IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

C.A. No.: 2013-CP-10-1400

Robert J. Burke.....Respondent,

v.

Republic Parking System, Inc. .....Appeallant.

AMENDED INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUES

RULES

OTHER

STATEMENT OF ISSUES ON APPEAL

1. The trial court did not err in denying Republic Parking System, Inc.'s ("Republic") motions for directed verdict because taking the evidence in the light most favorable to Robert J. Burke, more than one reasonable inference could have been drawn from the evidence on the issue of a duty by Republic and the trial court did not err in denying Republic's motion for judgment notwithstanding the verdict because the evidence before the trial court sustains the factual findings implicit in the verdict and which a reasonable jury could have reached.
2. The trial court did not err in failing to grant Republic judgment as a matter of law related to future damages, to the extent the jury even awarded future damages, and the trial court did not err with respect to its charge on future damages or by allowing testimony on future damages.
3. The trial court did not err in denying to direct a verdict in favor of Republic related to what Republic contends are unforeseeable damages.
4. Republic was not entitled to a new trial and the trial court did not err in denying Republic's motion for a new trial related to Republic's arguments that the trial court improperly charged the jury, that the trial court erred by not charging proximately caused damages in the liability phase of the trial, that the trial court improperly charged on premises liability based on the evidence of Republic being an occupier, that the trial court improperly charged on the burden of proof, and that the trial court improperly charged on reducing future damages to present value.
5. The trial court did not err and Republic is not entitled to a new trial based on the evidentiary rulings of the trial court including the exclusion of Dr. Todd Shuman, the testimony of Dr. Marshall White, the exclusion of medical records and the testimony of lay witness Michael Capaccio based on his perception.
6. The trial court did not err in disallowing the admission of medical testimony in the liability phase of the bifurcated trial which Republic requested.
7. The trial court did not err nor did it prohibit Republic from admitting evidence of control of the Lot.
8. The trial court did not err in its application of allocation under S.C. Code Ann. §15-30-10.
9. The trial court did not err in dismissing Jane Burke as a Plaintiff, and dismissing the City of Charleston and Indigo Realty, LLC due to settlements previously reached before trial.

STATEMENT OF THE CASE

On January 24, 2013, Respondent Robert J. Burke ("Burke" or "Plaintiff") was seriously injured in a parking lot within the City of Charleston, County of Charleston. On March 8, 2013, Burke and his wife, Jane B. Burke, filed a lawsuit in the Court of Common Pleas for Charleston County against Republic Parking System, Inc. ("Republic"), Indigo Realty Company, Ltd. ("Indigo"), Clarence D. Melton, Jr. ("Melton"), and 324 King, LLC ("324 King"), alleging that all defendants were negligent, negligent per se and grossly negligent. Jane B. Burke pled a claim for loss of consortium. (Comp., R. at __). On March 22, 2013, the Complaint was amended. (Amend. Comp., R. at __). On January 6, 2014, Defendant Melton was dismissed without prejudice by consent, pursuant to Rule 41, SCRCP. (Dismissal, R. at __). Thereafter, on December 5, 2013, Plaintiff Burke filed a motion for leave to amend his Complaint to assert a direct claim against the City, at that time a 3rd party defendant, which motion was granted on December 18, 2013. (Order Amend, R. at __). On January 6, 2014, the Plaintiff filed his Second Amended Complaint, against Defendants Republic, Indigo and the City. (2nd Am. Cmp., R. at__). On December 12, 2014, as a result of settlements reached, the Plaintiff filed a motion to dismiss Jane B. Burke as a Plaintiff and to dismiss Indigo and the City as Defendants, and the trial court granted such motion on December 15, 2014, thus leaving Robert J. Burke as Plaintiff versus Republic Parking System, Inc. as Defendant at trial. (Mtn. to Dismiss, R. at __).

Beginning on December 15, 2014, the case was tried before a jury in Charleston County with the Honorable R. Markley Dennis Presiding. Upon the motion of Republic, and over the objection of Mr. Burke, the case was bifurcated as to liability and damages. (Mtn. to Bif., Tr. at ___, R. at __). The jury found: 1) that the Plaintiff has proven by a preponderance of the evidence that Defendant Republic was negligent; 2) that Defendant Republic's conduct was not grossly negligent, willful wanton or reckless; 3) that the Defendant has proven by a

preponderance of the evidence that the Plaintiff was negligent; and 4) that taking the combined negligence that proximately caused the parties' injuries as one hundred percent (100%), what percentage of that negligence is attributable to the plaintiff and what percentage is attributable to the defendant: Plaintiff: 20%; Defendant 80%. (Verdict Forms, R. at __). On December 18, 2015, the damages portion of the trial resumed. On December 19, 2015, the jury returned a verdict for the Plaintiff in the amount of $4,005,125.00. (Verdict Form, R. at __).

Republic filed a motion for a new trial and for judgment notwithstanding the verdict on December 23, 2014. (Rep. Post Tr. Mtns., R. at __). On January 29, 2015, the Court held a hearing on the application of any set-off as well as on Republic's motion for a new trial and motion for judgment notwithstanding the verdict. As a result of that hearing, the Court denied Republic's motion for a new trial and judgment notwithstanding the verdict and the Court reduced the $4,005,125.00 judgment by $801,025.00 representing a twenty-percent reduction for the comparative negligence, as well as reducing the judgment by $20,000.00 for the settlement paid on behalf of Mr. Burke. The Court also approved $290,000.00 of the previous settlement which was applied to Jane B. Burke's loss of consortium claim. The final judgment entered against Republic was for an amount of $3,184,100.00 on January 29, 2015. (Judgment, Tr. at __, R. at __). Republic filed a notice of appeal of the jury verdict and the order denying Republic's post-trial motions on February 9, 2015.

STATEMENT OF THE FACTS

Robert J. Burke, a former college and NBA basketball coach, was severely injured in a fall in a parking lot operated, controlled and managed by Republic since 1997. (Tr. at 111:17-114:1, 669:11-703:25, 233:22-24, R. at __). Despite Republic contending that it has no duty to Mr. Burke, Republic controlled the lot, managed the lot, maintained the lot, controlled ingress

and egress of the lot, employed the employees operating and controlling the lot, was responsible to keep the lot properly maintained and free from hazardous conditions, and was responsible to promptly report to the City the need for major repairs or replacement. (Tr. at 199:20-202:25, P. Trial Ex 7, R. at__). Republic was the occupier of the lot, responsible for the lot and in control of the lot since 1997 based on the evidence, even though the City may have constructed the lot and lighting devices earlier. Republic had an employee at the lot during every hour of operation of the lot. (Tr. at 199:20-202:25, P. Trial Ex 7, R. at__).

Robert J. Burke ("Burke" or "Mr. Burke") is from Wilson, North Carolina and has been married to Jane B. Burke for over forty-five (45) years. (Tr. at 109:21-110:19, R. at __). On January 24, 2013, Burke was going to attend the College of Charleston versus The Citadel basketball game at the College of Charleston. Mr. Burke's son, Robert, was the assistant basketball coach for The Citadel and he was going meet his daughter Ashlyn at the game and watch his son coach at the game. (Tr. at 115:18-22, 120:3-14, R. at __). Mr. Burke has been involved with and coached basketball for approximately forty-five (45) years on all levels to include JV, varsity, high school, junior college, Division III, Division II, Division I and the NBA. (Tr. at 109:12-114:4, R. at __).

On January 24, 2013, after driving from Wilson, N.C., Mr. Burke parked his car in what is referred to as the George Street surface parking lot which is located off of George Street. ("George Street Lot" or "Lot") (Tr. at 121:9-19, P Tr. Ex. 1-6, R. at __). The Lot is open to the public, but the public must pay to park in the lot by taking a ticket and paying the fee to a Republic employee when departing. Mr. Burke proceeded to park his car to the right side of the lot behind the buildings which face King Street. (Tr. at 122:2-124:4, R. at __). It was very dark

when Mr. Burke entered and parked and Mr. Burke could not see any means of egress, stairs or a walkway. Id.

The property on which the George Street Lot is situated is leased by the City of Charleston ("City") from multiple property owners. (Tr. at 199:4-7, R. at __). In turn, the City contracted with Republic Parking System ("Republic") to operate, control, be responsible for and manage the George Street Lot, along with all of the City's parking garages, parking lots and meter operations. (Tr. at 193:15-201:21, P. Tr. Ex. 7, R. at __). In January of 2013, Republic was the operator, occupier and manager of the George Street lot. (Tr. at 193:20-22, R. at __).

After parking his car, Mr. Burke walked for approximately fifteen (15) seconds toward the parking attendant booth. (Tr. at 123:9-18, R. at __). Because it was dark, he used the light on the booth where he entered as a guide to exit the lot. (Tr. at 123:9-124:22, P Tr. Ex 8, R. at __). Mr. Burke did not see any obvious means of egress or an indication of how to exit the lot, he could not see any walkway nor could he see any steps. (Tr. at 122:2-124:4, R. at __). As Mr. Burke walked toward the attendant booth and in between two parked cars, he hit what he described as a curb or block which he could not see and went flying to the ground. The object was not marked, was not illuminated and there were no yellow markings on it. (Tr. at 123:11-25, 144:7-145:2, P. Tr. Ex. 8, R. at __).

Immediately thereafter, Mr. Burke fell to the ground, took what he described as a hard blow to his body, he felt as if he was trying to catch his breath, had difficulty breathing and felt as if he had been hit over his head. (Tr. at 125:5-20, 676:4-16, R. at __). At trial, Mr. Burke described a hard terrible blow to his midsection area, legs, knees, and forearms, described his sensation as being in a daze, he felt the sensation of bleeding, felt the sensation of blood pouring out of his clothes, felt the sensation of pain and blood on his arms, saw blood dripping down his

hands, felt swelling beginning to come out of the front part of his body, felt numb and was in excruciating pain. (Tr. at 125:5-127:12,676:4-679:9, R. at __). Ashlyn Burke, Mr. Burke's daughter, described the amount of blood loss as the equivalent to a "murder scene." (Tr. at 761:9-21, R. at __). A witness, Robert Cammer, while walking through the lot, heard a "commotion" and came across Mr. Burke on the ground in the process of being assisted up by two men. (Tr. at 146:8-20, 148:5-17, R. at __). Mr. Cammer assisted and testified that it was "really dark back there" where Mr. Burke fell, that he could only see silhouettes and used his phone flashlight for illumination. (Tr. at 148:15-152:15, R. at __).

Mr. Burke was bleeding profusely on the scene. (Tr. at 127:4-12, 171:14-181:18, 676:8-677:19 R. at __). His daughter Ashlyn was summoned and arrived on scene. (Tr. at 128:3-13, 171:14-181:18, R. at __). It was so dark that she had to use her phone as a flashlight. (Tr. at 178:5-21, R. at __). At that point, Emergency Medical Services arrived, began cutting off Mr. Burke's clothes and transported him to the emergency department at Medical University of South Carolina ("MUSC"). (Tr. at 128:8-25, 179:11-180:3, 676:8-677:19, R. at __).

In the time leading up to January 24, 2013, both Mr. Burke and Jane Burke were leading active lives, travelling, enjoying cruises, and dancing. Mr. Burke was also enjoying assisting his son and daughter with coaching, to include on court activities. (Tr. at 117:4-119:11, 873:13-878:10, R. at __). Prior to January 24, 2013, Mr. Burke was preparing himself to return to the professional workforce of college and professional basketball where he intended to work for three (3) to (5) years, making anywhere from $100,000 per year to $500,000 per year or more. (Tr. at 669:11-673:20, R. at __). At the trial on December 15, 2014, Mr. Burke was confined to a wheelchair. (Tr. at 109:4-6, R. at __). Following the night of January 24, 2013, he was unable to

pursue these positions due to his injuries suffered at the hands of Republic. (Tr. at 674:17-19, R. at __).

Mr. Burke was critically ill and was treated in the emergency department of MUSC, then admitted to the surgical trauma intensive care unit (for eight days) followed by admission to a floor. (Tr. at 681:12-15, P Ex. 12C at time 28:40 – 29:01. P. Ex. 12A at 9:7-11:5, 18:2-25, P. Tr Ex. 17-19, R. at __). Dr. Joseph Sakran of the Medical University of South Carolina, a trauma surgeon who treated Mr. Burke, testified at trial via video deposition for trial. (Tr. at 812:13-21, P Ex 12A, P Exhibit 12B&C, R. at __). The doctors were struggling to stop his internal bleeding for about six days and he bled a significant amount internally and externally. (Tr. at 683:13-684:8, P Ex 12A at 14:18-25, R. at __). Mr. Burke spent approximately one (1) month in MUSC for treatment for the injuries. (Tr. at 682:5-7, R. at __). Mr. Burke bled internally for approximately six (6) days and his body swelled from about 240 pounds to 295 pounds. (Tr. at 684:3-8, R. at__). Mr. Burke described the swelling of his legs as if they looked like tree trunks, his right knee was the size of a watermelon, his fingers doubled in size and his testicles swelled to the size of coconuts. (Tr. at 684:16-685:20, R. at __).

Mr. Burke suffered from an acute kidney injury due to his fall, trauma to his body from all of the injuries and subsequent procedures and was also forced to go on dialysis due to his kidney injuries. (P Ex. 12A at 28:12-19, P Ex at 12C at time 21:00, 42:30, P Tr Ex 17-19, 838:1-842-24, 887:5-889:9, R. at __). Following the one month hospitalization at MUSC, Mr. Burke was transferred to and admitted to Roper Hospital for another three (3) to four (4) weeks for rehabilitation. From Roper, Mr. Burke was discharged to home medical to treat him for about six weeks. (Tr. at 687:21-688:20, 686:1-25, 696:2-697:7, R. at __). Mr. Burke also suffered from continued knee issues from his injuries which resulted in needing to have a right knee

replacement. (Tr. at 700:21-703:24, R. at __). While in the hospital for the knee surgery he developed blood poisoning from that surgery. Id.

Plaintiff's expert witness, Alan Campbell, testified that the Lot where Mr. Burke was critically injured should have had a minimum illumination of 10 LUX based on industry standards. LUX is an accepted measurement of ambient lighting. (Tr. at 249:18-250:12, 259:3-18, R. at__). As a comparison, a darkened movie theater, while showing the movie, must have a minimum illumination of 2.5 LUX. (Tr. at 259:19-260:11, R. at__). Where Mr. Burke tripped and fell, the LUX readings were all below 1.3 LUX. (Tr. at 264:1-24, P. Tr. Ex. 13-15, R. at __). Where Mr. Burke parked, the light reading was 1.2 LUX and Mr. Burke walked through a portion of the lot which measured 1.7 LUX and where he tripped and fell, the highest illumination was 1.3 LUX. (Tr. at 265:10-25, P. Tr. Ex. 13-15, R. at __). Mr. Campbell testified that the lighting condition and the overall condition of the way vehicles were allowed to park in the lot fell well below applicable industry standards. (Tr. at 278:19-279:3, R. at __). Mr. Campbell opined that there were multiple inexpensive solutions Republic could have employed at the Lot in order to provide a safe passage for pedestrians to exit the Lot. (Tr. at 272:6-280:10, R. at __). Republic called no expert witness related to lighting or the parking lot and presented no evidence to refute Mr. Campbell's analysis or data.

The City contracted with Republic as an expert in the industry to provide the management, operation and control of the City's entire parking facilities beginning in 1997. (Dep. Of Skelton, 92:23-93:8, 233:22-24, P. Tr. Ex. 7, 9, R. at __). As discussed in argument below, the Lot became the responsibility of Republic, Republic became the occupier of the Lot, Republic was in control of the Lot and Republic had an affirmative obligation to maintain the

Lot and keep the Lot free from hazardous conditions. (P. Tr. Ex. 7, R. at __). In addition, Republic was to indemnify the City from liability. (P. Tr. Ex. 7, Un-redacted Tr. Ex. 7, R. at __).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN DENYING REPUBLIC'S MOTION FOR DIRECTED VERDICT AND REPUBLIC'S MOTION FOR JNOV BASED ON WHETHER REPUBLIC OWED A DUTY TO MR. BURKE BECAUSE THE EVIDENCE BEFORE THE COURT YIELDED MORE THAN ONE INFERENCE OF WHETHER REPUBLIC WAS AN OCCUPIER OF THE PREMISES, REPUBLIC HAD CONTROL OVER THE PREMISES AND REPUBLIC UNDERTOOK THE DUTY TO KEEP THE PREMISES IN A SAFE CONDITION, FREE OF HAZARDS.

An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3, 5 (S.C. 1997). The issue of duty in the context of a negligence action is an issue of law to be determined by the Court. Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47, 49 (1996). However, occasionally, the question of whether a duty arises depends on the existence of particular facts. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3, 5 (S.C. 1997). Republic was not entitled to a directed verdict or Judgment based upon the evidence and facts presented.

Where there are factual issues regarding whether the defendant owes a particular duty based on its status (such as whether the defendant has voluntarily undertaken a duty, represents an occupier in control of the premises, or stands as an independent contractor with expertise superior to that of the property owner) the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder[1]. Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 246-47, 711 S.E.2d 908, 911-12 (2011) (holding voluntary undertaking can give rise to duty

[1] Republic argues in its brief that a comment by the trial court yields error in and of itself. (Appellant Brief, 13, ¶2 & Fn.4). The comment by the trial court related to the determination of the mixed question of law and fact and is clearly not error. The trial court, after hearing the evidence, stated that "there's no question there was a duty," thus finding a duty was owed. (Tr. at 449:13-16, R. at __).

under certain facts); Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813, 815 (1997) (holding control can give rise to duty under certain facts); Sides v Greenville Hosp. Sys., 362 S.C. 250, 257, 607 S.E.2d 362, 365 (Ct. App. 2004) (holding independent contractor's expertise can give rise to duty under certain facts).

In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126, 130 (1999). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Id. The trial court can only be reversed on appeal when there is no evidence to support the ruling below. Sauers v. Poulin Brothers Homes, Inc., 328 S.C. 601, 493 S.E.2d 503, 504-05 (Ct. App. 1997). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict and the jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408 (Ct. App. 2000). Neither a directed verdict nor judgment notwithstanding the verdict should be granted unless only one reasonable inference can be drawn from the evidence. Sauers v. Poulin Brothers Homes, Inc., 328 S.C. 601, 493 S.E.2d 503, 504-05 (Ct. App. 1997). Id. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. Futch v. McAllister Towing of Georgetown, 335 S.C. 598, 518 S.E.2d 591, 611 (1999).

Republic contends in this appeal that the trial court should have entered a judgment in favor of Republic on directed verdict or by way of its motion for JNOV because Republic owed no duty to Mr. Burke. (Appellant Brief, p.1, 8-15, Republic Motion for Directed Verdicts & JNOV, R. at __). Republic implicitly argues that these motions should have been granted because there is no evidence that it voluntarily undertook a duty to keep the lot safe or bring

safety concerns to the City, it controlled the lot as an occupier, or it possessed greater expertise than the City on issues of parking management and lighting. However, as set forth below, substantial evidence exists in the record on each of these points. Therefore, the trial court properly denied Republic's motions for a directed verdict and JNOV and the jury's finding that Republic owed Burke a duty is supported by the evidence. The only permissible way that Republic's argument before this Court has any merit is if, based on the evidence presented in the light most favorable to Mr. Burke, only *one* inference could be drawn from such evidence – the sole inference that there was no duty owed by Republic. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126, 130 (1999).

The sole and one inference that Republic was seeking did not exist based on the evidence. The trial court properly denied Republic's motion for a directed verdict at the trial and submitted the issues to the jury. (Tr. at 333:15-344:3, 448:21-453:25, R. at __). The trial court also properly denied Republic's motion for JNOV (Tr. Jan. 29, 2015, 2:1-24:4, R. at __). The evidence before the trial court yielded more than one inference on the question of duty and therefore the trial court properly denied Republic's motion for directed verdict and denied entering judgment for Republic. Based on the evidence, in the light most favorable to Mr. Burke, there were clearly other inferences that could be drawn based on Republic's voluntary undertaking to keep the lot safe and bring safety matters to the City's attention, control and occupation of the lot, and its expertise in parking management and lighting. It would have been error for the trial court to grant Republic's motions based upon the evidence.

A. Substantial evidence supports the trial court denial of Republic's motions and jury's finding that Republic owed and breached a duty to Burke because Republic voluntarily assumed the duty to keep the lot safe, controlled the lot as an occupier, and possessed expertise on parking lot management and lighting.

The City has not been in the business of managing and operating its own parking facilities since the early 1990's when the City began contracting out the management and operations of public parking to third-party industry experts like Republic. (Tr. at 193:2-202:25, R. at __). The City engaged Republic to manage, control and operate all of its parking facilities since 1997. (Tr. at 193:2-202:25, 233:22-24, P. Tr. Ex. 7, 9, R. at __). The City selected and engaged Republic after a request for proposal process. In 2007, the City again requested proposals from parking management / operator vendors and Republic again submitted a proposal. (P. Ex. 9, Tr. at 193:2-202:25, R. at __). Subsequent to the 2007 submittal by Republic, the City re-engaged Republic to manage and operate its parking facilities under an agreement dated May 1, 2008.[2] ("Agreement") (Tr. Ex. 7, Un-redacted Tr. Ex. 7, Tr. at 198:6-17, R. at __). This Agreement provides considerable factual support for each of the grounds giving rise to Republic's duty discussed above.

The Agreement appointed Republic as the manager of all of the parking facilities operated by the City, to include the George Street Lot, and affirmatively made the physical facilities of all parking facilities the responsibility of Republic. The Agreement also obligated Republic, *inter alia*, to affirmatively make regular and frequent inspections of the Lot, to determine whether maintenance, repair or replacement of any of a portion of the facilities is required, to affirmatively keep the Lot in a properly maintained state, free from all hazardous conditions and deterioration, affirmatively to be responsible for all maintenance and repairs, and to promptly report to the City the need for major repairs and replacements. (P Tr. Ex. 7, R. at

[2] The May 1, 2008 agreement between Republic and the City was the parking management / operations agreement in effect while Mr. Burke was injured pursuant to extensions. (Tr. at 193:15-22, 198:6-17, R. at __).

__). Moreover, the Scope of Services contained within the Management Agreement specifically states, with respect to the services Republic is providing, that:

> Republic accepts the appointment as Parking Facilities Operator to operate, manage and maintain the City of Charleston's Parking Facilities.... The Parking Facilities shall be operated as a first-class commercial public parking facility with energy, fidelity, and diligence, respectful of the culture it serves, and in full compliance with all terms and conditions contained in this Agreement. (P Tr. Ex. 7, R. at __).

Republic incorrectly argues that the Agreement does not create a duty on the facts of this case. Under the Agreement, as well as additional facts and evidence, Republic voluntarily assumed the obligation to keep the lots free from hazardous conditions in a properly maintained state, to promptly report the need for repair or replacements to the City, to report hazards to the City, assumed complete and sole control of the operations and management of the George Street Lot and portrayed itself as an expert in parking lot management generally and parking lot lighting specifically. (P Tr. Ex. 7, 9, Tr. at 193:2-202:25, Dep. of Skelton at 25:11-24, 45:3-11, R. at __). As discussed in greater detail below, these facts fully support the denial of Republic's Motion.

i. The Agreement and other facts in the record provide sufficient support for the trial court's decision on the motions and the jury's conclusion that Republic voluntarily undertook a duty to keep the George Street Lot safe and free from hazards and bringing safety concerns to the attention of the City.

Jack Skelton, Esq., the Regional Vice President of Republic for the Eastern half of the United States testified that Republic was obligated under the Agreement to make regular and frequent inspections of the Lot and to determine whether maintenance, repair and/or replacement of the parking facilities were required, and to alert the City of any issues. (Dep. of Skelton, 69:17 – 70:11, Mang. Ag. (Tr. Ex. 7), R. at __). Mr. Skelton further testified and admitted that as part of Republic's *duty*, Republic evaluates particular lots from the standpoint of safety and hazardous conditions. (Dep Excerpts of Skelton, 17:21-23, 56:2-24, R. at __). Mr. Skelton

testified that if Republic believed the lighting at the Lot was poor or insufficient, Republic was *obligated* to notify the City. (Dep. of Skelton, 78:7-8, R. at __). However, according to Mr. Skelton, using his own words, Republic literally only "eyeballed" the lighting to make a determination of whether the lighting was sufficient or not. (Dep. of Skelton, 6:1-9, 25:16-18, R. at __). Mr. Skelton admitted that had he viewed the Lot and thought the lighting was bad or insufficient, he would have considered it a hazardous condition and he may have alerted the City. (Dep. of Skelton, 72:4-14, R. at __).

Despite the Agreement and notwithstanding Mr. Skelton's testimony, the City was never notified of the deficient lighting conditions even though the conditions were a fraction of industry standards. (Tr. at 209:1-19, R. at __). Had the City been notified, the City testified that it would have addressed it. (Tr. at 209:1-210:11, R. at __). At times, the City was requested by Republic to assist in certain other repairs to certain facilities and the City obliged rather than contracting the services out, as the City would have to pay for the repairs regardless. (Tr. at 207:18-208:16, R. at __). Those maintenance requests came directly from Republic. (Tr. at 208:3-5, R. at __).

Republic never did anything other than some inspections during the day, used the "eyeball test," and never alerted the City of any deficiencies even though Republic was the one on the ground operating and controlling the Lot. Republic's own inspection form contains a section on lighting, but as Mr. Skelton testified, Republic only uses the "eyeball" test and employs no employees who have expertise in evaluating lighting. (Tr. at 193:2-202:25, Dep. of Skelton at 25:11-24, 45:3-11, P. Tr. Ex. 11, R. at __). Even Republic's local manager and the maintenance director were confused as to their responsibility with regard to hazards. (Tr. at 365:20-371:10, 411:5-416:4, R. at __).

Based on the above, there can be no question that sufficient evidence existed which gave rise to more than one inference in relation to Republic undertaking a voluntary duty by way of the Agreement and otherwise, to keep the lot safe from hazards and to bring safety concerns to the City.

ii. The Agreement and other facts in the record provide sufficient evidence for the trial court's denial of Republic's motions for directed verdict and JNOV as well as for the jury's conclusion that Republic controlled the Lot as an occupier.

Colleen Carducci, the City's Director of Real Estate Management, managed the City's relationship with Republic and also took part in the selection of Republic in the 2008 Agreement. (Tr. at 193:1-14, 198:3-9, R. at __). She testified at trial that the City turned over to Republic control of the Lot and all facilities and relied upon Republic to manage and operate the Lot whereby Republic controlled access, hired and fired its own employees which were on-site during all hours of operation, hired supervisors and managers, collected all money, managed all day-to-day operations, was in-charge of maintenance and responsible for keeping the lots free from hazardous conditions. (Tr. at 198:5-202:25, R. at __). The City retained no management over any parking facilities and Republic had a duty under the Agreement to indemnify the City for any injuries to persons in the course of performance under the Agreement. (Tr. at 195:10-13, P. Ex. 7, R. at __).

Although Republic spends much time arguing the point that Republic did not construct or design the lot, Mr. Skelton, a lawyer and Regional Vice President of Republic testified that irrespective of who built or designed the Lot, when Republic took over the management and operation of the City's parking facilities, Republic was responsible for keeping the Lot free from hazardous conditions (to include lighting) and that after the management agreement was in effect, the physical facilities of the Lot (to include others) became the responsibility of Republic.

(Dep. of Skelton, 92:7-14, 93:16-21, P Ex. 7, R. at __). Mr. Skelton did not even know what the design of the lot called for. (Dep. of Skelton, 92:15-18, R. at __).

Even though Republic only eyeballed the lighting, Republic was supposed to, as a matter of course, monitor the lighting conditions for facilities under management by visual inspections. (Dep. of Skelton, 39:7-22, R. at __). Mr. Skelton also testified that as part of Republic's obligations, Republic had an obligation under the management agreement to keep the facilities free from hazardous conditions. (Dep. of Skelton, 38:19-24, Management Agreement (Tr. Ex. 7, R. at __).

Republic will likely argue that the Management Agreement did not create a duty to Mr. Burke because the language in the agreement does not create benefit to third parties. This argument is unpersuasive because the obligations of Republic in the Management Agreement go to and support the level of control Republic had over the Lot and the voluntary undertaking of the duties.

Much like the evidence of Republic's voluntary undertaking, there is also evidence that points to Republic's status as the occupier in control of the lot. Therefore, the trial court's finding of duty on the basis of control and occupation should not have been overturned as a result of Republic's motions for directed verdict and JNOV.

iii. The Agreement and other facts in the record provide sufficient evidence for the trial court's denial of Republic's motions for directed verdict and JNOV and the jury's conclusion that Republic possessed greater expertise than the City on issues of parking lot management and lighting specifically.

Mr. Skelton testified that Republic was an expert in the area of a parking management system. (Dep. of Skelton, 92:23-93:8, R. at __). Skelton confirmed every employee of Republic is obligated to note any safety hazards and any lighting issues on the Lot. (Dep. of Skelton, 44:24 – 45:11, R. at __). Although Republic's employees did complete quarterly inspection reports,

those reports were performed by employees with no particular training in lighting, and those reports were simply sent to a corporate department where they stayed. (Dep. of Skelton, 45:5-11, 45:14 – 47:25, 48:1-4, P Tr Ex. 11, R. at __).

The City was not in the parking management business and therefore, it hired a national company like Republic with expertise to manage and control the City's parking facilities. (Tr. at 194: 7-10, 208:17-25, R. at __). The testimony of Mr. Skelton's together with Ms. Carducci's fully support the fact that the City retained no control over any parking facilities and turned over complete control to Republic. (Tr. at 195:10-13, R. at __). Republic managed the day-to-day operations of the lots and was in-charge of maintenance for the lots, as well as responsible for keeping the lots free from hazardous conditions. (Tr. at 199:20-202:25, R. at __).

Republic makes a passing argument that the City had a non-delegable duty. Republic does not actually articulate how or why this purported non-delegable duty applies to the Lot or the facts of this case. Nevertheless, this argument is unpersuasive in this case. In Dolan v. City of Camden, the Supreme Court found that the municipality retained liability based upon a statute which waived immunity for the municipality for injury or death occurring on a highway within such municipality. Dolan v. City of Camden, 233 S.C. 1, 103 S.E.2d 328, 330-31 (1958). In addition, and most importantly as it relates to this case, the Court reasoned that the legislature intended to preserve the fundamental responsibility of a municipality which has full and complete control of those public streets and highways within its limits. Id. Here, the facts are that the City turned over complete custody and control of a parking lot to Republic. Republic had all the control based on the evidence.

Given the foregoing, the evidence fully supports the trial court's denial of Republic's motion for directed verdict, denial of Republic's motion for JNOV and the trial court's refusal to enter judgment in favor of Republic on the issue of duty.

B. Sufficient evidence was presented related to Republic's management, operation, control and occupation of the lot which evidence yielded more than one inference as to whether Republic had actual and constructive knowledge of the deficient lighting and deficient lot and therefore, the trial court properly denied Republic's motions for directed verdict and JNOV.

The question of whether Republic had actual or constructive notice of the deficient lighting or Lot is one of fact for the jury unless material facts are not in dispute. Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 389, 701 S.E.2d 776 (Ct. App. 2010). Republic argues the trial court erred in denying its motion for directed verdict and its motion for JNOV. By the facts presented regarding Republic's management of the Lot, operation of the Lot, control of the Lot, occupation of the Lot with employees, supervisors and maintenance personnel, sufficient evidence existed to lead to more than one inference as to notice and the case was properly submitted to the jury. Neither a directed verdict nor judgment notwithstanding the verdict can be granted unless only one reasonable inference can be drawn from the evidence. Sauers v. Poulin Brothers Homes, Inc., 328 S.C. 601, 493 S.E.2d 503, 504-05 (Ct. App. 1997).

Mr. Burke was an invitee in the Lot. Sims v. Giles, 343 S.C. 708, 716-718, 541 S.E.2d 857 (Ct. App. 2001). Although the operator of a parking lot is not an insurer of the safety of those who use the lot, reasonable care must be used by the operator to keep the premises used by invitees in a reasonably safe condition. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 331, 673 S.E.2d 801 (2009). The degree of care required must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. Henderson v. St. Francis Comm. Hosp., 303 S.C. 177, 180, 399 S.E.2d 767 (1990). Furthermore, a jury can determine that the operator should have anticipated that an unsafe condition may cause an invitee

to fall and injure themselves. Id. The duty of the operator or occupier to an invitee is an active or affirmative duty. Sims at 719. A possessor of land is not liable to his invitees for physical harm caused to them by any activity of condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Id.

Republic argues that they had no actual or constructive knowledge of the deficient lighting in the Lot. Republic holds itself out to its customers as experts in parking with over 2,800 employees. (Tr. at 436:7-1, 443:24-444:6, Dep. of Skelton, 92:23-93:8, P Ex. 9, R. at __). It is hard to imagine how Republic can argue such a position based upon the evidence and it being in position to observe the Lot every hour it was in operation. Mr. Burke's expert, Alan Campbell, testified that the grossly inadequate lighting conditions at the Lot was a dangerous condition and should have been plainly obvious to a competent, qualified parking contractor, which Republic holds itself out as. (Tr. at 278:19-280:11, R. at __).

Republic had a Republic employee in the George Street Lot every hour of its operation from 1997 through the time of Mr. Burke's injuries on January 24, 2013. (Tr. at 200:21-201:4, R. at __). In addition, Republic had supervisors, maintenance personnel and managers on-site. However, the City had no parking employees, no employees on-site and the City is not in the business of parking management or operations. (Tr. at 199:17-201:21, R. at __). Republic's maintenance supervisor testified that he visited the Lot from 1997 through present twice a day, first thing in the morning and late in the afternoon. (Tr. at 346:9-17, 16-20, R. at __).

Republic had an affirmative obligation under the Agreement to maintain the Lot, perform frequent inspections, keep the Lot free from hazardous conditions, inspect the Lot to determine if any repairs or replacements of the Lot were necessary and to report any need for repairs to the City. (P. Ex. 7, R. at __).

Dwight Potter, the general manager of Republic's operations for the City of Charleston testified that he did not know that he was supposed to note safety hazards. He also testified that Republic could have put up cones so patrons did not park in certain areas in order to allow better egress, could have asked the City for another light or two, and could have marked areas with striping so folks would have a clear path. He also admitted that Republic had an obligation to seek out dangerous conditions and eradicate them for the safety of Republic's customers. (Tr. at 392:18-22, 411:22-412:2, 414:13-416:4, R. at __).

Mr. Skelton testified that Republic had a duty to notify the City if lighting was insufficient so the City could address it and that duty was undertaken by Republic together with a duty to evaluate dangerous conditions to include surface conditions, tripping hazards, lighting and signage. (Tr. at 442:5-13, R. at __). Mr. Skelton testified that every employee of Republic is obligated to note any safety hazards and any lighting issues on the Lot, inspect for dangerous conditions and report them to the city. (Dep. of Skelton, 44:24-45:11, Tr. at 441:18-442:17 R. at __). Mr. Denny, the maintenance supervisor for Republic simply stated that he adopted the eyeball test for lighting as well. (Tr. at 366: 16-22, R. at __).

An incident report for Mr. Burke's injuries was never performed despite a Republic policy requiring such reporting. (Tr. at 432:15-433:5, R. at __). Only a single paragraph written on lined paper was written after suit was filed by the employee working the night Mr. Burke was injured. (Tr. at 433:17-25, P Ex. 12, R. at __). The City was not even informed of Mr. Burke's incident or injuries until the instant lawsuit was filed, even though the City expected to be. (Tr. at 236:8:15, R. at __). Mr. Skelton, Republic's Vice-President responsible for the City Agreement was not even notified, along with the maintenance supervisors, until after the lawsuit was filed, despite a Republic procedure requiring that these reports be made. (Tr. at 362:2-10, 433:17-25,

434:13-17. R. at __). This evidence could have been viewed by the jury as reasons Republic never had any true reports of insufficient lighting or injuries therefrom as Republic's employees did not follow protocol in notifying Republic or the City in this instance or any previous instances.

Republic makes passing arguments in its brief related to the risk being open and obvious and that Republic had no reason to anticipate the harm. As the evidence was presented, Mr. Burke assumed that the Lot would be safe for his travels, did not expect to trip over a hidden object in his path which was obscured by insufficient lighting, and did not see any other marked means of egress. (Tr. at 126:10-14, R. at __). There is no evidence in the record that the object Mr. Burke fell over was open or obvious. The Lot was so dark that it concealed all methods of ingress and egress as well as dangers[3]. Sufficient evidence existed by which Republic should have anticipated the harm from a Lot which was illuminated darker than a darkened theatre.

Republic and its employees were the only people in the best position to observe the Lot and its conditions on a daily basis. Even when they looked, they simply "eyeballed" the light. Republic had an affirmative duty and obligation to seek out dangerous conditions, yet they did not do so. The lighting in the lot was a fraction of industry standards and darker than a darkened movie theater. More than one inference existed as to whether Republic was on actual or constructive knowledge of the poor conditions of the Lot since 1997 and therefore, the trial court properly denied the motion for directed verdict and motion for JNOV. The trial court properly charged the jury on actual or constructive notice and the jury found in favor of Mr. Burke. (Tr. at 558:15-559:11, R. at __).

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[3] Republic mentions in its brief that Burke chose to "hurry through the parking lot rather than slowing down or taking another route." (Appellant Brief, p. 14, ¶3). There is no evidence in the record that Mr. Burke hurried or failed to slow down or exercise caution. However, the jury did find Mr. Burke comparatively negligent in the amount of 20%. (Verdict Forms, R. at __).

II. THE TRIAL COURT COMMITTED NO ERROR IN FAILING TO GRANT REPUBLIC JUDGMENT AS A MATTER OF LAW RELATED TO FUTURE DAMAGES, TO THE EXTENT THE JURY EVEN AWARDED FUTURE DAMAGES, AND THE TRIAL COURT DID NOT ERR WITH RESPECT TO ITS CHARGE ON FUTURE DAMAGES OR ALLOWING TESTIMONY ON FUTURE DAMAGES.

As an initial matter, there is no evidence in the record or basis for Republic to even argue that the jury in this case awarded Mr. Burke future damages of any variety. Republic is simply speculating. The case was submitted to the jury under a general verdict form, without objection by Republic. (Verdict Form, R. at __). Republic never requested that the Court amend the verdict form in order for the jury to itemize the damages being awarded to Mr. Burke nor did it request a special verdict form as to an itemization of damages. Because Republic did not request an alternate verdict form for this purpose, nor did Republic object to the verdict form used in this case, this argument is not preserved for appeal and has been waived.

Mr. Burke testified that his medical care alone cost approximately $300,000.00. (Tr. at 698:15-699:20, P Ex. 16, R. at __). Mr. Burke spent approximately one month at the Medical University of South Carolina, three to four weeks at Roper Rehabilitation Hospital and then five to six weeks of home health care. (Tr. at 687:21-688:20, 696:2-697:7, R. at __). Mr. Burke, his wife Jane Burke, his daughter Ashlyn Burke, and his son Robert Burke, all testified extensively to the extreme pain and suffering which was suffered by Mr. Burke from the incident at the hands of Republic, including his two month hospitalization, his long rehabilitation, as well as his loss of enjoyment of life, emotional injury, and alteration of lifestyle. (Tr. at 681:12-703:24, 760:17-779:13, 791:23-804:21, 871:9-891:3, R. at__).

Mr. Burke adequately provided evidentiary support for his medical damages as well as his pain and suffering, mental anguish, alteration of lifestyle, psychological trauma, emotional injury, depression, loss of enjoyment of life, future assisted living expenses and future medical

care. Ashlyn, Mr. Burke's daughter, read a letter to the jury which she received from her father when Mr. Burke believed he was going to die from his injuries. (Tr. at 778:3-779:13, R. at __). The trial court also charged the jury on all of these facets of damages. (Charges, Tr. at 942:3-959:17, R. at __).

Mr. Burke was in a wheelchair, unable to dress himself, unable to drive, unable to use the restroom by himself, unable to shower by himself. Mr. Burke endured months of pain and suffering in hospitals and home care. (Tr. at 681:12-703:24, 760:17-779:13, 791:23-804:21, 871:9-891:3, R. at__). Mr. Burke was an active man prior to January 24, 2013, travelling with his wife, dancing with his wife and friends, playing with his grandchildren, attending basketball games, walking for exercise, and truly enjoying life. (Tr. at 681:12-703:24, 760:17-779:13, 791:23-804:21, 871:9-891:3, R. at__). That all ended on the night of January 24, 2013.

Mr. Burke argued to be awarded damages in the form of medical expenses to include hospitalization, physicians, rehabilitation and physical therapy. Mr. Burke also argued for pain and suffering, mental anguish, alteration of lifestyle, psychological trauma, mental distress, emotional injury, depression and loss of enjoyment of life. Finally, Mr. Burke argued for future assisted living expenses, future medical expenses and future pay. The jury could have awarded Mr. Burke his actual medical expenses and pain and suffering. The jury could have awarded Mr. Burke his medical expenses, pain and suffering and loss of enjoyment of life. The jury could have awarded him minimal or no future damages.

South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages. Vincent v. Hartley, 324 S.C. 389, 408, 477 S.E.2d 715 (Ct. App. 1996). When there are several issues in the case submitted to a jury under full instructions, a general verdict in favor of one or the other parties, in the absence of objection to the verdict not having passed

upon the several issues separately, will be held to have concluded all the issues. Id.; Todd v. South Carolina Farm Bureau Mut. Ins. Co., 283 S.C. 155, 162-163, 321 S.E.2d 602, 606-607 (Ct. App. 1984)(also holding that any perceived injustice occasioned by this rule is always in the hands of the defendant to request a special verdict and having failed to do so and to submit the case to the jury on a general verdict, cannot now be heard to challenge the validity of the verdict).

The jury returned a general damages verdict in favor of Mr. Burke in the amount of $4,005,125.00. There is ample evidence to support the jury award on Mr. Burke's damages aside from any future damages. Republic was not entitled to judgment as a matter of law and therefore, the trial court should be affirmed on this argument.

To the extent the jury even awarded Mr. Burke future damages; the trial court properly instructed the jury on the issue of awarding future damages as well as of reducing any award to present value. (Written Charge, Tr. at 942:3-959:17, R. at __)[4] There is no requirement in this State that an expert must present evidence to the jury on the specific reduction of any future damages to present value. It should be noted that the jury requested a calculator in a jury note, presumably to assist with their calculations and reductions, if they indeed did award future damages. (Ct Ex 15, Tr. at 962:3-8, R. at __). In addition, as the trial court stated while hearing Republic's motion for JNOV on this issue, the jury could have very well initially awarded Mr. Burke a larger verdict and then reduced it to present day value and applied the mortality tables.

> I'm also comfortable with the charge. That's the charge that is given in so many cases concerning reducing it to present day value. You say, "well, there's nothing to indicate that they reduced it to present-day value." I don't know that. But they

[4] As in the liability phase of the trial, the jury requested the trial court's written charge and the complete written charge was given to the jury without objection. (Tr. at 961:13-17, Damages Charge, R. at __).

could have come back and said, you know, it's worth ten million dollars and we'll reduce it to the present day value. So that's the beauty of the jury.

(Tr. January 29, 2015 at 23:6-15, R. at __).

Republic also makes argument that the trial court erred in allowing the plaintiff to present evidence of future damages because the plaintiff did not have an expert to reduce the damages to present value. There is no prohibition in presenting evidence of future damages until and unless an expert is present to testify as to present value. With the mortality table information, a calculator and the evidence, the calculations of present value are within the common knowledge of the jury. The trial court committed no error with allowing the testimony.

Because the trial court properly instructed the jury on future damages and properly instructed that the jury must reduce any future damages award to present value, the trial court committed no error of law and this issue should be affirmed by this Court. An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

III. THE TRIAL COURT DID NOT ERR IN DENYING TO DIRECT A VERDICT IN FAVOR OF REPUBLIC RELATED TO WHAT REPUBLIC CONTENDS ARE UNFORSEEABLE DAMAGES.

Proximate cause is a question of fact for the jury. Hill v. York County Sheriff's Dept., 313, S.C. 303, 437 S.E.2d 179, 181 (Ct. App. 1993). In a negligence action, the plaintiff must prove proximate cause. Vincent v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715 (Ct. App. 1996). Negligence is not actionable unless it is the proximate cause of the injury. Id. Proof of proximate cause requires proof of causation in fact and legal cause. Id. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability. Id. Foreseeability is determined by looking to the natural and probable consequences of the act complained of. Id.

A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence. Id. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the person charged with negligence should have contemplated the particular event which occurred. Id. at 401. It is sufficient that he should have foreseen his negligence would probably cause injury to someone. Id. A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. Id. The issue of proximate cause may be resolved by direct or circumstantial evidence. Id. Legal cause or "foreseeability" is a question of fact for the jury. Id. at 402. Only in rare or exceptional cases and when the evidence is susceptible to only one inference does the issue of proximate cause become a matter of law for the court. Id.

The trial court properly denied Republic's motion for a directed verdict based on its conclusion that proximate cause is a fact issue for the jury and because the evidence did not only yield one inference, taking such evidence in the light most favorable to Mr. Burke. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126, 130 (1999) (Tr. at 900:13-901:21, R. at __). Additionally, the trial court ruled that the trial court would charge the jury on proximate cause and foreseeability and allow the jury to make the determination. (Tr. at 900:22-901:16, R. at __).

Additionally, as stated above, there was plentiful evidence related to Mr. Burke's damages caused by the fall. These damages began at the moment of impact to his body, causing bleeding, swelling, acute kidney trauma, and a knee injury. These damages continued through months of hospitalization and outpatient care, his knee surgery, subsequent blood poisoning due

to the surgery and dialysis. The jury properly found that the negligence of Republic was both the causation in fact and the legal cause of all of Mr. Burke's damages and injuries.

The trial court properly charged the jury on proximate cause and foreseeability. (Tr. 539:23-572:2, 942:3-959:16, Charges, R. at __). This Court should affirm the trial court.

IV. REPUBLIC WAS NOT ENTITLED TO A NEW TRIAL AND THE TRIAL COURT DID NOT ERR IN DENYING REPUBLIC'S MOTION FOR A NEW TRIAL.

An appellate court will not disturb a trial court's decision granting or denying a new trial unless that decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law. Steinke v. S.C. Dept. of Labor, Lic. & Reg., 336 S.C. 373, 386, 520 S.E.2d 142 (1999).

A. The trial court properly charged the jury and committed no error.

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528 (2000). When reviewing a charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408 (Ct. App. 2000). Furthermore, if the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error. Id. A jury charge that is substantially correct and covers the law does not require reversal. Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 415, 717 S.E.2d 765 (Ct. App. 2011).

When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528 (2000). The trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved. Id.

Moreover, even if the trial court erred in failing to give a requested instruction, the requesting party also must show that the error was prejudicial to warrant reversal on appeal. Id.

1. The trial court committed no error by not giving the proximate cause charge which Republic contends is error and the trial court properly charged the jury in the liability phase of the trial.

As an initial matter, Republic has waived this argument with respect to alleged error in the trial court's charge related to proximate cause in the liability phase of the trial and such cannot be considered on appeal. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Creech v. S.C. Wildlife and Marine Resources Dept., 328 S.C. 24, 36, 491 S.E.2d 571 (1997); Rule 51, SCRCP. Republic did not do so with respect to a proximately caused damages charge in the liability phase and therefore, this argument should not be considered on appeal.

Republic demanded and was awarded a bifurcated trial. As such, the trial court was explicit in its position that proximately caused damages was not going before the jury in the liability phase[5].

> The Court: So – and therein we get to the proximate cause issue, which is not going to go before the jury in this stage, but will go to the jury in the second stage. Before they can award damages they have to be proximately caused by negligence. (Tr. at 449:17-21, R. at __).
>
> The Court: Proximate cause, I'm not going to – as I've stated, I'm not going to give it at this point. Everything you have in that charge is in my general charge, but for the damages aspect. (Tr. at 469:13-18, R. at __).

Republic never objected or challenged the trial court on this issue of charging proximate cause in the liability phase. Moreover, following the charge of the jury, Republic never took exception to the trial court's form of charge with respect to proximate cause before the jury

[5] The trial court gave a full proximately caused damages charge in the damages phase of the trial. (Tr. at 942:3-959:17, Damages Charge, R. at __).

retired to consider the verdict. (Tr. at 572:3-575:25, R. at __). Republic only took exception with the trial court's charge following the verdict on liability. (Tr. at 631:3-643:10, R. at __). For these reasons, the argument is waived on appeal. To the extent that Republic has not waived its argument, the trial court properly charged the jury in the liability phase of the trial and committed no error by not giving the proximately caused damages charge that Republic contends was error.

As pointed out by Republic in its brief, Republic moved and insisted on a cumbersome bifurcated trial of liability and damages over the objection of Mr. Burke. (Tr. at 58:1-70:15, R. ___). Because of the nature of the bifurcated trial, the trial court did not allow either party to present evidence of proximately caused damages in the liability phase. The trial court allowed enough evidence of damages in order to direct a verdict later in the case that some amount of damages were sustained by Mr. Burke, which Republic agreed to and which Republic stipulated to in its brief. (Tr. at 70:1-15, R. at __). As a condition of granting Republic's motion to bifurcate the trial, the trial court stated that if some level of damages were proven, it would direct a verdict in the damages phase of some level of actual damages being sustained by Mr. Burke. (Tr. at 72:6-74:20, R. at __).

Proximately caused damages were not before the jury in the liability phase. The issue could not have been before the jury as neither party was permitted to offer evidence of proximately caused damages. Because of such, no robust proximately caused damages charge was necessary in the liability phase, despite Republic's argument on appeal.

Republic contends that the trial court did not charge proximate cause in the liability case. However, the trial court properly charged the jury on this issue in the context that was required in

the liability phase of the trial. (Tr. at 539:1-572:2, Liability Charge[6], R. at __). The trial court charged the jury on all aspects of negligence as it related to this case and also charged the jury that the plaintiff must prove a breach of that duty, and that some injury resulted as a result of the breach. (Tr. at 554:12-14, R. at __). Furthermore, the trial court did charge the jury that the negligence had to proximately cause the parties injuries. (Tr. at 568:23-25, R. at __).

Republic insisted on a bifurcated trial. A bifurcated trial by its definition means that the issues are so distinct that a trial on each alone will not result in injustice to the extent that separate juries can even hear the liability phase and the damages phase. Fortune v. Gibson, 304 S.C. 279, 282-283, 403 S.E.2d 674 (Ct. App. 1991). The trial court concluded that a bifurcated trial of liability and damages was proper, bifurcated the liability phase of the trial from the damages phase of the trial, and properly charged the jury with respect to each phase. Had the jury not found that Mr. Burke's injuries were proximately caused by the negligence, the jury would have returned an appropriate verdict in the damages phase.

Republic has not preserved this issue for this appeal. To the extent the issue is preserved, the trial court properly bifurcated the trial and properly instructed the jury and therefore, committed no error.

2. The evidence in the case fully supported Republic being an occupier of the Lot and therefore, the trial court properly charged the jury.

As Republic argues, the law to be charged to the jury is determined by the evidence presented at trial. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). There is substantial evidence in the record cited above supporting that Republic was in control of the Lot and an occupier for purposes of premises liability. An invitee is a person who enters onto the

[6] The trial court's written charge was requested by the jury in the liability phase and the entire written charge was given to the jury to use in deliberations without objection from either party. (Tr. at 576:1-577:25, Tr. Ex. 7, R. at __).

property of another at the express or implied invitation of the business operator. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827, 831 (Ct. App.1997). An independent contractor or servant to whom the owner or possessor of land turns over the entire charge of the land is subject to the same liability for harm caused to others, upon or outside of the land, by his failure to exercise reasonable care to maintain the land in safe repair as though he were the possessor of the land. *Restatement (second) of Torts § 387 – Persons Taking Over Entire Charge of Land.*

One who controls the use of property has a duty of care not to harm others by its use. Conversely, one who has no control owes no duty. Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (S.C. 1997). The general rule with respect to general property defects is that an occupier or possessor of land owes an invitee "the affirmative duty to use reasonable care to discover unreasonably dangerous conditions of the premises and either put the premises in a reasonably safe condition for use in a manner consistent with the purpose of invitation or warn him of the danger." Hughes v. Children's Clinic, P.A., 269 S.C. 389, 400, 237 S.E.2d 753 (1977). Our case law utilizes the term occupier and owner synonymously with respect to premises liability cases. Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857, 721 (Ct. App. 2001); Lynch v. Motel Enterprises, Inc., 248 S.C. 490, 494, 151 S.E.2d 435 (1966); Vogt v. Murraywood Swim and Racquet Club, 357 S.C. 506, 510, 593 S.E.2d 617 (Ct. App. 2004).

Republic continues to argue that it was not an owner, not an occupier and had no control of the Lot and was only performing its duties under the Agreement. (Appellant Brief, 21-22). The Agreement alone requires Republic to take control of the Lot and facilities, place employees, manage, operate, staff, maintain, keep the Lot free from hazardous conditions and report any deficiencies to the city. (Agreement, R. at __). Substantial evidence existed and established that

Republic exerted the proper amount of control to be deemed the possessor and occupier of the lot and the trial court committed no error in properly charging the jury based on this evidence. Furthermore, based on the testimony and evidence, the jury properly found that Republic exerted the necessary amount of control to be deemed an occupier.

When questioned by the trial court related to its motion, Republic could not even articulate to the trial court how it should be classified for premises liability purposes based on the facts in this case, only that it was "an independent operator there pursuant to the terms of our management agreement." (Tr. at 451:15-453:25, R. at __). Having heard the evidence, the trial court properly charged the jury with respect to the proper premises liability law. (Tr. 539:23-572:2, 942:3-959:16, Charges, R. at __). This Court should affirm.

3. The trial court adequately charged the jury with respect to the plaintiff's burden of proof.

Republic assigns error to the trial court's charge on burden of proof, even though the charge given by the trial court was substantially identical to the charge requested by Republic. The trial court committed no error in its charge and properly charged the jury with respect to the burden of the Plaintiff. (Republic Req. to Charge 8, Tr. at 471:25-474:25, Written Charge[7], Tr. at 552:25-553:17, R. at __)

The trial court committed no error in this charge and properly instructed the jury in conformity with the request from Republic. The case cited by Republic in support of this argument supports the charge given by the trial court and therefore, the trial court should be affirmed as there was no error. O'Neal v. Carolina Farm Supply of Johnston, Inc., 279 S.C. 490, 493-494, 309 S.E.2d 776 (Ct. App. 1983).

[7] Pursuant to a note from the jury, the jury requested that the trial court allow the jury to have the trial court's charge with them in deliberations. Without objection from counsel for Mr. Burke and from counsel for Republic, the trial court allowed the jury to have a copy of its written charge. (Tr. at 576:1-577:25, Court Ex. 7, Charge, R. at __).

4. The trial court properly charged the jury on reducing any future damages, to the extent any were awarded, to present value.

As argued above, there is nothing in the record to support that the jury awarded Mr. Burke future damages as opposed to medical damages for his care, loss of enjoyment of life and pain and suffering. In addition, the trial court properly charged the jury that any future damages must be reduced to present value. For these reasons, the trial court committed no error and the trial court should be affirmed.

B. The trial court did not err in its evidentiary rulings and should be affirmed.

A trial court has broad discretion as to the admission of evidence and testimony and its decision will be overturned only for an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 385, 529 S.E.2d 528 (2000). Evidentiary rulings are subject to an abuse of discretion standard and will only be reversed upon a showing of error and prejudice. Crowley v. Spivey, 285 S.C. 397, 410, 329 S.E.2d 774, 782 (Ct. App. 1985).

1. The trial court properly excluded Dr. Todd Shuman, Republic's purported expert, because Republic failed to disclose him as its expert witness prior to trial.

This case was filed on March 8, 2013 and Republic has been a party since that time. (Filed Summons and Complaint, R. at __). At no time during the entire pendency of this case did Republic *ever* identify or disclose an expert witness in discovery who would testify on its behalf at the trial of this case. Republic admitted to the trial court that it did not disclose or identify an expert in discovery, but simply added Dr. Shuman to its trial brief as an expert witness the Friday night before the Monday morning trial. (Tr. at 47:23 -49:18, Republic Trial Brief, R. at __).

Republic contends that Dr. Shuman was identified as an expert by the *City* and Republic "had agreed to pay half of his fee," but there is no evidence in the record that indeed Republic

had such an agreement. Rather, the City and Republic never paid Dr. Shuman anything in this case. (Tr. at 46:6-15, R. at __). The *City* only designated Dr. Shuman as an expert for "Defendant City of Charleston," not as a joint expert for the benefit of Republic, and there was no notice of a joint designation or cost splitting as Republic now argues. (City Expert Designation, R. at __). Nevertheless, Republic never placed Mr. Burke on any form of notice that Dr. Shuman was a shared expert or that Dr. Shuman would be testifying in any regard for *Republic's* defense.

Republic was on notice that Mr. Burke was in the process of settling with the City from the joint mediation which occurred on November 3, 2014. In addition, Republic was certainly on notice that Mr. Burke had settled with the City on December 12, 2014, when Mr. Burke filed a Motion to Dismiss Jane B. Burke as a plaintiff, and the City and Indigo Realty Company, LLC as defendants. Republic was on notice even before December 12, 2014 that Mr. Burke had settled with the City because Republic took exception with Mr. Burke filing a stipulation of dismissal of the City and Republic filed a motion to strike the stipulation of dismissal on December 11, 2014, which then prompted Mr. Burke to file a motion to dismiss Jane B. Burke as a plaintiff, and the City and Indigo Realty Company, LLC as defendants. (Burke Motion to Dismiss, Burke Stipulation of Dismissal, Republic Motion to Strike, R. at __). Despite such notice, Republic took no action to supplement its discovery in order to identify or disclose an expert.

The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal. Jenkins v. Few, 391 S.C. 209, 218, 705 S.E.2d 457, 462 (Ct. App. 2010). Also, where a party fails timely to disclose the identity of an expert witness, the question of whether the witness' testimony may be received in evidence is left largely to the discretion of the trial judge. Id. at 218-219. Pursuant to Rule 33(b)(6), SCRCP,

counsel has a duty to disclose any expert witnesses whom the party proposes to use as a witness at the trial of the case. Id. at 219. This rule imposes an ongoing duty to supplement interrogatory answers to reflect the addition of a witness or the intention to call a listed witness as an expert. Id.; Rule 33(b), SCRCP. The trial court has the discretion to determine whether a sanction is warranted for a violation of Rule 33(b)'s continuing duty to disclose information. Id.

In deciding to exclude a witness, a trial court is to evaluate the issue in the context of the following factors: 1) the type of witness involved; 2) the content of the evidence emanating from the proffered witness; 3) the nature of the failure or neglect or refusal to furnish the witness' name; 4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and 5) the prejudice to the other party. Jumper v. Hawkins, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001). However, the trial court need not specifically enunciate the factors from Jumper in its analysis and it is not reversible error to not do so. Arthur v. Sexton Dental Clinic, 368 S.C. 326, 339, 628 S.E.2d 894, 901 (Ct. App 2006)

This Court has decided that with regard to a witness who has been previously listed as a witness, but not an expert witness, and a party then attempts to call such a witness as an expert, the following factors should be used: the type of witness involved, the content of the evidence, the explanation for the failure to name the witness in answers to interrogatories, the importance of the witness' testimony, and the degree of surprise to the other party. Bensch v. Davidson, 354 S.C. 173, 580 S.E.2d 128 (2003)(deciding issue of expert witness exclusion in case where intended expert was only listed as a fact witness); Jenkins v. Few, 391 S.C. 209, 219, 705 S.E.2d 457, 462 (Ct. App. 2010).[8]

[8] Republic contended to the trial court that it had listed Dr. Shuman as a fact witness, but not an expert witness, but the record is void of evidence that Republic ever listed Dr. Shuman in any form of discovery response. (Tr. at 45:10-49:23, R. at __).

The trial court properly and adequately evaluated the Plaintiff's motion to exclude Dr. Shuman, a proposed expert, on the basis that Republic never identified an expert witness in response to the interrogatories propounded on Republic, and simply only listed Dr. Shuman as an expert witness in its trial brief submitted before trial. The trial court heard argument as to and considered 1) the type of witness; 2) the content of the witness' testimony; 3) the nature of the failure, refusal or neglect in Republic identifying Dr. Shuman as an expert witness; 4) the degree of surprise to Mr. Burke; and 5) the prejudice to Mr. Burke. (Tr. at 43:24-49:23, R. at__). It should be noted that Mr. Burke contended that the prejudice was related to Mr. Burke's decision to settle with the City as the City had an expert, and Republic did not and Republic not having an expert was part of Mr. Burke's settlement and trial strategy with respect to settling with the City. (Tr. at 46:24-48:5, R. at__). Mr. Burke's decision to settle with the City and proceed against Republic was directly related to the issue of experts and Mr. Burke would have been prejudiced if the trial court had allowed Dr. Shuman to testify as Mr. Burke's settlement and trial strategy was premised on this issue. Furthermore, the trial court considered the content of the witness' testimony and Republic proffered an earlier deposition of Dr. Shuman as the City's expert. (Tr. at 43:24-49:23, 643:12-644:9, R. at__). The trial court properly ruled within its broad discretion related to the admission of testimony and the exclusion of a witness due to the failure of Republic to disclose an expert in discovery. Jenkins v. Few, 391 S.C. 209, 218-19, 705 S.E.2d 457, 462 (Ct. App. 2010).

2. The trial court did not err in allowing plaintiff's expert Dr. Marshall White to testify as to matters within his education, training and experience.

Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the trial court. Fields v. Regional Medical Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506 (2005). Similarly, the admission or exclusion of evidence in

general is within the sound discretion of the trial court. Id. In both instances, the trial court's decision will not be disturbed on appeal absent an abuse of discretion. Id. The trial court properly ruled within its discretion related to Dr. Marshall White and its ruling should not be disturbed on appeal.

Republic argues that with respect to Dr. Marshall White, Republic was the victim of "trial by ambush" and "less able to defend itself." (Republic Brief, p. 25, ¶ 1). However, what Republic failed to tell the Court is that Republic was on notice that Dr. White would be called as an expert by Mr. Burke for over a year prior to the trial and Republic failed to take a discovery deposition of Dr. White. (Burke Supp. Disc. Response Dec. 2, 2013, R. at __).

Mr. Burke's supplemental discovery response dated December 2, 2013 expressly stated that Dr. White will testify about his consultations with Mr. Burke, his review of the records, his diagnosis, current medical conditions, future health issues, expected future medical treatments/procedures and related items. (Burke Supp. Disc. Response Dec. 2, 2013, R. at __).

Had Republic taken Dr. White's deposition, Republic would have been fully apprised of the extent of his testimony, better prepared for trial, more able to defend itself and not a victim of a so called "ambush" as argued by Republic. Dr. White's education, training and experience are as follows: Dr. White is a medical doctor who received his degree from The Citadel in 1982 and his medical doctor degree from the University of South Carolina in 1986. (Tr. at 818:9-819:16, R. at __). Dr. White has completed an internship in internal medicine at the Medical University of South Carolina, a year of psychiatry training, residency in neurology, and is board certified in neurology by the American Board of Psychiatry and Neurology. Id. In addition, at the time of trial, Dr. White had been treating patients in private practice for twenty-four (24) years. Id.

In its brief, Republic generally argues that "the trial court let him [Dr. White] testify to numerous matters that fall well outside the field of neurology, including but not limited to knee replacement surgery, kidney function, and dialysis. (Appellant Brief, p. 24, ¶ 2). However, Republic does not specifically make argument to the specific questions, testimony and rulings by the trial court that they now assign error to.

The first question that Republic appears to contend was error for Dr. White to answer related to Mr. Burke's INR level at the time of his injuries. (Tr. at 825:12-826:18, R. at __). Republic objected on the basis that Dr. White was testifying "beyond the field of neurology and pain management. (Tr. at 825:12-19, R. at __). The trial court noted and overruled the objection as follows: "Based on his overall qualifications and his experience, I'm going to allow him to render opinions in those areas. He's a physician, been treating people twenty-four, twenty-five years." (Tr. at 825:12-25, R. at __). Furthermore, Dr. White testified that he manages patients' Coumadin levels [INR] with prescription medication, treats patients' warfarin therapy and prescribes Coumadin to patients. (Tr. 864:15-24, R. at __). Dr. Sakran, Mr. Burke's treating trauma surgeon from the Medical University of South Carolina, also testified at trial through a video deposition for trial and rendered the same opinion regarding INR level without objection. (Court Exhibit (Video) 12B,12C,12D at 09:50, 19:30-20:15, Tr. at 814:7-816:24, Court Exhibit 12A Sakran Depo Trans. at 15:1-15, 26:2-27:25; R. at __).

The trial court found Dr. White competent to answer the above question based upon his education, training and experience and such was not error. (Tr. at 825:12-25, R. at __). In addition, to the extent it was error, which it was not, Republic was not prejudiced as Dr. White's testimony was simply cumulative of Dr. Sakran's previous testimony and to the extent there was error, it was harmless. Fields at 32-33.

The second question in the record that Republic appears to contend was error for Dr. White to answer related to Dr. White's opinion of the cause of Mr. Burke's right knee pain. (Tr. at 828:22-829:19, R. at __). Republic again objected on the basis that Dr. White was testifying beyond the field of neurology and pain management. (Tr. at 829:3-19, R. at __). Dr. White is a pain management specialist. The trial court overruled the objection stating succinctly that the question related to the cause of pain, and the trial court found Dr. White extremely qualified to answer the question. (Tr. at 829:-19, R. at __). The trial court properly allowed the testimony based on Dr. White's education, training and experience in pain management. He was extremely qualified to answer the question asked and the trial court committed no error in overruling the objection.

The third question in the record that Republic appears to contend was error for Dr. White to answer again related to Dr. White's opinion of the cause of Mr. Burke's right knee pain and ensuing surgery. (Tr. at 830:11-831:2, R. at __). For the same reasons as the previous question, the trial court properly allowed the testimony based on Dr. White's qualifications and no error was committed. (Tr. at 830:11-21, R. at __). In a fourth question to Dr. White, the trial court did sustain the objection related to Dr. White's testimony regarding what complications blood poisoning would cause. (Tr. at 838:17- 839-6, R. at __). Because the objection was sustained, there is no error for Republic to claim.

The fifth and final question which Republic objected to Dr. White answering related to his opinion of Mr. Burke's care based on Dr. White's evaluation of Mr. Burke's injuries, pain and condition. (Tr. at 840:13- 841:6, R. at __). It should be noted that Republic did not make a contemporaneous objection to the testimony before the question was answered and therefore, waived any objection to the question. It is unclear from the record what the basis of Republic's

objection to the question or testimony was, but the trial court properly found that Dr. White was qualified to answer the question based on his evaluation of Mr. Burke, his education, training and experience as a medical doctor. (Tr. at 840:13- 841:6, R. at __).

It should be noted that Republic, on cross examination, extensively examined and elicited testimony from Dr. White on the very same topics and subject matter that they now claim was error for the trial court to allow him to testify. (Tr. 843:110-866:21, R. at __). Republic made no other objections to Dr. White's testimony and extensively cross examined him following his direct examination. The trial court properly ruled within its discretion related to Dr. Marshall White and its ruling should not be disturbed on appeal.

Additionally, Republic only argues error, but not resulting prejudice of the alleged errors. To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence. Fields v. Regional Medical Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506 (2005). Republic has not proven the error or the resulting prejudice and therefore the trial court's rulings should not be disturbed on appeal.

3. The trial court did not err in its ruling on a portion of medical records Republic intended on admitting into evidence.

The admission or exclusion of evidence in general is within the sound discretion of the trial court. Fields v. Regional Medical Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506 (2005). The trial court made no errors with respect to the admission of a portion of the medical records. It should be noted, as the trial court pointed out, that Republic could have avoided this issue and had all records admitted had it authenticated the records pursuant to Rule 803(6), SCRE, but it chose not to do so nor resolve this issue prior to trial by way of a deposition. (Tr. 754:5-8, R. at __).

As best that can be understood with respect to Republic's argument on this issue, only three (3) records (Defendant's Exhibits 28, 30 and 31) which Republic intended on admitting were excluded by the trial court. The trial court properly evaluated these records under Rule 803(4), SCRE and excluded them because the trial court was unable to ascertain from the records whether the records fell within the hearsay exception as "a statement made for the purposes of medical diagnosis or treatment." (Tr. at 744:4 – 755:7, R. at __). The trial court noted that as for Defendant's Exhibits 28 and 30, these records contained conversation from Mr. Burke's doctors, not specifically a statement made by Mr. Burke for purposes of medical diagnosis or treatment. (Tr. at 744:4 – 755:7, R. at __). As far as Defendants Exhibit 31, the trial court found and excluded the record on the basis that the record was unclear whether it was a statement made for purposes of medical diagnosis or treatment, and furthermore, the record was a statement made after the commencement of litigation. (Tr. at 752:20 – 754:11, R. at __).

It should be noted that the trial court admitted a number of the medical records Republic sought to introduce where those records appeared to the trial court to be statements by Mr. Burke made for the purposes of medical diagnosis or treatment. (Tr. at 744:4 – 755:7, R. at __). The trial court made no error with respect to his rulings on these records. Furthermore, Republic could have admitted all of the records under Rule 803(6), SCRE had Republic properly authenticated the records, which it did not, as the trial court instructed Republic.

4. The trial court did not err in allowing Michael Capaccio to testify as a lay witness related to his perception under Rule 701, SCRE.

Michael Capaccio is a former basketball coach and a family friend of Mr. Burke and Mr. Burke's family. (Tr. at 780:11 – 790:24, R. at __). Mr. Capaccio has coached multiple basketball players who went on to play in the NBA. Id. Mr. Capaccio has known Mr. Burke since the mid-1990's and has observed him coaching, observed him coaching with Mr. Burke's daughter and

son, observed him dressed out and performing basketball drills on the basketball court and has observed Mr. Burke dancing just prior to his injuries. Id. Additionally, by crossing paths routinely, Mr. Capaccio knows a great deal about Mr. Burke's coaching career, his successes and Mr. Burke's respect in the basketball coaching profession. Id. Mr. Capaccio answered one question from his perception and observations of Mr. Burke which Republic contends was improper. The question posed to Mr. Capaccio was:

> Q: Mr. Capaccio, to your knowledge, is there a market for someone that has the same credentials and experience as Bob Burke does? (Tr. at 790:4-6, R. at __).

Following Republic's objection, the trial court overruled the objection under Rule 701, SCRE, finding that the testimony was based on Mr. Capaccio's observations and perception from his demonstrated personal understanding and knowledge that was demonstrated and within the purview of Rule 701, SCRE. (Tr. at 789:10 – 790:24, 806:8-807:4, R. at __).

The trial court did not abuse its discretion on this evidentiary ruling. Mr. Capaccio's testimony was within Rule 701, SCRE in that the testimony was rationally based on the perception of the witness, the testimony was helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and did not require special knowledge, skill, experience or training. Furthermore, Mr. Burke testified extensively as to his prospects of returning to work prior to his injuries, opportunities he was exploring, and pay ranges all without objection from Republic, and therefore Mr. Capaccio's testimony was merely cumulative. (Tr. at 669:11 – 673:20, R. at __).

V. REPUBLIC INSISTED ON A BIFURCATED TRIAL, OVER MR. BURKE'S OBJECTION, AND CANNOT NOW COMPLAIN OF THE BIFURCATED MATTERS.

Republic moved to bifurcate this trial between liability and damages over the objection of Mr. Burke. The trial court agreed to bifurcate the trial at the insistence of Republic. The

bifurcated nature of the trial required the trial court to exercise its discretion in only allowing liability evidence in the liability phase and then damages testimony in the damages phase. A party may not complain on appeal of error or object to a trial procedure which his own conduct has induced. Erickson v. Jones Street Publishers, 368 S.C. 444, 476, 629 S.E.2d 653 (2006).

1. There was no error committed by the trial court in Republic's opening statement or Republic's presentation of medical evidence in the liability phase of the trial.

In Section IV(B)(3) of Republic's brief, Republic contends that the trial court committed error by not allowing medical conditions in its "opening argument." However, as the trial court stated, Republic was making argument and not a statement, and that once the medical evidence was in evidence in the damages phase, Republic could make the argument to the jury in closing. (Tr. at 102:2-12, 105:11-107:18, R. at __). However, even though the trial court interrupted Republic in its opening statement and alerted Republic that it was going into damages, the trial court immediately corrected itself and stated that it would allow opening statement on those issues, presumably for Republic's comparative negligence defense. (Tr. at 102:2-21, R. at __). However, Republic chose not to give any more statement on that topic and moved onto another topic. Id. That was Republic's choice and it cannot complain on appeal about what it could have done, but chose not to.

Based on Republic's insistence to bifurcate the trial, the trial court properly controlled the medical injury testimony of both parties in the liability phase. Mr. Burke was prohibited from presenting medical injury testimony in this phase and so was Republic. The trial court properly exercised its function as the gatekeeper of testimony in this regard. Republic contends the trial court refused to allow evidence in the liability phase "to show his injuries were not caused by any action on the part of Republic." (Appellant Brief Section IV(B)(3)). However, the trial court actually did allow such testimony, asked Republic to reframe the questions to be germane to

liability, but Republic did not continue with the germane liability questioning. (Tr. at 134:8-25, R. at __). In addition, the trial court overruled Mr. Burke's objections to that line of questioning. (Tr. at 134:22-135:1, R. at __).

The trial court did not abuse its discretion based on the bifurcated trial and based on Republic's full opportunity to present this evidence in the damages phase of the trial, which it did. Republic had a full and fair opportunity to present its comparative negligence defense which was successful for Republic.

2. Republic was not prohibited from admitting evidence of control of the Lot and was not prohibited from admitting evidence of control of the Lot by the City.

In Section IV(B)(4) of Republic's brief, Republic contends it was prohibited from entering evidence related to control. Mr. Burke filed a motion *in limine* prior to trial which sought to prohibit testimony related to subsequent remedial measures. (P Mtn in limine, R. at __). The trial court ruled at the beginning of trial that the court could not rule on these issues in a vacuum and would have to hear the testimony and rule at that time. (Tr. at 43:1-44:24, R. at __).

Republic asked Colleen Carducci what action she initiated after receiving notice of Mr. Burke's injuries. (Tr. at 226:4-6, R. at __). After objection by Mr. Burke, the trial court sustained the objection after an off the record bench conference stating that the trial court was sustaining the objection at this point, in this portion of the proceeding and that issue could be revisited. (Tr. at 226:4-13, R. at __). There is no evidence in the record supporting that the trial court abused its discretion in not allowing the question at that point in the proceeding.

Additionally, Republic endeavored to ask Edward Anderson what he did after he learned of Mr. Burke's injuries. (Tr. at 380:23-24, R. at __). Following an off the record conference, Republic did not ask any further questions on this precise topic. (Tr. at 380:23-381:5, R. at __).

There is no evidence in the record as to this question that Republic sought to introduce evidence that was consistent with Rule 407, SCRE.

Republic had opportunity to present evidence of control or lack of control but actually decided not to do so. As argued below, Republic made a decision not to call additional witnesses, decided to not recall witnesses and decided not to read deposition excerpts, all of which Republic could have done on the issue of control, but it chose not to. (Tr. at 807:6-13, 808:6-809:24, R. at __). A trial court has broad discretion as to the admission of evidence and testimony and its decision will be overturned only for an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 385, 529 S.E.2d 528 (2000). Evidentiary rulings are subject to an abuse of discretion standard and will only be reversed upon a showing of error and prejudice. Crowley v. Spivey, 285 S.C. 397, 410, 329 S.E.2d 774, 782 (Ct. App. 1985). The trial court did not abuse its discretion and should be affirmed.

3. It would have been error for the trial court to allow allocation under S.C. Code Ann. §15-30-10 et seq. as Republic envisioned it and the trial court properly ruled regarding allocation in this case.

Republic contends that the trial court made inconsistent ruling throughout the trial regarding Republic's argument for allocation and perceived right to allocation. Republic actually interjected confusion to the trial multiple times by continuing to discuss allocation in relation to the bifurcation and furthermore, by insisting on the bifurcation of the trial. Republic's main goal was to have the City on the verdict form with Republic, even though the City was not a party at the commencement of trial. Republic's other goal was to present evidence and make argument that the City was at fault, which it could have done.

Actually, the trial court never ruled upon the issue as to whether Republic was entitled to special verdict on percentages of liability and oral argument on the "determination of the percentage attributable to each defendant" under S.C. Code Ann. §15-38-15(c)(3)(b) until much

later in the trial. It would have been error for the trial court to have allowed a special verdict on percentages of liability or subsequent oral argument after the damages verdict because Republic was the sole defendant and the provisions of S.C. Code Ann. §15-38-15 that Republic wanted to take advantage of only apply if there are more than one defendant[9]. The only provision which Republic could have taken full advantage of, but did not, was S.C. Code Ann. §15-38-15(c)(3)(D), the so called "empty chair" assertion.

When the trial court ultimately ruled on this issue, the trial court ruled that Republic was not entitled to apportionment under S.C. Code Ann. §15-38-15(c) including further argument after the verdict under subsection (c)(3)(b) or a special verdict on percentages of liability. (Tr. at 964:9-976:2, R. at__). The trial court reasoned that Republic was not entitled to such because 1) under S.C. Code Ann. §15-38-65, the City is a governmental entity and the Uniform Contribution Among Torfeasors Act shall not apply to governmental entities; 2) Republic was the only "defendant" and the statue only contemplates apportionment between two or more defendants; and 3) the Agreement between the City and Republic (Section 7.2) required Republic to indemnify the City anyway. (Tr. at 964:9-976:2, R. at__).

Republic argues that they were prejudiced in defending itself with regard to apportionment and allocation, but it is Republic who misconstrues the proper application of the Uniform Contribution Among Torfeasors Act and the trial court correctly ruled. Republic was not prejudiced at all because what Republic was seeking to do would have been contrary to the statute. Had the trial court allowed such, it would have been contrary to the statute. The trial

[9] Republic contends in its brief that the trial court granted the dismissal of the City and other parties on the condition that there would be an allocation. This is not accurate. The trial court told Republic that they were putting the cart before the horse. (Tr. at 40:13-17, R. at __). The trial court had not even had an opportunity to understand the case when it made initial commentary. When the trial court was presented with the proper law and after hearing the arguments, a correct ruling and application of the law was made.

court adequately advised Republic in the damages phase to put forth the evidence so that Republic could argue the "empty chair" defense in regard to the City. (Tr. at 633:3-634:25, 636:24-637:5, R. at __).

The trial court, upon a question from Republic, specifically told Republic that it needed to bring in all the evidence with regard to the City during this phase. (Tr. at 633:3-634:25, R. at __). The trial court even stated "you call whoever you want to." (Tr. at 633:3-634:5, R. at __). Notwithstanding, Republic decided that they would not recall any previous witnesses, but they would simply argue the evidence that the jury had already heard without recalling the witnesses (to support its empty chair defense). (Tr. at 636:13-24, R. at __). The trial court expressly stated that was Republic's choice, but they were free to put forward additional evidence. (Tr. at 636:24-637:5, R. at __).

Following the verdict on liability and at the beginning of the damages phase of the trial, the trial court still had not ruled on the allocation / apportionment argument of Republic even though Republic states that the trial court ruled pre-trial. (Tr. at 647:4-648:24, R. at __). Clearly, at the beginning of the damages phase, the trial court was still accepting argument from Mr. Burke that a settling defendant (the City) would not be subject to apportionment under S.C. Code Ann. §15-38-15(c). The trial court accepted case law and two U.S. District Court of South Carolina cases on the issue from Mr. Burke for further analysis for his ultimate ruling and stated "I'll make a determination." (Tr. at 647:4-648:2, R. at __). Republic stated "we understand, Your Honor" and the case progressed. (Tr. at 648:14-25, R. at __).

Deep within the damages portion of the trial, Republic was still contemplating putting in additional evidence to support its "empty chair" defense. The trial court asked if Republic was going to be calling witnesses and Republic responded that they would not, but they were working

on deposition designations. (Tr. at 807:6-13, R. at__). However, even though the trial court told Republic that it needed to put the evidence in before the close of evidence in order to argue about allocation should it be necessary later, Republic called no witnesses and did not publish any deposition designations to support its empty chair defense[10]. (Tr. at 808:6-809:24, R. at__). At the close of the damages portion of the trial, Republic stated it had no more witnesses. (Tr. at 898:6-16, R. at__).

Republic and the trial court again addressed this issue at the hearing on Republic's JNOV motion and motion for a new trial. It is clear that Republic is using the allocation issue to make an argument that they were misled or were prejudiced because they wrongfully thought they would get a second opportunity to present evidence. This argument is in direct contravention of the statute and the trial court's directives throughout trial. (Post Tr. Trans. 9:15-16:25, R. at __).

The trial court properly ruled on the issues of allocation and determined that Republic was not entitled to the relief it was seeking from the court, despite Republic causing a gross amount of confusion related to the issue. Republic wanted relief that it was not entitled to, the trial court properly ruled and this Court should affirm.

4. Jane Burke, the City of Charleston and Indigo Realty, LLC were properly dismissed by the trial court pursuant to Rule 41(a)(2), SCRCP.

Republic argues at length in its brief that the Plaintiff's Stipulation of Dismissal of Jane Burke, the City of Charleston and Indigo Realty, LLC was ineffective and did not comport with the rules of civil procedure. (P. Stip. Dismissal, Republic Mtn. to Strike, R. at __). The Plaintiff agrees with respect to the incorrect filing of the stipulation of dismissal and that is why Mr.

[10] It should be noted that at the motions hearing on Republic's motion for JNOV and motion for a new trial, Republic stated that had they known in advance about the trial court's ruling on allocation, Republic would have put the deposition transcripts into evidence "and let the jury be confused on why we're providing evidence on the issue of the City's control..." (Post Tr. Trans. 18:1-11, R. at __).

Burke filed a motion to dismiss Jane Burke, the City of Charleston and Indigo Realty, LLC pursuant to Rule 41(a)(2), SCRCP. (P. Mtn. to Dismiss, R. at __).

The bottom line is that Mr. Burke reached partial settlements with the City of Charleston and Indigo Realty, LLC and Mrs. Burke reached full settlement with the same parties and it was proper to file a motion to dismiss these parties. (P. Mtn. to Dismiss, Tr. at ___, R. at __). Republic would like this Court to believe that pre-trial discussion on the allocation issue impaired its defense or altered its trial strategy. Republic incorrectly argues that the trial court "ruled" that there would be an allocation as a "condition" of the dismissals. The trial court actually told Republic that they were putting the cart before the horse and that they would have the empty chair defense. (Tr. at 36:4-42:14, R. at __). The allocation issue arose multiple times with the trial court throughout the trial, with the trial court accepting argument and case law from the parties under advisement, but the trial court never ruled on the issue until later in the trial. (Tr. at 964:9-976:2, R. at __). Clearly, the trial judge did not rule at the beginning of trial as Republic contends.

It is well settled that a plaintiff has the sole right to determine which co-tortfeasor(s) he or she will sue and there is a strong public policy favoring the settlement of disputes. Chester v. South Carolina Dept. of Public Safety, 388 S.C. 343, 345-346, 698 S.E.2d 559 (2010). The trial court correctly dismissed Jane Burke, the City of Charleston and Indigo Realty, LLC without terms or conditions. The trial court properly told Republic that the dismissal would not affect setoff and as to allocation, the dismissal would not prohibit Republic from asserting the empty chair defense. (Tr. at 36:4-42:14, R. at __). The trial court never finally ruled on the greater allocation issue until much later in the trial. Id. The trial court committed no error and did not abuse its discretion. The granting or denial of a motion for a voluntary dismissal without

prejudice is within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion. Bradshaw v. Ewing, 297 S.C. 242, 247, 376 S.E.2d 264 (1989).

CONCLUSION

As shown and argued above, the evidence yielded more than one inference related to Republic's duty to Mr. Burke and the case was properly submitted to the jury. In addition, the trial court made no errors and the jury's decision is well supported by the evidence. Mr. Burke respectfully requests that the trial court be affirmed, that the jury's verdict be affirmed and his judgment against Republic related to his devastating injuries be affirmed.

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ATTORNEYS FOR ROBERT J. BURKE

January 29th, 2016

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

C.A. No.: 2013-CP-10-1400

Robert J. Burke.....Respondent,

v.

Republic Parking System, Inc. .....Appeallant.

PROOF OF SERVICE

I hereby certify that a true and correct copy of the ***Amended Initial Brief of Respondent and Designation of Matter to be Included in the Record of Appeal*** has been served upon the following by mailing a copy, properly addressed and with the sufficient postage affixed thereto, on this 29th day of January, 2016.

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January 29, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk
1220 Senate Street
Columbia, SC 29201

Re: ***Robert J. Burke and Jane B. Burke v. Republic Parking Systems, Inc.***
Civil Action No.: 2013-CP-10-1400
Appellate Case No.: 2015-000269
Our File No.: 1113.001

Dear Ms. Kitchings:

I hope this letter finds you well. The Court, per the Order filed on December 31, 2015, denied Respondent's Motion to exceed the page limitation and gave Respondent thirty days to serve and file an amended initial brief that does not exceed fifty pages.

To that end, enclosed for filing please find the original and one (1) copy of the Amended Initial Brief of Respondent Robert J. Burke, as well as the Designation of Matter to be Included in the Record on Appeal and the Proof of Service regarding the above-referenced matter. Please file the originals and return a clocked copy to our office in the enclosed self-addressed stamped envelope. By copy of this correspondence to counsel for the Appellant, I am notifying them of this filing.

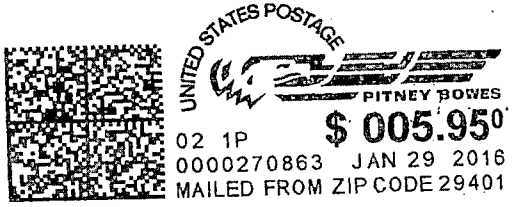
Thanks in advance for your assistance and please do not hesitate to contact me if you have any questions or need anything further. With kind regards, I remain

Sincerely yours,

McCULLOUGH KHAN, LLC

Jamie A. Khan

JAK/kbn
Enclosures
cc: Sarah P. Spruill, Esq.
Roopal S. Ruparelia, Esq.



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