that "[Petitioner] placed one of its seats under the temporary portable stage light," the deposition testimony to which Respondent cited in support of this claim indicates only that Petitioner arranged its chairs and couches and set up the stage according to its floor plan, and that the DJ also came in and set up its equipment according to Petitioner's floor plan. (Respondent's Final Brief at p. 4, citing R.p. 210 (Chapin Dep. 19:3–10); R.p. 211 (id. at 23:3–15)). Indeed, there is no evidence even to show that when Petitioner seated Respondent on the couch, which occurred roughly forty-five minutes before the light fell, the light was already positioned on the speaker. (See R.p. 298–99 (Eddins Dep. 27:2–28:6); R.p. 370 (Haynes Dep. 17:2–14) (admitting that Respondent and her fiancé did not see the light at any time before it fell)). (See also R.p. 220 (Chapin Dep. 58:19–60:18)).

As a result, Respondent failed to carry her burden of proof to show that the light constituted a dangerous or defective condition.

B. Even if Respondent had shown the light constituted a dangerous condition, Respondent failed to produce probative evidence that Petitioner created the condition or had actual or constructive notice of the condition.

Even if the light was a defective or dangerous condition, though, Respondent offered no evidence that *Petitioner* created the allegedly dangerous condition posed by the light or that Petitioner had actual or constructive notice of the allegedly dangerous condition. The light was installed by a DJ, who was an independent contractor. If, after the DJ installed the light, "someone interacted with the actual light fixture itself and touched it in a manner to cause it to become unstable," as Respondent's expert Mr. Williams speculated, there is no evidence of who that person might have been. (R.p. 157 (Williams Dep. 92:25–93:2)). Similarly, there is no

evidence of when such a person may have tampered with the light or when some other instrumentality may have rendered the light unstable, leaving any arguments as to constructive notice reliant upon sheer speculation.

The South Carolina Supreme Court upheld summary judgment in favor of Bi-Lo under similar facts to those of the case at bar in Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001). In Garvin, the plaintiff alleged that she was injured when, after reaching to grab a box of canned items from the top of a stack taller than her, several cans fell and hit her face. Critically similar to this case, the plaintiff in Garvin presented no actual evidence of "some defective manner of stacking the boxes, or that Bi–Lo was on notice that the stacked cans had become rickety," and merely claimed that the stack of cans was dangerous. Garvin, 343 S.C. at 628–29, 541 S.E.2d at 833; see also id., 343 S.C. at 628, 541 S.E.2d at 833 ("This evidence is insufficient, as a matter of law, to demonstrate the store created a dangerous condition."). Because the plaintiff failed to present such evidence, the Supreme Court held that "there [was] simply no evidence from which a jury could find a dangerous condition was created by Bi-Lo." Id.

Without evidence of a dangerous condition in this case, Respondent cannot meet her burden of establishing constructive knowledge. See, e.g., Norris v. Wal-Mart Stores E., L.P., 2014 WL 496010 (D.S.C. Feb. 6, 2014) (holding that without evidence proving spill on ground for specific length of time, plaintiff cannot establish constructive knowledge). Despite the lengthy testimony of Respondent's experts, there is no evidence that Petitioner installed the light in a manner which violated a binding and applicable code, regulation, industry standard, or policy. A stationary, inanimate object on top of another stationary, inanimate object is not an inherent hazard, nor is it a condition which a restaurant employee exercising reasonable care would be expected to remedy. (See R.p. 251 (Diehl Dep. 73:3-12) ("I don't know that any of our

employees would be able to identify a light that belongs to somebody else that a DJ brought in that they are unfamiliar with, where it was placed, or why it was placed there to be a potential hazard.")). There is therefore no evidence that Petitioner failed in its normal practice of "kind of constantly looking for safety issues" or that it had constructive notice of a dangerous condition with regard to the light. (R.p. 229 (Chapin Dep. 97:14–25)). Because Respondent failed to meet both its initial burden of evidence to show a dangerous or defective condition and its subsequent burden of evidence to show Petitioner created or had notice of that condition, the Circuit Court properly granted summary judgment.

III. RESPONDENT FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER PETITIONER PROXIMATELY CAUSED DAMAGES TO RESPONDENT.

South Carolina courts have consistently and steadfastly rejected the doctrine of res ipsa loquitur. See, e.g., Watson v. Ford Motor Co., 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010) ("We also note that Respondents may not rely solely on the fact that an accident occurred to prove their products liability case under a negligence theory since South Carolina does not follow the doctrine of res ipsa loquitur."). In a negligence case in South Carolina*, actori incumbit onus probatio*: the plaintiff always bears the burden of affirmatively proving a failure to exercise reasonable care by a preponderance of the evidence, and "this burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care." Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App.1991) (citing King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940)). "No inference of negligence arises from the mere fact of injury." Id. (citing Covington v. Atlantic Coast Line Railway Co., 158 S.C. 194, 155 S.E. 438 (1930), cert. denied, 282 U.S. 858, 51 S.Ct. 33, 75 L.Ed. 759 (1930)).

South Carolina's scintilla rule "does not set aside the rule of force in this state relating to res ipsa loquitur, which is that the doctrine does not prevail in this state." Turner v. Am. Motorists Ins. Co., 176 S.C. 260, 180 S.E. 55, 56–57 (1935).

In short, South Carolina does not recognize the doctrine of res ipsa loquitur because in South Carolina, the plaintiff bears the burden of proving the defendant was negligent. This standard is critical to safeguard innocent parties from being forced to pay liability they should not owe.

Where a plaintiff can only speculate about why a defendant might have been negligent, and where this speculation is based only on the fact of the injury itself, the plaintiff's case must fail because it is built on the doctrine of res ipsa loquitur. That Respondent relies on res ipsa loquitur to prove her case is demonstrated by her own expert's testimony, who admitted, among other things, that his analysis as to why the speaker fell was conducted in the "absence of evidence". (R.p. 157 (Williams Dep. 92:11–93:3)). In light of this evidentiary void, Respondent's experts offered a wide variety of possible causes for the light's fall. These ranged from birds to earthquakes, from gravity to someone tampering with the light. (R.p. 157 (Williams Dep. 92:12–93:2)). Respondent and her fiancé, neither of whom saw the light before it fell, were likewise unable to offer testimony as to why it fell, how it was installed, or whether it was secured. (R.p. 298–99 (Eddins Dep. 27:12–28:6); R.p. 370 (Haynes Dep. 17:5–14)).

As a result, Respondent relies solely on the fact that the injury occurred to say that some theoretical standard was violated. The light fell, Respondent says, because it was not properly secured. And, circularly, Respondent purports to know that the light was not properly secured because it fell. (R.p. 143 (Williams Dep. 35:18–21) ("And if you do those, if you take those actions and you follow manufacturer's recommendation, it won't fall off."); R.p. 158 (id. at

95:13–14, 18–20) ("Well, we've gone over this before. You can ask me how do I know it wasn't properly secured. . . . So, if you take all that action and you do all of that, then this wouldn't have happened."); R.p. 158 (id. at 97:12–14) ("If [the light] had been secured in place, then it wouldn't have fallen and struck her in the head.")). This is textbook res ipsa loquitur.

The value of South Carolina's stance on the doctrine of res ipsa loquitur is evident. If the law permitted Respondent to recover based on the type of circular reasoning Respondent has used here, it would entirely shift the burden of proof and could result in liability being imposed on innocent parties. To put it in other words, on the testimony presented, a host of possible outcomes exist which should result in a finding that Petitioner being found not liable. As one example, it is entirely possible the light *was* properly secured at the time it was installed, but that it was later altered without any opportunity for notice to the Petitioner. It is also possible the light was not present when the Respondent sat on the couch and that the DJ or a customer moved the light to a position over the Respondent during the nearly hour-long gap between when the Respondent sat and the light fell, again eliminating the opportunity for any notice to the Petitioner. It is possible that the light was installed according to the manufacturer's instructions and that the instructions were faulty. It is also possible that the light was installed according to the instructions but that the light or devices used to install it were faulty. On Respondent's evidence, any of the above scenarios is as likely as another, and Respondent has failed to prove critical elements of her case. Respondent seeks to fill these gaps with res ipsa loquitur.

In summary, Respondent has the duty to prove each factor of her case and not to rely on speculation. Here, Respondent can say only that the light fell. The rest of Respondent's case relies on speculation. Thus, her case attempts to stand on the mere fact that she was injured. This is res ipsa loquitur and the Circuit Court thus properly granted summary judgment.

IV. THE COURT OF APPEALS OVERLOOKED THE INADMISSIBILITY OF THE EXPERT TESTIMONY UPON WHICH IT SOLELY RELIES.

The Court of Appeals' reversal of the district court below was grounded entirely in the Court of Appeals' observation that "Eddins presented expert testimony that temporary light fixtures should have been barriered from patrons and the light's height and weight posed a foreseeable risk of harm to spectators seated underneath the light fixture." (Op. No. 2024-UP-237 at 2). The two clauses here describing Respondent's expert testimony present two aspects of the same conclusion: that this temporary overhead lighting was a *foreseeable* danger and thus patrons should have been barriered from it rather than seated under it. On the sole basis of this conclusory opinion offered by Respondent's experts, the Court of Appeals determined that there was sufficient evidence in the record to create a jury question as to whether Petitioner was negligent in seating Respondent under the light fixture. (*See id*.). The Court of Appeals' Order appears to also conclude on this same basis that the placement of seating underneath the light fixture constituted a hazardous condition which Petitioner's employees should have noticed and corrected. (*See id*. at 3).

The conclusory opinion of Respondent's experts, however, cannot carry the case to a jury because it is not admissible, a point which was demonstrated in Petitioner's brief but not examined or commented on in the Court of Appeals' Order. To be admissible as evidence, expert testimony must be reliable in substance and offered by a person who has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Watson v. Ford Motor Co., 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010). The testimony of neither expert proffered by Respondent met this threshold burden. (*See* Petitioner's Final Brief at 13–18).

Respondent's first expert, Mark Williams, explicitly admitted that he was unsure of the industry standard regarding usage of stage lights by DJs, which rendered him unqualified to

testify regarding this particular usage of a stage light by the DJ in this case. (R.p. 153 (Williams Dep. 75:20–23)). Additionally, the testimony he offered was unreliable because (a) he stated it was based on code sections that may have been both out of date generally and inapplicable in Charleston County specifically, and (b) he was unable to vouch for the scholarly nature of all his cited sources or explain how some of them pertained to the industry standard in Charleston. ((R.p. 160 (id. at 105:1–14); R.p. 160 (id. at 103:14–19)).

Mr. Williams' testimony was further inadmissible due to its heavy reliance on res ipsa loquitur reasoning in opining that the light was dangerous because it was allegedly installed defectively by the DJ. (R.p. 143 (Williams Dep. 35:18–21) ("And if you do those, if you take those actions and you follow manufacturer's recommendation, it won't fall off."); R.p. 158 (id. at 95:13–14, 18–20) ("Well, we've gone over this before. You can ask me how do I know it wasn't properly secured. . . . So, if you take all that action and you do all of that, then this wouldn't have happened."); R.p. 158 (id. at 97:12–14) ("If [the light] had been secured in place, then it wouldn't have fallen and struck her in the head.")). See Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797 (Ct. App.1991) (The "burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care.").

Respondent's second expert, James Rivenbark, is similarly unqualified, having admitted that he knows "very little" about stage lighting and has no background in engineering, lighting design, installation, or maintenance. (R.p. 182 (Rivenbark Dep. 56:2–6); R.p. 182 (id. at 55:15–17)). Furthermore, prior to this case, Mr. Rivenbark had never consulted in litigation or testified as a retained expert. (R.p. 195 (Rivenbark Dep. 108:18–20)). Lacking any authority, Mr. Rivenbark's testimony that Petitioner should not have seated patrons under temporary light

fixtures is also unreliable, as he was unable to point to any action of Petitioner that violated an industry standard, regulation, or code related to the location of the light. (R.p. 202 (Rivenbark Dep. 136:8–19)). Instead, he based his "expert" opinions on his legally erroneous lay opinion that if a patron is injured, the restaurant must have violated its duty of care. (R.p. 173 (Rivenbark Dep. 21:1–7) ("I mean, you know, someone is responsible for what goes on in a restaurant as far as being the operator/owner of the restaurant, what happens there[;] [a] light fell and hit someone in the head[;] [m]y opinion is that the restaurant's responsible."). Mr. Rivenbark's testimony is thus also not admissible in this case.

As recognized by the Court of Appeals' Order, the only evidence presented by Respondent to show that seating patrons under the temporary light set up by a DJ created a foreseeable danger—such that Petitioner failed to exercise ordinary care when it laid out the floor plan and seated Respondent under the light—was the testimony of Respondent's two proffered experts. However, because these experts were unqualified as to temporary lighting installation and offered seriously flawed, unreliable testimony, their opinions are inadmissible as evidence in this case. The Court of Appeals' Order overlooks this critical issue, which renders its reversal of the district court improper.

CONCLUSION

In summary, this is not a case in which the Respondent offers competing evidence for a jury to evaluate; rather, the Respondent has failed to set forth specific issues of fact establishing duty, breach, or proximate cause under the settled jurisprudence of the Supreme Court of South Carolina. As a result, the Circuit Court properly granted Tall Sam I Am's motion for summary judgment, and the Court of Appeals' reversal of that grant of summary judgment was in error.

Respectfully submitted,

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