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. .....Appellant.

BRIEF OF APPELLANT

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2. Did the trial court err in failing to grant judgment as a matter of law with respect to future damages because Burke did not present any evidence that would allow a jury to determine present value?

3. Did the trial court err in failing to direct a verdict as to damages sustained by Burke following a knee replacement surgery long after his fall that were not foreseeable to Republic?

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5. Did the trial court deprive Republic of a fair trial by erroneous evidentiary decisions each of which resulted in prejudice to Republic, including excluding Republic's expert, excluding relevant and admissible medical documents, allowing Burke's medical expert to testify outside his field and to matters not previously disclosed to Republic, allowing testimony relating to future damages without requiring additional evidence that would allow those damages to be discounted to present value, preventing Republic from exploring the extent to which Burke's medical condition at the time of the accident was the cause of his fall, excluding evidence showing the City's control over the George Street Lot, and allowing a lay witness to provide opinion testimony as to Burke's future employment prospects?

6. Did the trial court err in dismissing co-defendants in this action the morning of trial and in making inconsistent rulings throughout the trial as to whether there would be an allocation among the dismissed parties or argument as to the negligence of those parties?

STATEMENT OF THE CASE

This action stems from a fall sustained by Robert J. Burke ("Burke") in a City of Charleston municipal parking lot located on George Street in Charleston, South Carolina ("George Street Lot" or "lot") on January 24, 2013. The George Street Lot was owned by Indigo Realty Company, Ltd. ("Indigo"), leased by the City of Charleston (the "City"), and managed by Republic Parking System, Inc. ("Republic") pursuant to a Parking Garage Management Agreement ("Agreement").

Burke and his wife, Jane B. Burke, filed a complaint on March 8, 2013 against Indigo, Clarence D. Melton, Jr., 324 King, LLC, and Republic, alleging negligence, negligence per se, and gross negligence on the part of the defendants. (R. at 10-17). The Burkes filed a Second Amended Complaint on January 6, 2014, correcting the caption to include Indigo, Republic, and the City as defendants. (R. at 39-45). Republic answered the Second Amended Complaint on January 6, 2014, asserting the following defenses: general denial, that the injuries and damages were the intervening and superseding result of acts committed by others, comparative negligence, assumption of risk, failure to state a claim for loss of consortium, and unconstitutionality of punitive damages claim. (R. at 46-49).

Republic moved for summary judgment on November 17, 2014. (R. at 50). That motion was never heard.

Immediately prior to trial, Republic learned of purported settlements of the Burkes' claims against Indigo and the City. Republic sought to strike the purported stipulations of dismissal. (R.at 61-62). In its motion to strike, Republic asserted that Rule 41(a)(1)(B), SCRCP does not allow for a voluntary dismissal without the signature of all parties, that the City and Indigo were essential parties pursuant to Rule 19, SCRCP

and could not be dismissed, and, in the event Indigo and the City were dismissed, that the City and Indigo should remain on the verdict form for purposes of allocation. Republic argued it would be prejudiced by the absence of these parties. Over Republic's objections, the trial court allowed the settling parties to be dismissed; however, it stated there would be an allocation and that Republic would get to argue that any damages were caused by Indigo or the City. (R. at 235:7-239:14).[1]

Republic also sought a bifurcated trial, separating the liability portion of the trial from the damages portion of the trial. (R. at 54-56). The trial court granted the motion to bifurcate. (R. at 258:21-260:15).

The case was tried to a jury from December 15-19, 2014. Republic submitted written directed verdict motions in both phases of the trial and supplemented those written motions with additional arguments on the record. (R. at 74-78; 79-80; 379:25-390:3; 475:21-477:16; 762:19-764:16). The trial court denied these motions. (*Id.*). Republic also submitted written requests to charge and a proposed verdict form. (R. at 83-97; 98-109; 81-82).

In the liability phase of the trial, the jury determined that Republic was negligent but not grossly negligent and that Burke was also negligent.[2] (R. at 6-7). The jury assigned 80% of the negligence to Republic and 20% to Burke. After the jury's verdict in the first phase of the trial and over Republic's objections, the trial court directed a verdict and required the jury to find some measure of damages. (*See* R. at 579:8-16).

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[1] Mrs. Burke withdrew her claim for loss of consortium over Republic's objection prior to the beginning of trial. (R. at 233:1-21). Thus, the only claims that remained for trial were Burke's claims against Republic.

[2] Negligence per se was not included in the jury charge, nor was it included on the verdict form. Moreover, there was no evidence showing any statutory violation.

In the damages phase of the trial, the jury awarded damages of $4,005,125. (R. at 8). The trial court denied Republic's request for an allocation of the verdict among and between Republic, the City, and Indigo, notwithstanding its repeated indications and evidentiary rulings that an allocation would be held at the end of the trial and that Republic would have an opportunity to argue about the negligence of the City and/or Indigo at that time. (R. at 791:2-18).

Republic asked for a set off for funds previously paid by the settling defendants and requested ten days for post-trial motions. (R. at 791:19-25; 794:5-798:2). The trial court granted the request and indicated it would consider any setoff at a later date. (*Id.*). Republic timely moved on December 23, 2014 for judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. (R. at 157-69).

The trial court heard this motion together with the request for a set off on January 29, 2015. The trial court granted the request for set off as to funds paid in settlement of Burke's claims, but denied the post-trial motions. (R. at 5; 823:20-23). After applying the set off and reducing the verdict amount to reflect the jury's determination of comparative negligence, the trial court directed that judgment be entered in the amount of $3,184,100. That judgment was entered January 29, 2015. (R. at 5). This appeal followed with the service of a notice of appeal on February 9, 2015.

FACTS

I. The City designed the George Street Lot in the late 1970's or early 1980's and continues to control the lot's features with respect to layout and lighting.

The George Street Lot sits on property owned by Indigo, among others. (R. at 337:17-24). The lot was designed by the City and managed by the City for approximately twenty years. (R. at 338:8-15). Republic was in no way involved with the design or construction of the lot. (R. at 358:2-360:3).

In 1997 or 1998, the City began to contract out the maintenance of the lot. (R. at 338:12-15). In 2007, that contract was awarded to Republic. (R. at 340:9-19; 830-859). The City told Republic how to run the lot. (R. at 425:10-19; 438:20-439:22). The City conducted monthly inspections of the lot, including the lighting. (R. at 347:9-18; 1055, 1056). The City's inspection reports indicated whether individual items were acceptable, needed improvement, caused concern, or were unacceptable. (*Id.*). At the time of Burke's fall, the City did not indicate any concern with respect to the lighting. (R. at 1056). As of January 24, 2013, there had been no injuries or complaints to the City or Republic regarding the lighting or layout of the George Street Lot. (R. at 355:1-22; 360:4-7; 397:19-22; 422:9-16; 445:14-21).

The existing lighting scheme at the time of Burke's fall had been approved by the City in 1978. (R. at 430:20-431:13). The City was responsible for the lighting and admitted that Republic did not take on any responsibilities under the Agreement to upgrade the lighting. (R. at 426:10-17; 359:9-12). The City directed the kind of light bulbs to be used in the existing fixtures. (R. at 428:21-431:13). When asked, "Did Republic have any control over the type of light fixtures that get put in that parking lot?"

Colleen Carducci, the Director of Real Estate Management for the City, testified "In that lot, no." (R. at 359:13-16).

The City has taken steps to reduce the amount of lighting in and around the City to make it dark sky compliant and preserve the historic feel. (R. at 431:14-432:13). Thus, the City would not have approved, for example, stadium lighting in the George Street Lot. (R. at 431:14-16).

The City was also responsible for the layout of the lot. (R. at 358:2-360:3). Republic could not change the paint or the configuration of parking spaces without approval from the City. (R. at 472:17-473:2; 399:23-400:10; 410:17-24).

II. Burke fell in the George Street Lot on January 24, 2013.

On January 24, 2013, Burke traveled four and a half hours from his home in North Carolina to the City to watch a College of Charleston basketball game. (R. at 278:3-7; 287:7-11). Burke was a retired basketball coach and was excited to meet his daughter and to watch his son at work as an assistant basketball coach for the Citadel. (R. at 278:3-14).

Upon his arrival in the City, he drove to the George Street Lot, where he had parked on previous occasions. (R. at 279:9-12; 287:19-288:5). Burke entered the lot from George Street at approximately 6:30 in the evening. (R. at 278:18-24; 280:2-4). It was dark. (R. at 280:1-22). After retrieving his parking ticket at the gate, Burke parked his vehicle on the right side of the lot in a handicapped space.[3] (R. at 280:14-18; 289:5-292:6; 825; 1053).

[3] Burke identified the handicapped space at trial, although he testified he did not have a handicapped sticker on his vehicle, nor did he recall parking in a handicapped space. (Def. Ex. 1, R. at 289:5-292:6; 1053).

He then ignored the sidewalks and walked across the parking lot toward the ticket booth where he had just entered the lot. (Def. Ex. 4, R. at 295:2-297:1; 1054). At some point during his walk across the lot, Burke fell. (R. at 281:9-16). As testified by Burke, "I get out of the car, I turn left, I walk approximately fifteen seconds. There was a light in the booth, I used that as my guide. I went between two cars that were plenty separated. I hit something and went flying." (*Id.*).

There was no evidence presented at trial that the lot was poorly maintained at the time of Burke's fall in terms of burned out bulbs, damaged lighting equipment, or deteriorating paving. Instead, the evidence was that the lot was maintained in accordance with the City's expectations and guidelines. (R. at 354:2-355:22; *see* 1055, 1056).

After his fall, Burke was escorted back to his car by a passerby, Robert Cammer. (R. at 302:7-303:6). At Burke's direction, Cammer called Burke's daughter who was also in Charleston for the game. (R. at 286:3-7). She arrived shortly after receiving the call. (R. at 286:8-13). Emergency personnel arrived thereafter and transported Burke to the hospital for treatment. (R. at 286:14-18).

Burke was admitted to the Medical University of South Carolina ("MUSC") where he received treatment for injuries to his arms, chest, right knee, and thigh. (R. at 1052). He was also treated for blood loss. (*Id.*). After discharge from MUSC, Burke was admitted to Roper St. Francis Rehabilitation Hospital ("Roper Rehabilitation") for further physical therapy. (R. at 602:24-603:3). After his discharge from Roper Rehabilitation, Burke continued home care treatment. (R. at 611:2-9). He sought further treatment at Duke Medical Center. (R. at 617:6-11).

In August 2014, Burke had knee replacement surgery. (R. at 617:12-20). Burke suffered complications following the surgery, which resulted in a decline in his condition. (*See* R. at 617:24-618:8).

ARGUMENTS

I. The trial court erred in not entering judgment in favor of Republic because Republic did not owe any duty to Burke with respect to the lighting or layout of the George Street Lot, nor was there any evidence showing Republic created a dangerous condition or had knowledge of a dangerous condition and failed to correct it.

In reviewing an order denying a motion for JNOV, this Court must view the evidence and its inferences in the light most favorable to the non-moving party. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and motions for directed verdict and JNOV are properly denied. However, if only one reasonable inference can be drawn from the evidence, the motion must be granted. *Hainer v. Am. Med. Int'l., Inc.*, 320 S.C. 316, 320, 465 S.E.2d 112, 115 (Ct. App. 1995). As stated by the South Carolina Supreme Court, "[w]hen we review a trial judge's grant or denial of a motion for directed verdict or JNOV, we reverse only when there is no evidence to support the ruling or when the ruling is governed by an error of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010).

Questions of existence and scope of duty are matters of law for the Court. *Staples v. Duell*, 329 S.C. 503, 506-07, 494 S.E.2d 639, 641 (Ct. App. 1997). In this case, Republic did not have any duty with respect to Burke, much less broad duties as an "occupier" as charged by the trial court. For these reasons, the judgment must be reversed.

A. The Agreement does not create a duty on the facts of this case.

Generally, South Carolina law does not impose a duty to act. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456-57, 578 S.E.2d 711, 714 (2003). There are five exceptions to this rule: "1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant." *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246-47, 711 S.E.2d 908, 911-12 (2011). None of these circumstances are present here.

As an initial matter, a municipality has a non-delegable duty to maintain streets and ways under its control; this would include ancillary structures like sidewalks and parking areas. *Vaughan v. Town of Lyman*, 370 S.C. 436, 443, 635 S.E.2d 631, 635 (2006) (reciting rule that municipality has a common law duty to maintain streets but finding issue of fact relating to whether municipality exercised control in case where pedestrian fell on sidewalk); *see Dolan v. City of Camden,* 233 S.C. 1, 4-5, 103 S.E.2d 328, 330-31 (1958) (finding municipality has duties with respect to streets, ways and bridges owned or controlled by municipality). Republic did not and could not acquire that duty by virtue of the Agreement.

This is corroborated by the terms of the Agreement. "[T]he City owns, controls, and regulates off-street parking facilities owned by the City" and "owns, leases or manages certain parking facilities," including the George Street Lot. (R. at 830; 858). Republic is not an owner or occupier of the George Street Lot. Instead, "Republic [performed] its duties and obligations [under the Agreement] for the City in the capacity of an independent contractor." (R. at 856, ¶ 10.7). The Agreement further provides in ¶

10.1 that "[n]othing contained in this Agreement shall be construed to confer upon any other party, the rights of a third party beneficiary, except as may be otherwise specifically provided for herein." (R. at 855, ¶ 10.1).

Under the Agreement, Republic was required to maintain the lot in the same condition as when the Agreement was entered. (R. at 836, ¶ 4.1(b)). The City continued to inspect the lot and maintained "free and unobstructed access" to the lot. (R. at 347:9-18; 1055; 1056; 836, ¶ 4.1(a)(2); 840, ¶ 5.5). The City "at its sole discretion, [could] direct the City's personnel to make the necessary repairs or provide the necessary replacements or upgrades to the Parking Facilities at the City's expense, or authorize an independent contractor to make the necessary repairs or provide the necessary replacements or upgrades at the City's expense." (*Id.*). The City paid for "all capital improvements and replacements to the Parking Facilities." (R. at 463:7-20; 830, ¶ 1.1(b)). The City had not undertaken any major improvements in the lot since at least 2003. (R. at 358:2-6). Republic could not change anything without the City's approval, including the lighting and the configuration of the lot. (*See* R. at 357:2-360:3; 399:23-400:10; 410:10-12; 426:10-17; 428:21-429:18; 430: 16-432:13; 472:17-473:2; 830-859).

These provisions and testimony show that Republic did not assume any duty with respect to Burke in terms of the design of the lot. If anyone had such a duty, it was the City.

Even if Republic could be construed to be an occupier for purposes of premises liability law, "[t]he liability of an owner or occupant of real estate in reference to injuries caused by a dangerous or defective condition of the premises depends in general upon his having control of the property." *Dunbar v. Charleston & W. C. Ry. Co.*, 211 S.C. 209,

216, 44 S.E.2d 314, 317 (1947). The root of this inquiry is control. "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, 314, 494 S.E.2d 813, 815 (1997) (citations omitted). In *Miller*, the plaintiffs brought action against the Kendall Company following the failure of a dam. The Supreme Court found the company did not owe any duty with respect to the failure because,

> Kendall's contractual right of control was limited to maintaining a certain normal water level for production purposes. The contract between Kendall and City specifically reserved to City complete control of the dam and water level in the event of a weather emergency. Kendall had no physical control of the sluice gates and no contractual right to control them in this situation. Accordingly, we conclude Kendall owed no duty of care to respondents based on its contractual right of control.

Id. Similarly, here, the City retained control over the lighting and the layout of the lot, and therefore, Republic did not owe a duty.

In the case of a contractor, generally there is no duty unless there is evidence that the contractor had superior knowledge to that of the owner. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 257, 607 S.E.2d 362, 365 (Ct. App. 2004) (upholding grant of summary judgment to contractor in case where contractor "did not have superior knowledge of the lighting as the [owner] admitted it was responsible for the lighting on the premises."). In this case, the City of Charleston designed the lighting scheme for the lot, managed the lot for many years, continued to inspect and monitor the lot, retained complete financial control, and was the only party that could authorize any changes to the lighting, the layout, or anything else about the lot. Therefore, like the contractor in *Sides*, Republic lacked the requisite control and knowledge.

With respect to lighting, the testimony reflected that Republic could change bulbs, but could not change the kinds of bulbs or the number and configuration of the lighting

fixtures. (R. at 400:11-401:4; 401:21-403:1). Edward Anderson, the assistant director of building operations for the City, testified that the City prides itself on its historic appearance, including purposefully dim conditions because it is Charleston, not Las Vegas. (R. at 431:21-432:13). Similarly, Republic was not allowed to change how the lots were painted or the configuration of the lots with respect to paint or layout. (R. at 399:23-400:10; 410:17-24; 472:17-473:2). The City designed the lots to maximize the number of parking spaces, and Republic was not allowed to alter those configurations. (R. at 399:23-400:10). In the past, Republic had been admonished for painting stripes on curbs without the City's permission. (R. at 399:18-400:2). Quite simply, Republic was to maintain the lot as it found it, which was how the City had designed the lot and maintained it for many years. The City, in its long experience with the lot, liked things the way they were and wanted it kept that way.

There is no evidence that Burke's fall was as a result of a maintenance issue. Instead, Burke argued that the lighting scheme was inadequate and that the lot was poorly configured. These two items remained within the control of the City and were subject to the City's superior knowledge and thus, there was not a duty on the part of Republic.

At the directed verdict stage, the trial court considered Republic's arguments as to the existence and scope of any duty on the part of Republic; however, at that point the trial court erred in finding, "I think there's no question there was a duty. The extent of that duty, however, I think is what the jury has to determine so far as this action is concerned." (R. at 476:13-16).[4] For the reasons set forth above, the trial court should

[4] This statement is error in and of itself. *See Staples v. Duell*, 329 S.C. 503, 506-07, 494 S.E.2d 639, 641 (Ct. App. 1997) (finding questions of existence and scope of duty are matters of law for the Court to decide and not for the jury).

have entered judgment as a matter of law in Republic's favor on the duty issue. Accordingly, the judgment must be reversed.

B. The evidence in this case does not support the verdict against Republic because Republic was not on notice that a dangerous condition existed, nor did it create a dangerous condition.

A plaintiff in a premises liability case, "must demonstrate that the defendant committed a specific act that created the dangerous condition, which in turn caused [the] injury. Alternatively, he must demonstrate that the defendant had actual or constructive knowledge of an existing dangerous condition and failed to correct it." *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779-80 (Ct. App. 2010) (citations omitted). There is no evidence showing Republic either created a dangerous condition or had notice of a dangerous condition and failed to correct it.

Again, the City created the lot from layout to lighting scheme, and there was no evidence the lot had been changed after Republic entered the Agreement. Nothing in the long history of this lot suggests there had ever been an incident or complaint regarding the lighting or layout of the lot. (R. at 355:1-12; 360:4-7; 397:1-22; 422:6-16; 445:13-21). There was not any evidence that the lot in question violated any code at the time it was built. Neither the City nor Republic had any indication there might be a problem prior to Burke's fall. This absence of notice warrants judgment as a matter of law in this case.

Moreover, "[a]lthough questions of negligence are often for the jury, when the risk complained of is open and obvious to [Plaintiff], there is no duty to warn of that risk as a matter of law." *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 42, 674 S.E.2d 500, 504 (Ct. App. 2009). This is not a case where Republic had any reason to anticipate the harm, and as such, it is distinguishable from cases such as *Creech v. S.C. Wildlife &*

Marine Res. Dep't, 328 S.C. 24, 31, 491 S.E.2d 571, 574 (1997) (finding duty to warn existed for dock that only had a partial railing in light of warnings given to property owner about risks) and *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362-63 (1991) (finding duty to warn existed for stool that was missing its seat).

Here, there was nothing unusual or broken (like the partial railing or the seat with a missing stool in *Creech* and *Callander*). It was dark, much like it had been every night since the lot was put in operation in the late 1970's or early 1980's. In that time, and as discussed above, there was no history of problems in this lot. Furthermore, there was no evidence showing Republic should have anticipated Burke would choose to hurry through the parking lot rather than slowing down or taking another route. In such a case, there is no duty. *See Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 409 S.E.2d 349 (1991) (finding no duty to warn a patron who slipped on a wet grass and gravel path because the danger was open and obvious and the landowner could not have anticipated the harm because the landowner had provided numerous routes across the property). Quite simply, there is no duty with respect to "a natural condition, the peril of which [is] obvious." *Id.* at 378, 409 S.E.2d at 351. For this reason, Republic was entitled to judgment as a matter of law.

II. The trial court erred in failing to grant judgment as a matter of law with respect to future damages because Burke did not present any evidence that would allow a jury to determine present value.

As raised by Republic at the directed verdict stage and in its post-trial motion, there was no evidence presented at trial which would allow the jury to assess the present value of Burke's claimed future damages. (R. at 763:6-764:16; 79-80; 157-169).

Therefore, Republic was entitled to judgment as a matter of law with respect to these damages.

South Carolina law requires that any award for future damages be reduced to present value. *Grimsley v. Atl. Coast Line R. Co.*, 189 S.C. 251, 253, 1 S.E.2d 157, 158 (1939). In addition, "[t]he general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required." *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). Present value is an economic determination that is outside the knowledge, skill, training, and experience of the jury. As such, any claim for future damages must be accompanied by expert testimony that would allow a jury to discount any award to present value or some other evidence that would give the jury the power to make that determination. Here, no such evidence was presented.

South Carolina courts routinely allow expert testimony with respect to present value. *See, e.g., Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 581-82, 686 S.E.2d 176, 182 (2009) (accepting evidence of future medical expenses as established by medical expert and reduced to present value by economist); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 51 (Ct. App. 2000) (accepting expert testimony of present value of "future medical and related costs"). However, they have not been called to date to assess whether expert testimony is required on this subject.

This Court has previously remanded a present value determination to the family court for determination when neither party presented expert testimony on the issue. *Freeman v. Freeman*, 318 S.C. 265, 269, 457 S.E.2d 3, 6 (Ct. App. 1995). In addition, *South Carolina Jurisprudence* provides, "[t]he plaintiff should introduce expert evidence

to the jury— typically through an economist or, occasionally, an accountant— of an appropriate discount rate for determining present value." 11 S.C. Jur. *Damages* § 19. The United States Supreme Court, when grappling with this issue in the context of a FELA action, provided that present value may be determined through expert testimony or evidence of standard interest and annuity tables showing present values. *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 340-42 (1988).

In this case, there was no evidence that would let a jury return a verdict that was properly discounted to present value. Given the above precedent and the general rules about when expert testimony is required, the trial court erred in submitting future damages to the jury without some evidence that would allow the jury to make that determination. As a result, Republic was entitled to judgment as a matter of law as to this aspect of Burke's claim.

III. The trial court erred in failing to direct a verdict as to damages that were not foreseeable at the time of Burke's fall.

Moreover, as raised by Republic at the close of Burke's damages case, there was no foreseeability and thus no proximate cause with respect to damages suffered by Burke following knee surgery more than a year and half after his fall. (R. at 763:13-18). "Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought." *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968). To determine foreseeability, courts look to the "natural and probable consequences of the complained of act." *Young v. Tide Craft, Inc.*, 270 S.C. 453, 462-66, 242 S.E.2d 671, 675-76 (1978). A defendant cannot be charged with "that which is unpredictable or that which could not be expected to happen." *Id.* "When the [original wrongdoer's] negligence appears merely to have brought about a

condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause." *Stone* at 161, 161 S.E.2d at 173.

In this case, Burke was making a reasonable recovery following his fall. After his release from the hospital, he eventually returned home. (R. at 611:2-5). As his mobility improved, he was able to walk with a walker and then a cane and then unassisted. (R. at 611:15-612:1). He was not wheelchair bound and was not receiving dialysis. (R. at 611:15-612:1; 719:4-13).

Later, in August 2014, Burke opted to have knee replacement surgery. (R. at 617:6-20). It was only after that surgery that Burke suffered complications from blood poisoning resulting in decreased mobility and kidney function. (R. at 617:21-618:8; 719:4-13). These damages stem from complications from the later knee surgery and are not a "natural and probable consequence" of Burke's fall. Republic could not have possibly anticipated those later damages that arose from the knee surgery. Therefore, the trial court erred in failing to grant Republic's directed verdict motion and request for JNOV as to those damages.

IV. In the alternative, the trial court erred in failing to grant a new trial in this matter based on inadequate jury charges and erroneous evidentiary decisions.

In assessing Republic's arguments that this case should be reversed and remanded for a new trial, this Court applies the following standard: "[t]he grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Chapman v. Upstate RV & Marine*,

364 S.C. 82, 88-89, 610 S.E.2d 852, 856 (Ct. App. 2005) (quotations omitted); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49, 691 S.E.2d 135, 149 (2010) ("Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law.").

A. The trial court's charge failed to give the jury the full and correct law applicable to their determinations.

The essence of a party's challenge to erroneous jury instructions is that the jury has been instructed in such a way that the jury has been prevented from reaching a fair and just verdict. The remedy for a court's failure to correct an erroneous jury charge is the granting of a new trial. *See Gamble v. Int'l Paper Realty Corp. of S.C.*, 323 S.C. 367, 375, 474 S.E.2d 438, 442 (1996); *Eaddy v. Dorn*, 289 S.C. 356, 359, 345 S.E.2d 513, 515 (Ct. App. 1986).

As allowed by Rule 51, SCRCP, Republic submitted written jury charges. (R. at 83-97; 98-109). "Ordinarily, a trial court has the duty to give a requested instruction that correctly states the law applicable to the issues and the evidence." *Williams v. Addison*, 314 S.C. 35, 40, 443 S.E.2d 582, 585 (Ct. App. 1994). Here, the trial court failed to give requested charges to the prejudice of Republic. In addition, the trial court gave charges that were not supported by the evidence.

1. Proximate cause should have been charged in both phases of the case.

In this case, there were numerous proximate cause issues relating to underlying liability (rather than the degree of damages). These include Republic's inability to change anything about the parking lot or its lighting and Burke's condition at the time of

his fall. In the liability phase of the case, the jury was asked to assign "negligence" but was not given any definition of proximate cause.

This was over Republic's objection and notwithstanding the written charge submitted by Republic that would have clearly defined the term and apprised the jury as to the full scope of what it was called to determine. (R. at 91, 496:13-15; 572:16-573:6). Republic also submitted a verdict form that would have made it clear that any negligence must have proximately caused injury to Burke. (R. at 81-82).

The trial court insisted that proximate cause was not part of the liability determination and would not be included in the charge or on the form. (R. at 492:13-20; 496:13-15). More confusingly, the trial court used the term "proximate cause" without any context or explanation in the charge for the first phase of the trial. (R. at 504:9-13).

Proximate cause is part and parcel with the liability determination in a negligence action. *Hinds v. Elms*, 358 S.C. 581, 585, 595 S.E.2d 855, 857 (Ct. App. 2004) ("A determination of negligence, standing alone, is a far cry from a determination of liability. Liability encompasses all elements of a negligence claim, including damages proximately caused by the alleged negligence.). "To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." *Vinson v. Hartley,* 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App.1996).

During lengthy deliberations, the jury sent several inquiries that reflected the jurors were having difficulty applying the trial court's charge. First, the jury sought and received a written copy of the charge. (R. at 1193; 540:3-18). Next, the jury asked for

clarification regarding the level of circumstantial evidence required to meet the preponderance of the evidence. (R. at 1202; 542:3-10). Later, the jury asked whether they could deem "'negligence' after the accident/ injury occurred as described on page 3 & 4 of the charge . . . . ." (R. at 1203; 549:9-20 (emphasis in original)). The trial court expressed consternation at the question and recharged the jury without additional explanation. (R. at 549:3-553:12). Counsel and the trial court then discussed whether the jury's question was related to proximate cause. (R. at 555:3-557:2). After the verdict, Republic renewed its objections and requested that proximate cause should have been charged after the jury's question about "negligence" after the accident. (R. at 561:3-6). Republic also sought a mistrial at the end of the liability phase of the trial due to irregularities in the charge and the deliberation; however, the trial court denied that request. (R. at 561:3-562:24).

The jurors' question relating to negligence "after the injury" shows they did not understand this element of a negligence cause of action and indicates prejudice to Republic. It is true Republic sought to bifurcate damages and liability in this case. (R. at 54-56). It is also true that Republic agreed to the concept that the trial court would direct a verdict as to some damages in the event the jury returned a verdict for Burke on liability. (R. at 259:23-260:15). Republic did not agree, however, that proximate cause would not need to be proven by Burke in his case. The jury was entitled to consider proximate cause as an element of tort liability and was not given the chance to do so by the trial court, even when the jury asked questions that clearly reflected a need for additional instruction on this concept. Yes, damages were reserved for the second phase

of the trial, but proximate cause should have been included in the liability determination during the first phase of the trial.

2. Republic was not an owner or occupier of the George Street Lot.

"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). As argued above, Republic was not an owner or occupier of the lot and did not have any superior knowledge to that of the City. Republic objected to the trial court's insistence on charging the jury using these terms. (R. at 478:15-480:25). Republic only assumed those duties provided in the Agreement, and not any broader duties as suggested by the trial court's charge. Therefore, the trial court erred in charging this case as a standard premises case, rather than charging the jury on the law applicable to Republic.

This error was compounded by portions of the trial court's charge that were directly refuted by the Agreement and the evidence. For example, the trial court instructed the jury "The occupier of premises further owes an invitee an affirmative duty to use reasonable care to discover any unreasonably dangerous condition on the premises. And then *to either put the premises in a reasonably safe condition for use in a manner consistent with the purpose of the invitation or to warn the invitee of that danger.*" (R. at 523:24-524:6; 524:22-525:3) (emphasis added). Here, as established above, Republic could not change the lot.

3. The trial court failed to adequately instruct the jury with respect to sole negligence of others and intervening, superseding cause.

Republic submitted a charge that would have clarified for the jury that it could not find Republic liable for the actions of the City. (R. at 92; 499:6-501:16). The proposed

charge read as follows:

> The Defendant claims that the Plaintiffs' injury was not proximately caused by the Defendant's negligence but was solely caused by the negligence of another person. The Defendant does not have the burden of proving that the negligence of the other person caused the Plaintiffs' injuries. Instead, the burden remains on the Plaintiffs to prove that the Defendant's negligence was the proximate cause of the Plaintiff's injuries.

(*citing* S.C. Civil Charges, June 2013 at 41; *O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 309 S.E.2d 776 (Ct. App. 1983)). The trial court refused the charge. This was error given the evidence that the City retained control over the lot. This error prejudiced Republic, especially in light of the trial court's rulings on allocation and rulings relating to the presentation of evidence showing that the City controlled the lot.

4. The trial court erred in charging the jury that it could award future damages because there was no evidence that would let the jury determine present value.

As argued above, Burke did not present any evidence that would allow a jury to reduce its verdict to present value. As such, it was error to charge the jury that its award could include any measure of recovery for future damages.

B. Republic was prejudiced by erroneous evidentiary rulings.

Republic is further entitled to a new trial because of several erroneous evidentiary rulings. These rulings prevented Republic from receiving a fair trial. Generally, 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 erred in disallowing Republic's expert medical witness, allowing Burke's expert to testify about damages that were previously undisclosed and outside his field of expertise, and in failing to admit certain pieces of evidence relating to Burke's medical history.

The trial court severely limited Republic's ability to rebut Burke's damages case with respect to the medical evidence. The combination of the trial court's refusing to admit certain exhibits that reflected communications made for medical treatment or diagnosis, excluding Republic's medical expert, and allowing Burke's medical expert to testify beyond the scope of his expertise in neurology and to damages that were well beyond the scope of anything disclosed to Republic in discovery prevented Republic from showing that the damages proximately caused by the fall were significantly less than Burke's theory of the case. Each of these errors alone would justify the award of a new trial.

a. Burke's expert, Dr. Marshall White, was improperly allowed to testify outside his field of expertise and improperly allowed to testify to damages that had not been disclosed to Republic previously.

Burke's expert, Dr. Marshall White, testified that his exclusive field of practice is neurology and pain management. (R. at 692:4-9). Per Dr. White, "[n]eurology is a specialty which deals with diseases of the peripheral nervous system, muscle and brain and spinal cord." (R. at 692:11-13). He was submitted as an expert in those fields. (R. at 693:7-10). Dr. White admitted he had not treated Burke and had only seen him twice, once in November 2013 and again the Friday before trial. (R. at 716:18-22; 719:16-18). Given this testimony and qualification, the scope of Dr. White's testimony should have been limited to matters within his field of expertise.

Over objection, the trial court let him testify to numerous matters that fall well outside the field of neurology, including but not limited to knee replacement surgery, kidney function, and dialysis. (R. at 64-65; 247:1-19; 689:25-691:2; 694:17-25; 698:17-699:1; 703:18-21; 711:22-712:5). "To be competent as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the *particular subject* of his testimony." *Gooding v. St. Francis Xavier Hosp.*, 317 S.C. 320, 324, 454 S.E.2d 328, 330 (Ct. App. 1995) (emphasis in original, citations omitted), *aff'd in part, rev'd in part on other grounds,* 326 S.C. 248, 487 S.E.2d 596 (1997). Here, the objection was not to the qualification of Dr. White in his field, but to the trial court's decision to allow him to testify to other matters. Dr. White is not an orthopedist, nor is he an endocrinologist or an urologist. He should not have been allowed to give causation testimony to areas far afield from his own practice and field of study.

In addition, the trial court allowed Dr. White to testify, over objection, to matters that had not been previously disclosed to Republic, including assisted living and dialysis. (R. at 713:23-714:6). This "trial by ambush" tactic left Republic less able to defend itself, particularly given the exclusion of Republic's medical expert.

b. The trial court erred in disallowing the testimony of Republic's expert, Dr. Todd Shuman.

"The sanction of excluding a witness should never be lightly invoked." *Jenkins v. Few*, 391 S.C. 209, 219, 705 S.E.2d 457, 462 (Ct. App. 2010). Republic proffered Dr. Todd Shuman to give expert medical testimony in its defense. (R. at 573:12-18; 1204-1297). Dr. Shuman had been listed as an expert by the City and, perhaps more significantly, he had been deposed by Burke. Republic listed him on its witness list and

had agreed to pay half of his fee. (R. at 243:6-22). As of the Friday before trial, the City was still a party to this action. Burke did not inform Republic of any objection to Dr. Shuman prior to moving for his exclusion at the beginning of the trial, nor did Burke articulate any prejudice that he would suffer were Dr. Shuman allowed to testify. Burke admitted he knew what to expect as far as Dr. Shuman's testimony. (R. at 243:24-25). The trial court excluded Dr. Shuman's testimony for the sole reason that Republic had not named him as an expert in earlier discovery responses. (R. at 245:1-5).

As shown in his proffered deposition, Dr. Shuman would have testified that there were several medical reasons that might have explained Burke's fall, that the result of his fall and recovery were complicated by his existing medical conditions, and that his injuries from the fall may not have been as severe as indicated by Burke's witnesses. (R. at 1222:13-20). For example, with respect to the knee replacement, Dr. Shuman would have testified that the problem was as a result of a chronic problem, not an acute one such as the fall. (R. at 1230:11-14).

Given the facts of this case, the exclusion of this key witness was unduly harsh. The factors to be considered in excluding a witness are: "(1) the type of witness involved, (2) the content of the evidence, (3) the explanation for the failure to name the witness in answer to the interrogatory, (4) the importance of the witness's testimony, and (5) the degree of surprise to the other party." *Id.* at 219, 705 S.E.2d at 462; *see also Bryson v. Bryson*, 378 S.C. 502, 506-07, 662 S.E.2d 611, 613 (Ct. App. 2008); *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001).

Here, the witness had been named as an expert by the City, had been deposed, and was on Republic's witness list; therefore, there was no surprise and no prejudice to Burke

by allowing him to testify. Republic, on the other hand, was gravely prejudiced by not being able to refute the testimony presented by Dr. White, particularly in light of the trial court's decision to allow Dr. White to testify outside his field of specialty (neurology and pain management) and to allow him to testify to types of damage that were not previously disclosed to Republic. Given the importance of the witness, the lack of surprise to Burke, and the timing of the City's dismissal (and thus, the reason Republic had not yet updated its responses), the exclusion of this witness based solely on Republic's failure to supplement its discovery response was an abuse of discretion.

c. The trial court erred in refusing to admit certain medical records that would have shown that not all of the damages claimed by Burke were caused by his fall.

The trial court did not allow Republic to use certain medical records in the cross examination of witnesses. These documents should have been admitted under either Rule 803(4), SCRE, as statements for the purpose of medical diagnosis or treatment, or, in the case of Burke's testimony, under Rule 803(5), SCRE. The exclusion of these documents prejudiced Republic's ability to defend itself, especially given the exclusion of Republic's medical expert.

The trial court considered several medical records presented for admission by Republic and ruled inconsistently as to which of these documents could be admitted. As a general rule, medical history is admissible. *Todd v. Joyner*, 385 S.C. 421, 426, 685 S.E.2d 595, 598 (2009). Rule 803, SCRE provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ...
>
> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external

> source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

The trial court considered several medical records in light of this rule and allowed the admission of some but not others. (R. at 1058-1063; 625:5-636:5). The relevance of the documents was not in dispute; rather, Burke's objection was to hearsay. (R. at 624:1-4). Each of these documents came from Burke's medical records. The trial court placed an artificially narrow construction on the term "medical diagnosis" and excluded certain documents as not in connection with a diagnosis. (R. at 625:5-636:5). Republic contends this was error. The conversations between Burke and his physicians would necessarily be in connection with diagnosis or treatment as contemplated by the rule.

The excluded records would have shown Burke's diabetes and Coumadin usage were not necessarily well-controlled (R. at 1058-59; 1060), that he had a history of renal insufficiency (R. at 1062), that "he has had some arthritic problems with his knee and trying to decide what to do as far as moving forward with disability planning" (*id.*), that he had "been informed he may need a knee replacement several years ago" (R. at 1063), and that he "denies any acute trauma to said knee" (*id.*). These statements and admissions by Burke would have shown that many of the claimed damages were not caused by the fall, perhaps most crucially the knee replacement surgery in August 2014. In these documents, Burke sought treatment for conditions he claimed at trial were caused by the fall and made statements that showed those conditions were pre-existing and chronic and were not caused by acute trauma. Thus, the prejudice from the exclusion of these documents is clear.

2. The trial court erred in allowing Burke to present evidence of future damages, given Burke's admitted lack of any evidence relating to discounting those damages to present value.

As argued above, the trial court erred in allowing the jury to consider future damages in light of Burke's failure to present an expert to reduce those damages to present value or provide notice of certain elements of those damages as shown above with respect to Dr. White's testimony. Republic objected to the admission of evidence on this point, but was overruled. (R. at 574:10-25).

3. The trial court erred in preventing Republic from exploring the extent to which Burke's medical condition at the time of the accident caused his fall.

In its opening argument, Republic sought to discuss how Burke's existing medical condition might have played a role in his fall. (R. at 264:2-21). The trial court did not allow the discussion. (R. at 266:13-267:16). This argument was a part of Republic's comparative negligence defense and should have been allowed. The trial court deemed the argument improper, but stated it would allow testimony on the point. (R. at 267:13-15).

However, when Republic sought to introduce evidence in the liability phase of the trial of Burke's medical condition at the time of the accident to show his injuries were not caused by any action on the part of Republic, the trial court refused to allow these questions. (R. at 292:8-294:17). The line of questioning would have shown that Burke had swelling and numbness in his legs that could have contributed to his fall, especially after a long car ride. (*See id.*; R. at 1235:14-1236:7). Thus, Republic was unable to present its comparative negligence defense fully. The prejudice of this exclusion was

compounded by the trial court's refusal to instruct the jury on the meaning of proximate cause in the liability phase of the case.

4. The trial court erred in preventing Republic from presenting certain evidence with respect to the City's control over the George Street Lot and responsibility for Burke's injuries.

Generally, evidence of subsequent remedial measures is not admissible "to prove negligence or culpable conduct." Rule 407, SCRE. However, the rule goes on to provide an exception as follows: "[t]his rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

Here, Republic sought to establish the City's control over the parking lot with evidence relating to the City's subsequent actions. (R. at 240:1-241:23; 351:4-15; 426:23-427:3). The trial court declined to admit this evidence to the prejudice of Republic. (R. at 351:4-15; 426:23-427:3). Additional evidence of control would have allowed Republic to argue more forcefully that any negligence in this case belonged to the City alone. Thus, the evidence was clearly relevant pursuant to Rule 401, SCRE and was not barred by Rule 407, SCRE. Therefore, the questions should have been allowed.

5. The trial court erred in allowing a lay witness to provide opinion testimony about Burke's potential future earnings.

Over Republic's objection, the trial court allowed Michael Capaccio, a former college basketball coach, to give opinion testimony about Burke's prospective employment prospects within basketball. (R. at 658:3-6; 666:7-667:22). This testimony required Capaccio to draw on his special knowledge, skill, experience and training within basketball and the coaching community.

Capaccio was not named as an expert and was not qualified as one. Therefore, this testimony was inadmissible opinion testimony from a lay witness and should have been excluded under Rule 701, SCRE. *See Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 410, 764 S.E.2d 249, 252 (Ct. App. 2014) (finding portions of fire chief's testimony were improperly admitted opinion testimony where "statements were not mere perceptions observed by [the fire chief], but instead constituted opinions that 'require special knowledge, skill, experience or training' to properly be made. *See* Rule 701, SCRE."); *see State v. Kelly,* 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985) (finding a lay witness "may only testify regarding his direct observations unless ... qualified as an expert"). This testimony was prejudicial because Burke did not present any other testimony from a disinterested witness regarding future employment prospects.

V. The trial court erred dismissing Indigo and the City and in making inconsistent rulings on whether there would be an allocation among these parties to the prejudice of Republic.

Prior to trial, Republic opposed Burke's requests to dismiss to Indigo and the City. (R. at 61-62; 235:23-239:14). Republic opposed the dismissals to protect its right to an allocation under S.C Code Ann. §§ 15-78-100 and 15-38-15, which could have greatly reduced its proportionate share of any verdict. Republic also sought to preserve its ability to argue that the City was the solely responsible party and that the City controlled the lighting and layout of the lot.

Republic argued the stipulations of dismissals were inappropriate under Rule 41(a)(1)(B), SCRCP, because Republic did not consent. (R. at 61-62; 237:5-12). As such, they were ineffective. *See, e.g., Robertson v Limestone Mfg. Co.*, 20 F.R.D. 365 (W.D.S.C. 1957) (stating Rule 41 was designed for an entire action by all parties and that it may not be used by one party out of four seeking to relinquish a claim as opposed to an

action); *see also Volvo Trademark Holding Aktiebolaget v. AIS Constr. Equip. Corp.*, 162 F. Supp. 2d 465 (W.D.N.C. 2001) ("[A] Rule 41 dismissal of a party rather than an action is ineffectual as a matter of law.").[5] In the alternative, Burke sought dismissals pursuant to Rule 41(a)(2), SCRCP. (R. at 63). Under either subsection of Rule 41(a), the purpose of the rule is to permit the plaintiff voluntarily to dismiss the action when no other party will be prejudiced. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2362 (3d ed. 2008). Republic contended the dismissals on the morning of trial were prejudicial to it.

Republic further argued that Republic and Indigo were indispensable parties pursuant to Rule 19, SCRCP. (R. at 61-62). While Rule 19 concerns the necessity of joining a particular party to a lawsuit, it follows that a party that is "indispensable" may not be dismissed from a lawsuit by a notice filed by the plaintiff. In relevant part, Rule 19 provides that "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (a) in that person's absence, the court cannot accord complete relief among existing parties." In interpreting the factors that determine whether a party is indispensable, the Supreme Court included the following: "the defendant may properly wish to avoid...sole responsibility for a liability he shares with another." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968). Under this analysis and given the South Carolina allocation statutes, Indigo and the City should have remained as parties.

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[5] In the absence of South Carolina authority on a procedural issue, South Carolina courts look to interpretations the Federal Rules of Civil Procedure. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.").

To protect its rights, Republic argued that dismissal was inappropriate regardless, but if the trial court were to grant dismissal, any dismissal should be conditioned on allowing an allocation of negligence among Indigo, the City, and Republic. (R. at 61-62; 233:22-239:14). Such conditions are appropriate by the express language of Rule 41(a)(2), SCRCP ("an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."). As noted by the Fourth Circuit,

> [t]he purpose of Rule 41(a)(2) is freely to allow voluntary dismissals unless the parties will be unfairly prejudiced. To fulfill this purpose, Rule 41(a)(2) requires a court order as a prerequisite to dismissal and permits the district court to impose conditions on voluntary dismissal to obviate any prejudice to the defendants which may otherwise result from dismissal without prejudice. In considering a motion for voluntary dismissal, the district court must focus primarily on protecting the interests of the defendant.

Davis v. USX Corp., 819 F.2d 1270, 1273 (4th Cir. 1987) (citations omitted).

Here, the trial court heard Republic's arguments and granted the dismissal but provided there would be an allocation as a condition of the dismissal. (R. at 237:13-238:17). This ruling was clearly stated at the beginning of the trial, as set forth in the following exchange:

> **Counsel**: Certainly they have moved for dismissal by Order of the court. I understand your ruling, subject our objection and our Motion. We understand that you're allowing us to introduce material evidence. I would ask for an allocation on the verdict form to see -- should there be a liability verdict, to see what the allocation would be among tort feasors.
>
> **The Court**: Well, we're putting the cart before the horse. We've got to get there.
>
> There will be a separate verdict form. It's not going to be on the primary because it's -- first of all, as I understand it, they've got to determine fault. There is no reason to have anybody else on the verdict form. We don't talk about allocation. I will let you argue about that if they find fault, because now you come back and you'd get a chance to do. It really is -- the only -- it's akin to talking about comparative negligence, in the sense

> of arguing that. You have a specific argument now that 'who is the party' or which party is more egregious than the other. Certainly there are cases where they are, in some situations.
>
> I'll allow that. We will work through that part of it.

(R. at 237:13-238:17).

Immediately after considering the dismissal and allocation issue, the trial court considered motions in limine, including Burke's request that Republic not be able to introduce evidence relating to changes made to the lot by the City after Burke's fall.[6] (R. at 240:1-11). Republic opposed the request because it planned to introduce the evidence, not as a subsequent remedial measure, but rather to show control by the City. (R. at 240:17-22). The trial court reserved judgment on the matter at that time. (R. at 241:3-23). During the liability phase of the trial, when objections were made, the trial court did not allow questions about the City's post-accident actions. (R. at 351:4-15; 426:23-427:3). At the time of the first objection, the trial court stated that Republic could "revisit that if necessary later." (R. at 351:14-15).

After preventing Republic from fully exploring the City's control over the lot, the trial court denied Republic's request for a directed verdict based on its argument that the sole negligence was that of the City. (R. at 74-78). The trial court further refused

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[6] Burke's counsel described this evidence as follows:

> The second issue relates to— and I brought this to the court's attention just to get some guidance on subsequent remedial measures. There was testimony that the City had changed some light bulbs. Also there can be testimony that the curb where he tripped and fell has since been painted. They've placed some cones on the parking spot, keeping people from not parking there. There's a lot that has been done subsequent to his fall. Obviously control issues.

(R. at 240:1-11).

Republic's requested jury charge on the sole negligence of third parties. (R. at 92; 499:6-501:23; 536:11-15). Thus, the decisions of the trial court with respect to evidence and the charge effectively combined to prevent Republic from establishing this defense.

After the verdict in the first phase of the trial and when asked by Republic's counsel when the allocation would occur, the trial court stated he would let Republic ask questions about the City's actions after Mr. Burke's fall during the damages phase of the case. (R. at 563:3-12). The trial court then stated Republic could make arguments about the negligence of the City based on evidence presented in the first phase of the trial, without re-calling those witnesses. (R. at 566:18-23). The trial court further directed counsel as follows:

> **The Court**: Because as I stated, we're going to— let's have an understanding. When we're talking about 'you can argue', that's going to be after the verdict is returned on the damages issue. Then we'll send the jury back and we'll bring them back in and you can have further argument about the apportionment.
>
> **Counsel**: On the allocation?
>
> **The Court**: Yes.
>
> **Counsel**: So you don't want the allocation in the opening and closing then?
>
> **The Court**: I don't want them now because you can come back.

(R. at 576:10-22). Republic honored the trial court's instructions and did not argue the negligence of the City in its opening or closing. Toward the end of the trial, Republic's counsel asked for additional instruction about the allocation and was told any argument would come after the verdict. (R. at 684:3-7). Only after the verdict and after making all of these interim ruling that guided the evidence Republic could present, the charges that were given, and the arguments that were made did the trial court change its mind about allocation. (R. at 787:16-788:18).

This change in position by the trial court was prejudicial to Republic and warrants a new trial. Among other things, this change in course deprived Republic of its right under S.C. Code Ann. § 15-38-15(D) "***to assert*** that another potential tortfeasor, ***whether or not a party***, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." (Emphasis added).

With respect to this issue, the trial court's error was two-fold: (1) the trial court should not have dismissed Indigo and the City, in which case, there would have been no question as to whether an allocation was appropriate under S.C Code Ann. §§ 15-78-100 and 15-38-15 and (2) the trial court should not have made dismissal of Indigo and the City conditional on an allocation, conducted the trial as if there were going to be an allocation with respect to evidence, charges, and arguments, and then, after the verdict, determined there would be no allocation and Republic would not get to argue the negligence of the City. As a result, Republic is entitled to a new trial.

CONCLUSION

As shown above, Republic's duties in this case were limited by the Agreement, which required it to maintain a lot that had been in place without incident since the late 1970's or early 1980's. Given this evidence, there was no basis for the submission of this case to a jury. In addition, the trial court made numerous errors in the trial of this case that prevented Republic from receiving a fair trial. Accordingly, Republic respectfully requests that this Court reverse the judgment entered against it in this matter for any or all of the reasons set forth herein.

Respectfully submitted,

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March 18, 2016

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

RECEIVED
MAR 21 2016
SC Court of Appeals

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

Robert J. Burke .....Respondent,

v.

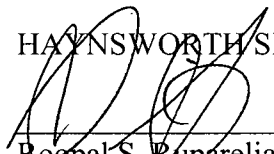
Republic Parking System, Inc. .....Appellant.

CERTIFICATE OF COMPLIANCE

I certify that the final appellant's brief and reply in this matter comply with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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Dated: March 21, 2016

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. .....Appellant.

PROOF OF SERVICE

I certify that I have served the following documents on Respondent on March 21, 2016, by mailing copies of the same via United States Mail, postage prepaid, to the following address:

Clayton B. McCullough
Jamie A. Khan
McCullough Khan, LLC
359 King Street, Ste. 200
Charleston, SC 29401

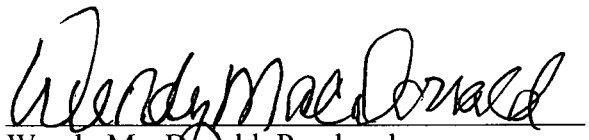
DOCUMENTS SERVED

1) Final Reply Brief of Appellant, Republic Parking System, Inc.;

2) Final Brief of Appellant, Republic Parking System, Inc.;

3) Certificate of Compliance; and

4) Certificate of Appellant.



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