

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

**RECEIVED**

MAR 21 2016

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

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**SC Court of Appeals**

Robert J. Burke ..... Respondent,

v.

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

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**REPLY BRIEF OF APPELLANT**

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THE STATE OF SOUTH CAROLINA  
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Robert J. Burke .....Respondent,

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## ARGUMENTS IN REPLY<sup>1</sup>

The parties do not dispute that Burke fell and sustained injuries in the George Street Lot on the evening January 24, 2013. Nor do the parties dispute that it was dark at the time of the fall, just as it had been every night since the City of Charleston (“City”) designed the lot and its lighting scheme in the late 1970’s or early 1980’s.

Instead, the parties disagree as to the applicable analysis relating to the existence and scope of any duty between the parties and, in the event there was a duty, the recoverable damages. As set forth in its Appellant’s Brief and further discussed below, Republic is entitled to judgment as a matter of law, or, in the alternative, a new trial.

**I. Republic managed the George Street Lot pursuant to a Parking Garage Management Agreement (“Agreement”), and that Agreement does not give rise to a duty to Burke in this case.**

Republic argued throughout the trial of this case that its obligations and duties were limited to those set forth in the Agreement entered between the City and Republic. The trial court reviewed the Agreement, found there was a duty as a matter of law, and then gave a basic premises liability charge as if Republic were an owner or occupier of the property. (R. at 475:24-476:16; 523:12-525:22).

Contrary to the position taken in Section I of Burke’s Respondent’s Brief, the jury in this case was not tasked with determining duty. The trial court did not charge the jury according to the terms of the Agreement, nor did it charge the jury as if the duty issue were a mixed question of law and fact relating to whether Republic had voluntarily assumed a duty. Thus, even if the Court accepts Respondent’s suggested method of determining duty in this case, Republic would still be entitled to a new trial.

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<sup>1</sup> Republic Parking System, Inc. (“Republic”) has fully briefed the arguments addressed by Robert J. Burke in its Appellant’s Brief. It does not undertake to repeat all of those arguments here, but rather to address certain points raised in Burke’s Respondent’s Brief.

**A. The existence and scope of duty are generally questions of law for the Court.**

The parties agree that the general rule is that “[w]hether the law recognizes a particular duty is an issue of law to be decided by the court.” *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997). Republic has argued that this is the rule applicable in this case. In further support of that argument, Republic notes that the duty analysis in this case is governed by the Agreement and construction of an unambiguous contract is a matter of law for the court. *See Pearson v. Church of God*, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996); *Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 676, 301 S.E.2d 142, 144 (1983). Republic contends that there is no question under the Agreement as to the scope of Republic’s obligations and the fact that the Agreement does not create any duties to third parties. (R. at 830-859).

After acknowledging this general rule, Burke has argued instead that the duty issue in this case presents a mixed question of law and fact. South Carolina courts have recognized that there are situations where “the question of whether a duty arises depends on the existence of particular facts.” *Carson* at 217, 486 S.E.2d at 5. However, in those cases, “it is the duty of the court to instruct the jury as to the defendant’s duty, or absence of duty, if either conclusion as to the facts is reached.” *Id.* (citing Restatement (Second) of Torts § 328B cmt. e (1965)).<sup>2</sup>

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<sup>2</sup> This comment provides,

It is the further function of the court to determine whether, upon facts in evidence which the jury may reasonably find to be true, the law imposes upon the defendant any legal duty to act or to refrain from acting for the protection of the plaintiff. This decision is always for the court. Thus it is no part of the province of a jury to determine what duty a possessor of land owes to an undiscovered trespasser.[ ] Where the existence of the duty will depend upon the existence or non-existence of a fact as to which

Burke cites three cases in support of this argument; however, in each of these cases, the court found no duty as a matter of law. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246-47, 711 S.E.2d 908, 911-12 (2011) (affirming the trial court’s grant of summary judgment to defendant because there was no duty and further finding “[o]nly when there is a duty would a standard of care need to be established”); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (finding no contractual duty in dam failure case where contractor assumed maintenance obligations for dam but City reserved control over dam and water level in weather emergency); *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256-57, 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”). These cases all support Republic’s argument that the trial court erred in its assessment of the duty issue in this case. In fact, Republic cited each of these cases in its Appellant’s Brief.

In addition, Burke’s Respondent’s Brief takes the position that the trial judge submitted the duty issue to the jury. This is not the case. Instead, the trial court found that Republic owed all of the duties owed by an owner or occupier of real property to an invitee and charged the jury accordingly. (R. at 475:24-476:16; 523:12-525:22).

The trial court did not present the jury with any charge relating to the existence of any particular facts based on Republic’s status “such as whether the defendant has voluntarily undertaken a duty, represents an occupier in control of the premises, or stands

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the jury may reasonably come to either one of two conclusions—as for example, whether the trespasser was in fact discovered—then it becomes the duty of the court to instruct the jury as to the defendant’s duty, or absence of duty, if either conclusion as to such fact is drawn.

as an independent contractor with expertise superior to that of the property owner” as referenced in Section I of Burke’s Respondent’s Brief. Such a charge would have been required if this case presented mixed questions of law and fact as to duty. *See Carson* at 217, 486 S.E.2d at 5.

Republic sought a charge based on the terms of the Agreement and the evidence, but the trial court insisted on charging this case as a basic matter of premises liability. (R. at 478:9-480:20). As a result, the jury did not make any determination as to any underlying factual questions relating to duty. Therefore, even if Burke is correct and this case presented a mixed question of law and fact on this element, Republic would be entitled to a new trial because the jury was not charged with respect to “the existence or non-existence of a fact as to which the jury may reasonably come to either one of two conclusions” and “the defendant’s duty, or absence of duty, if either conclusion as to such fact is drawn.” Restatement (Second) of Torts § 328B cmt. e.

**B. Under the Agreement, Republic was tasked with maintaining the George Street Lot, and the City retained control and financial responsibility for any changes in the George Street Lot.**

Burke’s theory of liability rested on design issues with the George Street Lot. As testified by Burke’s liability expert, Alan Campbell, the lot could have been made safer in the following ways: increased lighting, creation of a dedicated walkway though the parking lot as shown by painting striping in an existing parking space resulting in the loss of the space for parking, and adding railings. (R. at 370:6-378:10). As shown in Republic’s Appellant’s Brief, none of these items were within Republic’s control under the terms of Agreement.

The City designed the lot and operated it for many years. (R. at 338:8-15). There was no history of injuries in the lot until Burke's fall. (R. at 355:1-22; 360:4-7; 397:19-22; 422:9-16; 445:13-21). The conditions referenced by Burke were all existing at the time of the Agreement. (See R. at 358:2-360:3; 430:20-431:13). Republic was retained to maintain the lot and return it to the City in the condition in which it found it. (R. at 835-838, Article IV; 840-841, ¶¶ 5.9, 5.10). In addition, Republic did not assume any duties to third parties under the Agreement. (R. at 855, ¶ 10.1) ("Nothing contained in this Agreement shall be construed to confer upon any other party, the rights of a third party beneficiary . . .").

Burke's assignments of negligence do not arise from maintenance issues.<sup>3</sup> For example, this is not a case of a chipped curb or a burned out light bulb. Instead, Burke seeks to recover for complaints about the underlying design of the lot. Pursuant to the Agreement, these items remained within the purview of the City. Moreover, there was no evidence that the lot had changed over time; thus, the City was well aware of those conditions. There was nothing new about the way the lot looked at night.

The witness testimony was consistent with the Agreement as to the specific complaints raised by Burke. The testimony was consistent from both the City and Republic that Republic could not change the lighting. (See e.g. R. at 359:13-16 (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,

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<sup>3</sup> Burke makes a passing reference to an after the fact failure to report Burke's fall in violation of Republic's policy; however, an event occurring after the fact of injury could not have been the proximate cause of any injury to Burke. Thus, this allegation is irrelevant in the liability analysis and would not provide any basis for a tort claim in this case.

testified “In that lot, no.”); R. at 456:13-21 (when Dwight Potter, general manager for Republic in Charleston, was asked, “So you undertook an evaluation of the lighting conditions at the George Street lot?” he responded, “Undertook it to the scope, you know, the way I understood my position and Republic’s position, as I was told by the City, was we were to replace the bulbs at all the facilities, whatever the existing light bulb was, the ballast was. If it had a dome, a globe on it, a pole, whatever, we were to replace as is.”). The testimony was also clear that 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).

Thus, all of the assignments of negligence made by Burke were created by and were within the control of the City as set forth in the Agreement. For these reasons and as more fully argued in its Appellant’s brief, Republic was entitled to judgment as a matter of law in this case.

**II. Burke did not present any evidence that would allow the jury to return a properly discounted verdict for future damages.**

In Section II of Burke’s Respondent’s Brief, Burke appears to take the position that Republic’s arguments as to future damages are barred by the two issue rule. This argument is misplaced. The two issue rule applies in cases where more than one cause of action is submitted to the jury under a general verdict. In such a case, the appellate court will affirm unless the appellant appeals all causes of action. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). The rule applies with respect to distinct causes of action and defenses, not different components of damages for one claim.

As previously argued by Republic, any award for future damages must 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, “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). Burke does not argue that present value calculations are within the common knowledge of the jury, but instead argues that the charge on the mortality table was sufficient to guide the jury in this calculation. Burke, however, fails to address how the jury could have completed the calculation. The jury was not given any formula or present value table, nor was there any guidance as to the applicable interest rate or compounding periods. Therefore, the jury was not equipped to derive a properly discounted award.

This was all to the prejudice of Republic. Burke’s closing argument focused on future damages as did the testimony of his medical expert, Dr. Marshall White. These damages made up the majority of the total presented by Burke in his closing argument. For all of the reasons previously argued by Republic, Burke was not entitled to recover any measure of future damages based on the evidence presented at trial. Quite simply, Burke failed to meet his burden with respect to future damages because the jury could not perform the necessary computation required to reduce any award to present value.

**III. Republic could not have foreseen the damages stemming from Burke’s elective knee surgery more than a year after his fall.**

Republic has not argued that all of the damages claimed by Burke at trial were not foreseeable. Instead, Republic has argued there is a causal break as a matter of law with respect to any injuries incurred as a result of Burke’s subsequent elective knee replacement surgery such that those damages were not foreseeable.

As shown by the evidence at trial, Burke had achieved a substantial recovery prior to the surgery. (*See R.* at 611:15-612:1; 719:4-13). Therefore, these damages sustained

after and as a result of the knee surgery were not a natural and probable consequence of Burke's fall. As such, they are not recoverable as a matter of law. *See Young v. Tide Craft, Inc.*, 270 S.C. 453, 462-66, 242 S.E.2d 671, 675-76 (1978). Here, the fall may have brought about a set of affairs, but the knee surgery presented "another and entirely independent and efficient agency" causing the injury. *Stone v. Bethea*, 251 S.C. 157, 162, 161 S.E.2d 171, 173 (1968). As such, Republic is not liable for those injuries and the trial court erred in failing to direct a verdict accordingly.

**IV. Republic is entitled to a new trial based on numerous errors committed by the trial court.**

**A. The trial court failed to fully and fairly charge the jury in this case.**

**1. The trial court erred in failing to charge proximate cause in the liability phase of this case.**

Republic's request for a bifurcated trial did not absolve Burke of his burden of proving every element of a negligence cause of action, including proximate cause. As discussed in its Appellant's Brief, Republic raised this issue repeatedly to the trial court, in the form of a written request to charge, a proposed verdict form, and exceptions made to the charge in the charge conference, after the charge but before deliberations, and after the verdict in the liability phase of the trial. (R. at 91; 81-82; 496: 13-15; 536:11-15; 572:16-573:6). Accordingly, this objection is fully preserved and Republic is entitled to a new trial for the reasons set forth in Republic's Appellant's Brief.

**2. The trial court erred in charging the jury as if Republic were an owner or occupier of the George Street Lot.**

As discussed above, Republic contends it did not have a duty in this case as a matter of law. Burke disagrees and argues instead that this case presents a mixed question of fact and law as to duty with respect to Republic's status. Burke contends

there were questions of fact as to whether Republic “had 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.” (Respondent’s Brief at Section I).

Following the denial of its directed verdict on the duty issue, Republic argued that the jury should be charged with respect to its status as an independent contractor pursuant to the terms of the Agreement. (R. at 478:9-480:20). The trial court denied that request and instead found as a matter of law that Republic owed the duties of an occupier to an invitee and charged the jury accordingly. (R. at 475:24-476:16; 523:12-525:22). Thus, the jury did not “properly [find] that Republic exerted the necessary amount of control to be deemed an occupier” contrary to the argument made in Section IV(A)(2) of Burke’s Respondent’s Brief. As argued above, this charge was in error even if the Court accepts Burke’s argument that the issue of duty in this case is a mixed question of fact and law.

**3. The trial court’s erroneous charge in the liability phase of the case was compounded by its failure to give an adequate charge on the sole negligence of others.**

As reflected in Republic’s Appellant’s Brief as a whole, the trial court effectively prevented Republic from presenting an empty chair defense with respect to the City. This includes the failure to give the charge that would have directly told the jury they could not find against Republic for the negligence of another person. Burke does not argue that Republic’s proposed charge was not supported by the evidence, nor does he argue that the charge was not a correct statement of law. Instead, he argues that the charge given by the trial court, while different, was good enough. Neither the written charge nor the oral charge included any express treatment of a case where a third party is in fact the negligent actor. Given the evidence in this case relating to the City, the failure to give this charge constituted prejudicial error such that a new trial is warranted.

**B. The trial court mishandled the medical testimony in this case to Republic's prejudice.**

**1. The trial court erred in excluding Republic's expert, Dr. Todd Shuman.**

“The exclusion of a witness is a sanction which ‘should never be lightly invoked.’” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 108, 410 S.E.2d 537, 541-42 (1991) (quoting *Kirkland v. Peoples Gas Co.*, 269 S.C. 431, 435, 237 S.E.2d 772, 774 (1977)). Contrary to the arguments raised by Burke in his Respondent's Brief, the trial court excluded Republic's expert medical witness solely because he had not been previously disclosed by Republic as an expert. (R. at 245:1-5). As stated by the trial court, “Very well. I am going to grant his motion [in limine]. He's not going to testify. I don't quarrel with the fact that they can't claim surprise but there's a duty to identify an expert.”). (*Id.*).

The City was not dismissed from the case until the morning of trial. As of that time, Republic had done everything in its power to keep the City in the case and had named Dr. Shuman in its pre-trial brief. Thus, there was no surprise to Burke that Republic planned to call Dr. Shuman as an expert at the time the City was dismissed.

Further, the amount of the total settlement with the City (\$300,000) shows that the settlement was not motivated by the presence or absence of Dr. Shuman, but rather by the operation of the tort claims cap applicable to claims against the City as set forth in S.C. Code Ann. § 15-78-120. Burke's argument to the contrary is disingenuous.

There was no question that Dr. Shuman had been disclosed by Republic as an expert witness in its pre-trial brief, that he had been previously deposed, and that he had previously been named as an expert by the City. (R. at 66-73; 243:6-22). Rather than

engaging in the full analysis required before invoking the severe sanction of witness exclusion, the trial court simply excluded the witness. Such a ruling amounts to an abuse of discretion. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007) (holding failure to consider factors in ruling on discovery sanction is an abuse of discretion).

**2. The trial court erred in allowing Burke's medical expert, Dr. White, testify outside his field to undisclosed damages.**

Republic notes that the largest category of damages for which Dr. White presented testimony were based on Dr. White's examination of Burke the Friday before trial. A deposition would not have revealed these damages because Dr. White had not concocted them yet. Moreover, Burke did not supplement his earlier interrogatory responses or production of medical records to reflect these damages. As such, Republic was powerless to defend against them to its grave prejudice, particularly in light of the exclusion of Republic's expert, Dr. Shuman.

As shown in Republic's Appellant's Brief and Burke's Respondent's Brief, Republic objected to this testimony numerous times and was overruled each time. Once an objection has been properly raised, a party is not required to continue to object to preserve an issue. *See Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 45-46, 426 S.E.2d 756, 758 (1993) (noting that where a trial judge has fair opportunity to consider and rule upon an issue, it is not incumbent upon counsel "to harass the judge by parading the issue before [the trial judge] again"). Thus, these arguments are fully preserved and warrant the grant of a new trial in this case.

**C. The trial court erred in failing to allow Republic to present evidence directly relevant to issues of liability during the liability phase of the trial.**

Republic has assigned no error to the trial court for the bifurcation of this case. Rather, Republic argues that the trial judge did not allow it to present its full case with respect to liability, including certain evidence relating to the role of the City and other evidence relating to the comparative negligence of Burke. These matters were relevant to the issues to be determined in the first portion of the case, and Republic should have been free to explore and argue them. The trial court's refusal to allow Republic to do so was prejudicial, particularly in light of the trial court's later reversal on its rulings relating to argument on the negligence of others.

**V. The trial court erred in making decisions regarding evidence and argument that effectively stripped Republic of its ability to argue the empty chair with respect to the City.**

As previously argued by Republic, the trial court's rulings in this case from the dismissal of Indigo and the City through the verdict indicated that there would be an allocation as a condition of the dismissal. These rulings further provided Republic would be able to argue that the City was solely at fault in this case. Thus, Republic was entitled to an allocation and argument pursuant to Rule 41(a)(2), SCRCP, regardless of whether it was entitled to a statutory allocation.

In addition, the trial court made evidentiary rulings to exclude evidence on the grounds that Republic would have another opportunity to present evidence and make arguments relating to the City's actions and control. The trial court's ruling, only after a verdict had been returned, that there would be no argument and no allocation stripped Republic of that opportunity and gravely prejudiced Republic's defense. Had Republic been allowed to present that evidence and make those arguments in the liability phase of

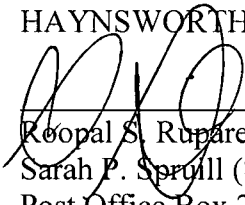
the trial, the outcome might have been very different. As a result Republic is entitled to a new trial.

**CONCLUSION**

For all of the foregoing reasons and those previously argued by Republic, the judgment in this matter must be reversed and remanded for entry of judgment in favor of Republic, or, in the alternative, this matter must be reversed and remanded for a new trial.

Respectfully submitted,

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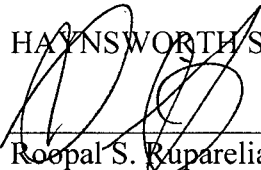
**CERTIFICATE OF COMPLIANCE**

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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,

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

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**PROOF OF SERVICE**

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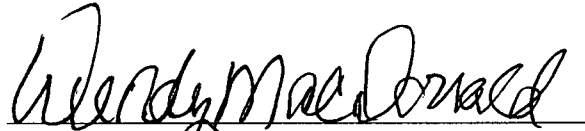
I certify that I have served the following documents on Respondent on March 21, 2016, by mailing copies of the same via United States Mail, postage prepaid, to the following address:

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.

A handwritten signature in black ink, reading "Wendy MacDonald". The signature is written in a cursive style and is positioned above a horizontal line.

Wendy MacDonald, Paralegal  
Haynsworth Sinkler Boyd, P.A.  
P.O. Box 2048  
Greenville, SC 29602  
864.240.4544