

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.

RECORD ON APPEAL

VOLUME I OF III (Pages 1 - 500)

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Clarence
D. Melton, Jr., and Republic Parking
System, Inc.

Defendants,

Indigo Realty Company, LLC,

Third Party Plaintiff,

vs.

City of Charleston,

Third Party Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-1400

**ORDER GRANTING MOTION TO
AMEND AND REALIGN THE
PARTIES**

FILED
2013 DEC 18 PM 4:27
JULIE J. ARMSTRONG
CLERK OF COURT
BY R

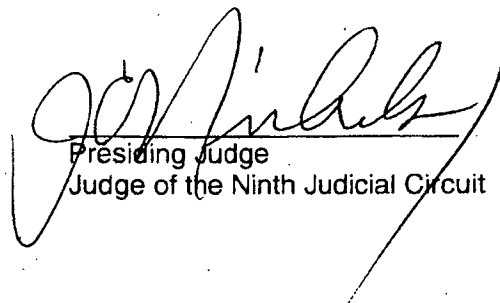
The Plaintiffs hereby wish to amend the pleadings to reflect that third party defendant City of Charleston is properly a defendant to this case pursuant to Rules 15(a) and 19(a), SCRPC. Further, Plaintiffs wish to realign the caption to reflect same.

IT IS ORDERED that the City of Charleston be made a Defendant in this matter, that the caption be re-arranged to so reflect, and that Plaintiffs are hereby authorized to filed an Amended Complaint.

IT IS FURTHER ORDERED the City of Charleston can reconvene the Plaintiffs' depositions.

AND IT IS SO ORDERED.

Dated: 12/17/13


Presiding Judge
Judge of the Ninth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

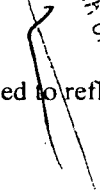
Indigo Realty Company, LLC; Republic
Parking System, Inc., and the City of
Charleston,

Defendants

) IN THE COURT OF COMMON PLEAS

) Civil Action No.: 2013-CP-10-1400

**CONSENT AMENDED SCHEDULING
ORDER**

FILED
2014 AUG 13 AM 10:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

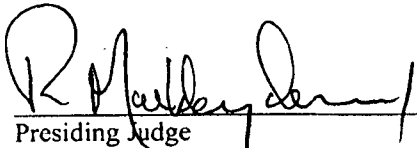
For good cause shown, the following Scheduling Order in this case is amended to reflect:

1. Discovery must be completed on or before October 1, 2014.
2. Dispositive Motions shall be filed on or before October 15, 2014.
3. The parties shall mediate the case on or before November 15, 2014.
4. The case is subject to trial after December 15, 2014.

In the event this case is not resolved at mediation, the parties agree to exempt depositions taken for trial from the deadline on discovery, and permit such to occur up to December 1, 2014.

AND IT IS SO ORDERED.

Aug 12, 2014
Charleston, South Carolina


Presiding Judge
Ninth Judicial Circuit



WE SO CONSENT:

Lisa Reynolds w/permission
Clayton B. McCullough
McCullough Khan, LLC
68 1/2 Queen Street
Charleston, SC 29401
Attorney for the Plaintiffs

WE SO CONSENT:

Lisa Reynolds w/permission
Bonum S. Wilson, III
Wilson & Heyward, LLC
P.O. Box 13177
Charleston, SC 29422
Attorney for Indigo Realty

WE SO CONSENT:

Lisa A. Reynolds
Lisa A. Reynolds
Anderson Reynolds & Stephens LLC
P.O. Box 87
Charleston, SC 29402
Attorney for the City of Charleston

WE SO CONSENT:

Lisa Reynolds w/permission
Stephen Darling
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402
Attorney for Republic Parking Systems, Inc.

Reid

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-10-1400

Robert J. Burke

Republic Parking Systems, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: The jury verdict in this case of \$4,005,125 is reduced by \$801,025 (representing the percentage of Plaintiff's comparative negligence), and is further reduced by \$20,000 (representing the amount of claims previously paid) for a total final verdict of \$3,184,100; The original verdict forms are attached hereto.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

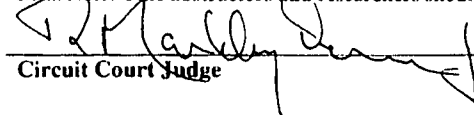
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Robert J. Burke	Republic Parking Systems, Inc.	\$3,184,100
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2060
Judge Code

1/29/2015
Date

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

ROBERT J. BURKE

Plaintiff,

vs.

REPUBLIC PARKING SYSTEM, INC.,

Defendant.

IN THE COURT OF COMMON PLEAS
CASE NO. 2013-CP-10-1400

VERDICT FORM

1. Do you find that the Plaintiff has proven by a preponderance of the evidence that the Defendant was negligent?

yes

YES: GO TO QUESTION 2

____ NO: STOP AND DELIBERATE NO FURTHER

2. Do you find that the Plaintiff has proven by clear and convincing evidence that the Defendant's conduct was not only negligent but also grossly negligent, willful, wanton or reckless?

____ YES: GO TO QUESTION 3

no

NO: GO TO QUESTION 3

3. Do you find that the Defendant has proven by a preponderance of the evidence that the Plaintiff was negligent?

yes

YES: GO TO QUESTION 4

____ NO: STOP AND DELIBERATE NO FURTHER

4. If your answers to questions 1 and 3 are BOTH YES, then answer this question:

Taking the combined negligence that proximately caused the parties' injuries as one hundred percent (100%), what percentage of that negligence is attributable to the plaintiff and what percentage is attributable to the defendant?

Plaintiff:	<u>20</u>	%
Defendant:	<u>80</u>	%
Total	<u>100%</u>	

ABronckfus
PRESIDING JUROR

CHARLESTON, SOUTH CAROLINA
DECEMBER 18, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ROBERT J. BURKE,)

Plaintiff,)

vs.)

REPUBLIC PARKING SYSTEM, INC.)

Defendant.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2013-CP-10-1400

VERDICT

WE, THE JURY in the above entitled action, unanimously find for the:

Plaintiff in the amount of four million five thousand one
DOLLARS (\$ 4,005,125 .00) actual damages. hundred twenty
five dollars and
zero cents.

Shirley #28
Presiding Juror

CHARLESTON, SOUTH CAROLINA

December 19, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-10-1400

Robert J. Burke

Republic Parking Systems, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff or ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial--filed on 12/29/14--is DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

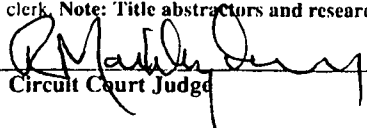
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2060

Judge Code

1/29/2015

Date

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Robert J. Burke and Jane B. Burke,)
)
Plaintiffs,)

vs.)

Indigo Realty Company, Ltd., Clarence)
D. Melton, Jr., 324 King, LLC, and)
Republic Parking System, Inc.)
)
Defendants.)

TO: DEFENDANTS NAMED ABOVE.

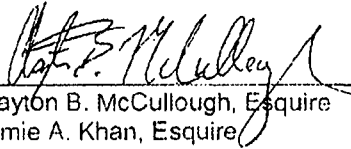
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-_____

SUMMONS
(JURY TRIAL DEMANDED)

FILED
2013 MAR -8 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your pleading to said Complaint upon the subscribers at their offices at 68 ½ Queen Street, Charleston, South Carolina, 29401, within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for judgment by default for the relief demanded in the Complaint.

McCULLOUGH KHAN, LLC


Clayton B. McCullough, Esquire
Jamie A. Khan, Esquire
Ross A. Appel, Esquire
68 ½ Queen Street
Charleston, SC 29401
T: 843.937.0400
D: 843.937.0401
clay@mkiawsc.com

March 8, 2013
Charleston, South Carolina

ATTORNEY FOR THE PLAINTIFFS

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Robert J. Burke and Jane B. Burke,)
)
Plaintiffs,)

vs.)

Indigo Realty Company, Ltd., Clarence)
D. Melton, Jr., 324 King, LLC, and)
Republic Parking System, Inc.)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-_____

COMPLAINT
(JURY TRIAL DEMANDED)

FILED
2013 MAR -8 PM 4:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: DEFENDANTS NAMED ABOVE.

Plaintiffs, Robert J. Burke and Jane B. Burke, complaining of the above named Defendants, allege and state as follows:

THE PARTIES

1. Plaintiff Robert J. Burke ("Robert Burke") is a citizen and resident of Wilson, North Carolina.
2. Plaintiff Jane B. Burke ("Jane Burke") is a citizen and resident of Wilson, North Carolina. Jane Burke is the wife of Plaintiff Robert Burke.
3. Defendant Indigo Realty Company, Ltd. ("Indigo") is an entity organized and existing under the laws of the State of South Carolina that owns property located on George Street, Charleston, South Carolina. The Charleston County Parcel Identification Number for the property is 4570404112. This parcel operates, together with adjoining parcels, as an hourly fee parking lot.

4. Defendant Clarence D. Melton, Jr. ("Melton") is an individual, and upon information and belief, is a citizen and resident of Charleston County, South Carolina. Mr. Melton owns property located on George Street, Charleston, South Carolina. The Charleston County Parcel Identification Number for the property is 4570404117. This parcel operates, together with adjoining parcels, as an hourly fee parking lot.
5. Defendant 324 King, LLC ("324 King") is an entity organized and existing under the laws of the State of South Carolina that owns property located on George Street, Charleston, South Carolina. The Charleston County Parcel Identification Number for the property is 4570404010. This parcel operates, together with adjoining parcels, as an hourly fee parking lot.
6. Defendant Republic Parking System, Inc. ("Republic") is a corporation organized and existing under the laws of the State of Tennessee and operates as the management company for the "George Society" parking lot at issue.

JURISDICTION AND VENUE

7. This court has jurisdiction over the parties and the subject matter of this action.
8. Venue is proper in the Court of Common Pleas for Charleston County pursuant to South Carolina law.

FACTS

9. On January 24, 2013, Robert J. Burke was a customer in the "George Society" parking lot located on George Street, Charleston, SC. Mr. Burke entered the parking lot at approximately 7:00 p.m. through the gate operated by Republic and the property owned by Indigo.

10. After taking his parking ticket from Republic's agents, he drove his vehicle to the right front portion of the "George Society" parking lot and parked in a handicap space located on the property owned by Melton and 324 King. At the time he exited his vehicle, the weather was clear.
11. Mr. Burke attempted to exit the parking lot by walking towards George Street. There is no clear passage way from his parking space to George Street nor any signage or directives on how to safely exit the lot. Mr. Burke was required to weave his way through parked vehicles seeking an exit.
12. While attempting to exit the parking lot, Mr. Burke tripped and fell on a raised curb located inside the "George Society" parking lot on the property owned by Indigo.
13. The curb was virtually hidden as the result of the extremely low and poor lighting conditions in this area of the "George Society" parking lot.
14. Additionally, the curb was obscured by parked vehicles.
15. A subsequent lighting measurement performed by a qualified engineer, taken in similar lighting conditions during the same-time of night, revealed that the amount of light present in the immediate location of Mr. Burke's fall is less than 50% of the minimum for surface area parking lots based on standards set out by the Illuminating Engineering Society of North America.
16. The curb was hidden and obscured, based on the amount of light and created a dangerous and hazardous condition to pedestrians in the parking lot.
17. At the time this incident occurred, Mr. Burke was an invitee. As such, the Defendants owed him a duty to exercise reasonable and ordinary care in keeping

the parking lot free and clear of dangerous conditions. This includes having adequate lighting to provide a safe passage way through the parking lot.

18. As a result of his fall, Mr. Burke suffered significant injuries. He continues to receive daily medical treatment even after being released from the hospital. His injuries have greatly limited, or altogether eliminated, the activities in which he can participate, cost him great pain and have severely limited or altogether eliminated his ability to work and earn a living. He has incurred extensive medical bills, will have extensive future medical bills and will have significant physical limitations for the rest of his life.
19. Defendants Indigo Realty Company, Ltd., Clarence D. Melton, Jr., and 324 King, LLC own that portion of the "George Society" parking lot which presented and contained the dangerous conditions and operate such for profit, on which Mr. Burke parked and where Mr. Burke fell due to the negligence of the Defendants.
20. Defendant Republic Parking System, Inc. operates and manages the "George Society" parking lot for the other Defendants, for profit.
21. Additionally, Mrs. Burke has suffered greatly by all of the above. She has endured emotional trauma as a direct result of her husband's treatment. She has also spent a significant amount of time caring for her husband based on his medical condition and physical limitations.

FOR A FIRST CAUSE OF ACTION
(Negligence, Negligence Per Se and Gross Negligence)
AGAINST ALL DEFENDANTS

22. The Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 21 as if fully repeated verbatim herein.

23. The injuries suffered by the Burkes were due to and caused by, and were the direct and proximate result of the carelessness, negligence, recklessness, wantonness, and heedlessness of the Defendants in each of the following particulars:

- (a) In failing to warn of the dangers and unsafe conditions;
- (b) In failing to take adequate safety measures including, but not limited to, maintaining a safe, effective level of light to allow pedestrians to observe and avoid dangerous conditions;
- (c) In failing to have a safe ingress/egress passage way for pedestrians to exit the parking lot; and
- (d) In failing to maintain the property to adequately provide for the safety of the parking lot customers.

24. The Defendants knew or should have known that the condition of the parking lot, including but not limited to the extremely poor lighting conditions, created a dangerous condition to pedestrians and their customers.

25. The poor lighting conditions violate the applicable industry standard and amount to negligence per se.

26. The Defendants were negligent and grossly negligent in breaching their duties of care owed to Plaintiffs.

27. The Defendants' acts and omissions were the proximate cause of the damages suffered by the Plaintiffs.

28. Plaintiffs have suffered and will continue to suffer from damages including, but not limited to:

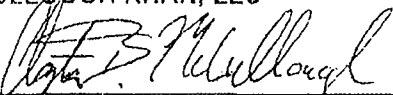
- (a) Healthcare expenses;
- (b) Physical pain and suffering;
- (c) Mental and emotional distress;
- (d) Loss of ability to work and be productive;
- (e) Loss of enjoyment of life;
- (f) Loss of earning capacity;
- (g) Loss of consortium; and
- (h) Permanent disability.

29. Plaintiffs are entitled to and pray for an award of damages against the Defendants, both actual, special, consequential and in an amount deemed sufficient to compensate them fully for all losses and damages, past, present, and future, as well as punitive damages in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

WHEREFORE, the Plaintiffs are entitled to and pray for a judgment against the Defendants in any amount to be proven at trial to compensate them for the loss they have suffered as a result of the Defendants conduct for past, present and future damages, as well as a separate punitive award in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

McCULLOUGH KHAN, LLC

By:



Clayton B. McCullough, Esquire

Jamie A. Khan, Esquire

Ross A. Appel, Esquire

McCullough Khan, LLC

68 ½ Queen Street

Charleston, SC 29401

Telephone: 843.937.0400

Facsimile: 843.937.0706

E-Mail: clay@mkiawsc.com

ATTORNEYS FOR PLAINTIFFS

3-8, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC., Clarence
D. Melton, Jr., 324 King, LLC, and
Republic Parking System, Inc.

Defendants.

TO: DEFENDANTS NAMED ABOVE.

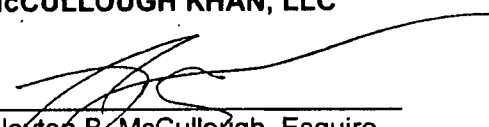
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-1400

AMENDED SUMMONS
(JURY TRIAL DEMANDED)

FILED
2013 MAR 22 PM 3:36
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your pleading to said Complaint upon the subscribers at their offices at 68 ½ Queen Street, Charleston, South Carolina, 29401, within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for judgment by default for the relief demanded in the Complaint.

McCULLOUGH KHAN, LLC


Clayton B. McCullough, Esquire
Jamie A. Khan, Esquire
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Charleston, SC 29401
T: 843.937.0400
D: 843.937.0401
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March 22, 2013
Charleston, South Carolina

ATTORNEYS FOR THE PLAINTIFFS

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Clarence
D. Melton, Jr., 324 King, LLC, and
Republic Parking System, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-1400

AMENDED COMPLAINT
(JURY TRIAL DEMANDED)

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2013 MAR 22 PM 3:36

FILED

TO: DEFENDANTS NAMED ABOVE.

Plaintiffs, Robert J. Burke and Jane B. Burke, complaining of the above named
Defendants, allege and state as follows:

THE PARTIES

1. Plaintiff Robert J. Burke ("Robert Burke") is a citizen and resident of Wilson, North Carolina.
2. Plaintiff Jane B. Burke ("Jane Burke") is a citizen and resident of Wilson, North Carolina. Jane Burke is the wife of Plaintiff Robert Burke.
3. Defendant Indigo Realty Company, LLC ("Indigo") is an entity organized and existing under the laws of the State of South Carolina that owns property located on George Street, Charleston, South Carolina. The Charleston County Parcel Identification Number for the property is 4570404112. This parcel operates, together with adjoining parcels, as an hourly fee parking lot.

4. Defendant Clarence D. Melton, Jr. ("Melton") is an individual, and upon information and belief, is a citizen and resident of Charleston County, South Carolina. Mr. Melton owns property located on George Street, Charleston, South Carolina. The Charleston County Parcel Identification Number for the property is 4570404117. This parcel operates, together with adjoining parcels, as an hourly fee parking lot.
5. Defendant 324 King, LLC ("324 King") is an entity organized and existing under the laws of the State of South Carolina that owns property located on George Street, Charleston, South Carolina. The Charleston County Parcel Identification Number for the property is 4570404010. This parcel operates, together with adjoining parcels, as an hourly fee parking lot.
6. Defendant Republic Parking System, Inc. ("Republic") is a corporation organized and existing under the laws of the State of Tennessee and operates as the management company for the "George Society" parking lot at issue.

JURISDICTION AND VENUE

7. This court has jurisdiction over the parties and the subject matter of this action.
8. Venue is proper in the Court of Common Pleas for Charleston County pursuant to South Carolina law.

FACTS

9. On January 24, 2013, Robert J. Burke was a customer in the "George Society" parking lot located on George Street, Charleston, SC. Mr. Burke entered the parking lot at approximately 7:00 p.m. through the gate operated by Republic and the property owned by Indigo.

10. After taking his parking ticket from Republic's agents, he drove his vehicle to the right front portion of the "George Society" parking lot and parked in a handicap space located on the property owned by Melton and 324 King. At the time he exited his vehicle, the weather was clear.
11. Mr. Burke attempted to exit the parking lot by walking towards George Street. There is no clear passage way from his parking space to George Street nor any signage or directives on how to safely exit the lot. Mr. Burke was required to weave his way through parked vehicles seeking an exit.
12. While attempting to exit the parking lot, Mr. Burke tripped and fell on a raised curb located inside the "George Society" parking lot on the property owned by Indigo.
13. The curb was virtually hidden as the result of the extremely low and poor lighting conditions in this area of the "George Society" parking lot.
14. Additionally, the curb was obscured by parked vehicles.
15. A subsequent lighting measurement performed by a qualified engineer, taken in similar lighting conditions during the same time of night, revealed that the amount of light present in the immediate location of Mr. Burke's fall is less than 50% of the minimum for surface area parking lots based on standards set out by the Illuminating Engineering Society of North America.
16. The curb was hidden and obscured, based on the amount of light and created a dangerous and hazardous condition to pedestrians in the parking lot.
17. At the time this incident occurred, Mr. Burke was an invitee. As such, the Defendants owed him a duty to exercise reasonable and ordinary care in keeping

the parking lot free and clear of dangerous conditions. This includes having adequate lighting to provide a safe passage way through the parking lot.

18. As a result of his fall, Mr. Burke suffered significant injuries. He continues to receive daily medical treatment even after being released from the hospital. His injuries have greatly limited, or altogether eliminated, the activities in which he can participate, cost him great pain and have severely limited or altogether eliminated his ability to work and earn a living. He has incurred extensive medical bills, will have extensive future medical bills and will have significant physical limitations for the rest of his life.
19. Defendants Indigo Realty Company, LLC, Clarence D. Melton, Jr., and 324 King, LLC own that portion of the "George Society" parking lot which presented and contained the dangerous conditions and operate such for profit, on which Mr. Burke parked and where Mr. Burke fell due to the negligence of the Defendants.
20. Defendant Republic Parking System, Inc. operates and manages the "George Society" parking lot for the other Defendants, for profit.
21. Additionally, Mrs. Burke has suffered greatly by all of the above. She has endured emotional trauma as a direct result of her husband's treatment. She has also spent a significant amount of time caring for her husband based on his medical condition and physical limitations.

FOR A FIRST CAUSE OF ACTION
(Negligence, Negligence Per Se and Gross Negligence)
AGAINST ALL DEFENDANTS

22. The Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 21 as if fully repeated verbatim herein.

23. The injuries suffered by the Burkes were due to and caused by, and were the direct and proximate result of the carelessness, negligence, recklessness, wantonness, and heedlessness of the Defendants in each of the following particulars:
- (a) In failing to warn of the dangers and unsafe conditions;
 - (b) In failing to take adequate safety measures including, but not limited to, maintaining a safe, effective level of light to allow pedestrians to observe and avoid dangerous conditions;
 - (c) In failing to have a safe ingress/egress passage way for pedestrians to exit the parking lot; and
 - (d) In failing to maintain the property to adequately provide for the safety of the parking lot customers.
24. The Defendants knew or should have known that the condition of the parking lot, including but not limited to the extremely poor lighting conditions, created a dangerous condition to pedestrians and their customers.
25. The poor lighting conditions violate the applicable industry standard and amount to negligence per se.
26. The Defendants were negligent and grossly negligent in breaching their duties of care owed to Plaintiffs.
27. The Defendants' acts and omissions were the proximate cause of the damages suffered by the Plaintiffs.
28. Plaintiffs have suffered and will continue to suffer from damages including, but not limited to:

- (a) Healthcare expenses;
- (b) Physical pain and suffering;
- (c) Mental and emotional distress;
- (d) Loss of ability to work and be productive;
- (e) Loss of enjoyment of life;
- (f) Loss of earning capacity;
- (g) Loss of consortium; and
- (h) Permanent disability.

29. Plaintiffs are entitled to and pray for an award of damages against the Defendants, both actual, special, consequential and in an amount deemed sufficient to compensate them fully for all losses and damages, past, present, and future, as well as punitive damages in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

WHEREFORE, the Plaintiffs are entitled to and pray for a judgment against the Defendants in any amount to be proven at trial to compensate them for the loss they have suffered as a result of the Defendants conduct for past, present and future damages, as well as a separate punitive award in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

[SIGNATURE BLOCK APPEARS ON NEXT PAGE]

McCULLOUGH KHAN, LLC

By: _____

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ATTORNEYS FOR PLAINTIFFS

3/22, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Robert J. Burke and Jane B. Burke)
)
)
Plaintiffs)

vs.)

Indigo Realty Company, LLC, Clarence)
D. Melton, Jr., 324 King, LLC and)
Republic Parking System, Inc.)
)
Defendants)

Indigo Realty Company, LLC)
)
Third Party Plaintiff)

vs.)

City of Charleston)
)
Third Party Defendant)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL DISTRICT
CASE NO: 2013-CP-10-1400

**ANSWER to AMEND COMPLAINT
AND THIRD PARTY COMPLAINT**

FILED
2013 JUN 11 PM 12:01
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Defendant Indigo Realty Company, LLC (hereinafter referred to as "Defendant Indigo Realty") by and through its undersigned attorneys, answers the Amended Complaint and complains of Third Party Defendant as follows:

FOR A FIRST DEFENSE

1. Each and every allegation which is not specifically addressed or admitted is expressly denied

2. Defendant admits, on information and belief, the allegations in Paragraph 1 of Plaintiffs' Amended Complaint
3. Defendant admits, on information and belief, the allegations in Paragraph 2 of Plaintiffs' Amended Complaint.
4. As to the allegations in Paragraph 3 of Plaintiffs' Amended Complaint, Defendant admits it is such an entity owning property on George Street which is operating as a parking lot. Whether the parcel identification number is identical to the Defendants' deeded interest is unknown, and therefore left to Plaintiffs' proof.
5. Defendant lacks sufficient information to admit or deny the allegations in Paragraphs 4, 5 and 6 of Plaintiffs' Amended Complaint and thus leaves Plaintiffs to their proof.
6. Defendant admits the allegations in Paragraphs 7 and 8 of Plaintiffs' Amended Complaint.
7. Defendant lacks sufficient information to admit or deny the allegations in Paragraphs 9 and 10 of Plaintiffs' Amended Complaint and thus leaves Plaintiffs to their proof.
8. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 11 of Plaintiffs' Amended Complaint but denies any inference that there is no "clear passageway" to exit the parking lot, or any inference that Plaintiff was "required" to weave in order to so exit.
9. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 12 of Plaintiffs' Amended Complaint and thus leaves Plaintiffs to their proof.

10. Defendant denies, on information and belief, the allegations in Paragraphs 13 and 14 of Plaintiffs' Amended Complaint.
11. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 15 of Plaintiffs' Amended Complaint and thus leaves Plaintiffs to their proof.
12. Defendant denies the allegations in Paragraph 16 of Plaintiffs' Amended Complaint.
13. As to the allegations in Paragraph 17 of Plaintiffs' Amended Complaint, Defendant lacks sufficient information to admit or deny the legal conclusion to be drawn from Plaintiffs' alleged status, but denies any inference that any duty was breached.
14. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 18 of Plaintiffs' Amended Complaint and thus leaves Plaintiffs to their proof.
15. Defendant denies the allegations in Paragraphs 19 and 20 of Plaintiffs' Amended Complaint.
16. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 21 of Plaintiffs' Amended Complaint and thus leaves Plaintiffs to their proof.
17. Defendant denies the allegations in Paragraphs 23 through 27 of Plaintiffs' Amended Complaint.
18. Defendant lacks sufficient information to admit or deny the allegations in Paragraph 28 of Plaintiffs' Amended Complaint and thus leaves Plaintiffs to their

proof.

19. Defendant denies the allegations in Paragraph 29 of Plaintiffs' Amended Complaint.

FOR A SECOND DEFENSE
(Sole Negligence of Plaintiff)

20. That the Defendant would allege that any injuries or damages sustained by the Plaintiffs, as alleged in the Complaint, were due to and caused by the sole acts of negligence and recklessness on the part of Plaintiff Robert Burke in failing to exercise due and reasonable care for his own safety.

That the Defendant pleads the sole negligence and recklessness of Plaintiff Robert Burke as the sole proximate cause of said injuries or damages to the Plaintiff, which is further a complete defense to the claims of Plaintiff Jane Burke.

FOR A THIRD DEFENSE
(Comparative Negligence of Plaintiff)

21. That if the Defendant were negligent, reckless, willful, wanton, or grossly negligent in any particular, which is expressly denied, any injuries or damages sustained by the Plaintiffs, as set forth in the Amended Complaint, were due to and caused in whole or in part by the Plaintiff Robert Burke's own acts of negligence and recklessness.

That the Defendant therefore pleads the doctrine of comparative negligence, which forbids recovery by the Plaintiff Robert Burke if his negligence is greater than that of the Defendant, and requires that if there is a judgment for the Plaintiffs, that judgment shall be reduced in proportion to the amount of the Plaintiff Robert Burke's own negligence.

FOR A FOURTH DEFENSE
(Sole Negligence of Third Parties)

22. That the Defendant would allege that any injuries or damages sustained by the Plaintiffs, as alleged in the Complaint, if in fact caused by negligence or recklessness, were due to and caused by the sole acts of negligence and recklessness on the part of Third Parties in failing to exercise due and reasonable care for Plaintiff's safety and the safety of others. That the Defendant pleads the sole negligence and recklessness of Third Parties, if any, as the sole proximate cause of said injuries or damages to the Plaintiff.

FOR A FIFTH DEFENSE
(Rule 12(b)(7))

23. That the Defendant moves to dismiss the within action for failure to join the City of Charleston, an indispensable party, pursuant to SCRPC Rule 19.

FOR A SIXTH DEFENSE AND
BY WAY OF A THIRD PARTY CLAIM

24. Defendant/Third Party Plaintiff Indigo Realty is an LLC organized and existing in South Carolina, doing business in Charleston, now sued in this action by the Plaintiff.

25. That the Defendant/Third Party Plaintiff owns certain property described in the Complaint and hereafter as the "George Street" parking lot.

26. That the Third Party Defendant, City of Charleston, designed, constructed and maintains of the George Street parking lot.

27. That there exists a lease and lease addendum [hereinafter "the lease"] for the George Street parking lot between Defendant/Third Party Plaintiff and Third Party Defendant City of Charleston which is and was in effect January 24, 2013, whereby Defendant/Third Party Plaintiff is identified as landlord and Defendant City of Charleston is its Tenant.

28. That notice and demand upon the Defendant City of Charleston by Indigo Realty to perform the city's duties owed the Defendant/Third Party Plaintiff under the lease has been made, with no relief to date.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT

29. In this action, Plaintiff has made certain allegations against Indigo Realty sounding in negligence and gross negligence arising from the condition of the subject George Street parking lot, specifically its surface, marking, design and lighting.

30. That pursuant to the terms of the lease between Defendant/Third Party Plaintiff Indigo Realty LLC and Third Party Defendant City of Charleston, City of Charleston is wholly responsible for the condition and maintenance of the parking lot surface, and specifically for the provision of lighting.

31. That the Third Party Defendant City of Charleston designed the subject premises, including the lighting and layout thereof.

32. That pursuant to the lease the Third Party Defendant, City of Charleston agreed to be responsible for such signage as was needed, and to remove any improperly parked vehicles.

33. That pursuant to the lease the Third Party Defendant City of Charleston agreed to be responsible for any and all liability arising out of the use of any structure on the property.

34. That pursuant to the lease, the Defendant City agreed to provide comprehensive, fire, theft and liability insurance on the Defendant/Third Party Plaintiff's behalf, and to ensure the the Defendant/Third Party Plaintiff would be named as an additional insured on such policy, but has failed to do so.

35. That by virtue the Third Party Defendant City of Charleston's breach of some or all of the above duties, Indigo Realty has been required to defend itself against Plaintiffs' claims and such has damaged the Defendant/Third Party Plaintiff and may cause future damages to it, it is held liable to the Plaintiff.

36. That the Defendant City of Charleston is liable to the Defendant/Third Party Plaintiff for all such damages caused by any of the above-referenced breaches of contract with it.

FOR A SECOND CAUSE OF ACTION
(Indemnity- Contractual, and in the Alternative, Equitable)

37. That Plaintiff has sued the Defendant/Third Party Plaintiff for damages arising from negligence and recklessness arising from its ownership of the George Street parking lot.

38. That Defendant/Third Party Plaintiff's entire ownership of the subject George Society parking lot is leased to the Third Party Defendant, which Third Party Defendant City of Charleston designed, built, maintains and controls pursuant to the lease between them.

39. That the Third Party Defendant, by contract, has agreed that it may be liable to the Defendant/Third Party Plaintiff for personal injury caused by the wrongful or negligent acts or omissions of any employee or officers of the Third Party Defendant City of Charleston acting within the scope of his employment or official capacity in the operation of the leased premises.

40. That the design, signage and lighting of the leased premises were performed or approved by employees of, or those within their official capacity for, the Third Party Defendant.

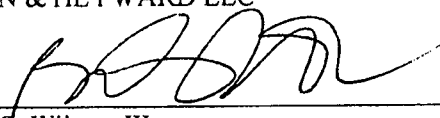
41. That the maintenance, layout, placement or presence of vehicles on the leased premises is the responsibility of an employee within their official capacity on behalf of the Third

Party Defendant City of Charleston.

42. That the Defendant/Third Party Plaintiff has now been required to defend its interests against the allegations of the Plaintiff which, if true, arise solely from Third Party Defendant's breach of its lease duties, and by the alleged tortuous conduct in the design, construction or maintenance of the subject premises by the Third Party Defendant.

WHEREFORE, Defendant/Third Party Plaintiff requests dismissal of the action against it, the striking of any claim for punitive damages. That the Defendant/Third Party Plaintiff be identified in full for any judgment whether actual or punitive, that may be entered against it by the Plaintiff, including all costs and attorney fees in the defense of Plaintiffs' claim and prosecution of this action, for damages arising from breach of the lease by the Third Party Defendant, and any other relief that may be awarded by the Court.

WILSON & HEYWARD LLC

By: 

Bonum S. Wilson, III
924 Folly Road
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Charleston, SC 29422
(843) 762-4567
E-mail Address: bwilson@wilsonheyward.com
ATTORNEY FOR DEFENDANT/THIRD PARTY
PLAINTIFF INDIGO REALTY

Charleston, SC
June 10, 2013

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Clarence
D. Melton, Jr., and Republic Parking
System, Inc.,

Defendants.

Indigo Realty Company, LLC,

Third-Party Plaintiff,

vs.

City of Charleston,

Third-Party Defendant.

THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-1400

**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE
PURSUANT TO RULE 41 AS TO
CLARENCE D. MELTON, JR., ONLY**

2014 JAN -6 PM 11:45
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

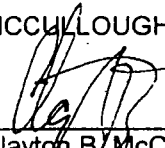
FILED

Pursuant to Rule 41, the Plaintiffs, with the consent of all parties to this action,
hereby dismiss this action without prejudice as to Defendant Clarence D. Melton, Jr., only.

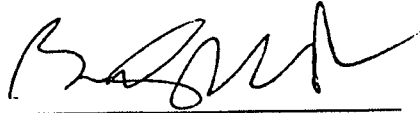
CLAWSON AND STAUBES, LLC


Jeffrey A. Ross, Esquire
Attorney for Defendant Clarence D.
Melton, Jr.

MCCULLOUGH KHAN, LLC

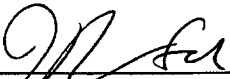

Clayton B. McCullough, Esquire
Jamie A. Khan, Esquire
Ross A. Appel, Esquire
Attorney for Plaintiff

Stipulation of Dismissal Without Prejudice Pursuant to Rule 41 as to Clarence D. Melton, Jr., Only
Burke v. Melton, et al.
Case No. 2013-CP-10-1400



Bonum S. Wilson, III, Esquire
Attorney for Defendant/Third-Party Plaintiff
Indigo Realty Company, LLC

Stipulation of Dismissal Without Prejudice Pursuant to Rule 41 as to Clarence D. Melton, Jr., Only
Burke v. Melton, et al.
Case No. 2013-CP-10-1400



Stephen E. Darling, Esquire
Attorney for Defendant Republic Parking System, Inc.

Stipulation of Dismissal Without Prejudice Pursuant to Rule 41 as to Clarence D. Melton, Jr., Only
Burke v. Melton, et al.
Case No. 2013-CP-10-1400



Lisa A. Reynolds, Esquire
Attorney for Third-Party Defendant City of Charleston

4. Defendant City of Charleston is a governmental entity of the State of South Carolina. The City of Charleston leases the parking lot at issue from individual property owners and operates a for-profit parking lot. Upon information and belief, the City of Charleston designed, constructed, and supervised the creation of the parking lot and has operated it since its creation as a for-profit parking lot.
5. Defendant Republic Parking System, Inc. ("Republic") is a corporation organized and existing under the laws of the State of Tennessee and operates as the management company for the "George Society" parking lot at issue.

JURISDICTION AND VENUE

6. This court has jurisdiction over the parties and the subject matter of this action.
7. Venue is proper in the Court of Common Pleas for Charleston County pursuant to South Carolina law.

FACTS

8. On January 24, 2013, Robert J. Burke was a customer in the "George Society" parking lot located on George Street, Charleston, SC. Mr. Burke entered the parking lot at approximately 7:00 p.m. through the gate operated by Republic and the property owned by Indigo.
9. After taking his parking ticket from Republic's agents, he drove his vehicle to the right front portion of the "George Society" parking lot and parked. At the time he exited his vehicle, the weather was clear.
10. Mr. Burke attempted to exit the parking lot by walking towards George Street. There is no clear passage way from his parking space to George Street nor any

signage or directives on how to safely exit the lot. Mr. Burke was required to weave his way through parked vehicles seeking an exit.

11. While attempting to exit the parking lot, Mr. Burke tripped and fell on a raised curb located inside the "George Society" parking lot on the property owned by Indigo.
12. The curb was virtually hidden as the result of the extremely low and poor lighting conditions in this area of the "George Society" parking lot.
13. Additionally, the curb was obscured by parked vehicles.
14. A subsequent lighting measurement performed by a qualified engineer, taken in similar lighting conditions during the same time of night, revealed that the amount of light present in the immediate location of Mr. Burke's fall is less than 50% of the minimum for surface area parking lots based on standards set out by the Illuminating Engineering Society of North America.
15. The curb was hidden and obscured based on the amount of light and created a dangerous and hazardous condition to pedestrians in the parking lot.
16. As a result of his fall, Mr. Burke suffered significant injuries. He continues to receive medical treatment even after being released from the hospital. His injuries have greatly limited, or altogether eliminated, the activities in which he can participate, cost him great pain and have severely limited or altogether eliminated his ability to work and earn a living. He has incurred extensive medical bills, will have extensive future medical bills and will have significant physical limitations for the rest of his life.
17. Additionally, Mrs. Burke has suffered greatly by all of the above. She has endured emotional trauma as a direct result of her husband's treatment. She has also spent

a significant amount of time caring for her husband based on his medical condition and physical limitations. The above has also caused her to limit or eliminate her ability to work and earn a living.

18. At the time this incident occurred, Mr. Burke was an invitee. As such, the Defendants owed him a duty to exercise reasonable and ordinary care in keeping the parking lot free and clear of dangerous conditions. This includes having adequate lighting to provide a safe passage way through the parking lot.
19. Defendant Indigo Realty Company, LLC owns that portion of the "George Society" parking lot which presented and contained the dangerous condition and the location where Mr. Burke fell.
20. The City of Charleston leases the property at issue to operate a for profit parking lot. It created the conditions found on site by overseeing the design, construction, and maintenance of the parking lot. This includes the lighting for the parking lot. The City entered into a management agreement with Republic. In the agreement, the City agrees to make routine inspections of the parking lot.
21. Defendant Republic Parking System, Inc. operates and manages the "George Society" parking lot for the City of Charleston, for profit. Republic's management agreement it entered into with the City of Charleston specifies that Republic will be responsible for maintenance and repairs of the parking facility, including specifically agreeing to perform "regular and frequent inspections", and to maintain the lot "free from hazardous conditions". The agreement also calls for Republic to be responsible to promptly notify the City of the need for major repairs and/or replacements.

FOR A FIRST CAUSE OF ACTION
(Negligence, Negligence Per Se and Gross Negligence)
AGAINST ALL DEFENDANTS

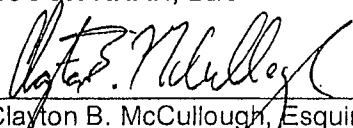
22. The Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 21 as if fully repeated verbatim herein.
23. The injuries suffered by the Burkes were due to and caused by, and were the direct and proximate result of the carelessness, negligence, gross negligence, recklessness, wantonness, and heedlessness of the Defendants in each of the following particulars:
- (a) In failing to warn of the dangers and unsafe conditions;
 - (b) In failing to take adequate safety measures including, but not limited to, maintaining a safe, effective level of light to allow pedestrians to observe and avoid dangerous conditions;
 - (c) In failing to have a safe ingress/egress passage way for pedestrians to exit the parking lot;
 - (d) In failing to design, construct, and maintain the parking lot in a reasonably safe manner;
 - (e) In failing to inspect the property to discover and repair deficiencies;
 - (f) In failing to maintain the property to adequately provide for the safety of the parking lot customers; and
 - (g) In failing to follow accepted industry standards and applicable building codes.

24. The Defendants knew or should have known that the condition of the parking lot, including but not limited to the extremely poor lighting conditions, created a dangerous condition to pedestrians and their customers.
25. The poor lighting conditions violate the applicable industry standard and amount to negligence per se.
26. The Defendants were negligent and grossly negligent in breaching their duties of care owed to Plaintiffs.
27. The Defendants' acts and omissions were the proximate cause of the damages suffered by the Plaintiffs.
28. Plaintiffs have suffered and will continue to suffer from damages including, but not limited to:
 - (a) Healthcare expenses;
 - (b) Physical pain and suffering;
 - (c) Mental and emotional distress;
 - (d) Loss of ability to work and be productive;
 - (e) Loss of enjoyment of life;
 - (f) Loss of earning capacity;
 - (g) Loss of consortium; and
 - (h) Permanent disability.
29. Plaintiffs are entitled to and pray for an award of damages against the Defendants, both actual, special, consequential and in an amount deemed sufficient to compensate them fully for all losses and damages, past, present, and future, as well as punitive damages in an amount deemed sufficient to impress upon the

Defendants the seriousness of their conduct and to deter such similar conduct in the future.

WHEREFORE, the Plaintiffs are entitled to and pray for a judgment against the Defendants in any amount to be proven at trial to compensate them for the loss they have suffered as a result of the Defendants conduct for past, present and future damages, as well as a separate punitive award in an amount deemed sufficient to impress upon the Defendants the seriousness of their conduct and to deter such similar conduct in the future.

McCULLOUGH KHAN, LLC

By: 

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ATTORNEYS FOR PLAINTIFFS

12-17, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Robert J. Burke and Jane B. Burke,

Case No. 2013-CP-10-1440

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and the City of
Charleston,

Defendants.

ANSWER OF DEFENDANT REPUBLIC
PARKING SYSTEM, INC. TO SECOND
AMENDED COMPLAINT

FILED
JAN 14 PM 1:10
CLERK OF COURT

The Defendant Republic Parking System, Inc., answering the Second Amended Complaint of the Plaintiffs above-named, alleges and says:

1. It does not have information sufficient to form a belief as to the allegations of paragraphs 1, 2, 3 and 4.
2. Answering the allegations of paragraph 5, it admits that it is a Tennessee corporation and it is party to a Parking Garage Management Agreement for the George Society parking lot at issue and denies all allegations inconsistent therewith.
3. The allegations of paragraphs 6 and 7 state conclusions of law, which is its required neither to admit nor deny.
4. It does not have information sufficient to form a belief as to the allegations of paragraphs 8, 9, 10 and 11 and, therefore, denies same and demands strict proof thereof.
5. It denies the allegations of paragraphs 12 and 13.
6. It does not have information sufficient to form a belief as to the allegations of paragraph 14 and, therefore, denies same and demands strict proof thereof.
7. It denies the allegations of the paragraph 15.
8. It does not have information sufficient to form a belief as to the allegations of

paragraph 16 and, therefore, denies same and demands strict proof thereof.

9. It does not have information sufficient to form a belief as to the allegations of paragraph 17.

10. It does not have information sufficient to form a belief as to the allegations of paragraph 18 and, as to those allegations which state conclusions of law, which it is required neither to admit nor deny same and, therefore, it denies same and demands strict proof thereof.

11. It does not have information sufficient to form a belief as to the allegations of paragraphs 19 and 20.

12. Answering the allegations of paragraph 21, it asserts that the Defendant Republic Parking System, Inc. manages the parking lot in question pursuant to the aforementioned Parking Garage Maintenance Agreement and denies any allegations of said paragraph inconsistent therewith.

AS TO THE FIRST CAUSE OF ACTION

13. Answering the allegations of paragraph 22, it reasserts and realleges its responses to the allegations of paragraphs 1 through 21 as if set forth verbatim herein.

14. It denies the allegations of paragraphs 23, 24, 25, 26, 27, 28 and 29, being all of the remaining allegations of the First Cause of Action and Second Amended Complaint.

15. It denies each and every allegation of the Plaintiffs' Second Amended Complaint which is not hereinabove specifically admitted.

FURTHER ANSWERING AND AS AN ADDITIONAL AND COMPLETE DEFENSE, THIS DEFENDANT ALLEGES:

16. The Plaintiffs' injuries and damages, if any, were due solely to, caused wholly by and were the direct and proximate result or an intervening and superseding result of the acts and omissions of some other party, person, entity or company other than this Defendant, over whom this Defendant had no control, so as to bar recovery against the Defendant Republic Parking System, Inc.

**FURTHER ANSWERING AND AS AN ADDITIONAL AND
COMPLETE DEFENSE, THIS DEFENDANT ALLEGES:**

17. Even if this Defendant was careless, negligent, reckless, wanton and heedless as alleged in the Plaintiffs' Second Amended Complaint, which is specifically denied, the Plaintiffs' injuries and damages, if any, were due to and caused by their own comparative negligence, either greater than the negligence of the Defendants or, in the alternative, equal to or less than the negligence of the Defendants, combining and concurring with the alleged acts and omissions of the Defendants, all so as to bar or partially bar recovery against this Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL AND
COMPLETE DEFENSE, THIS DEFENDANT ALLEGES:**

18. At the time of the accident described in the Second Amended Complaint, the Plaintiffs knew of the conditions then and there existing and they assumed the risk of any accident and injury, and their voluntary assumption of the risk bars recovery against this Defendant.

**FURTHER ANSWERING AND AS AN ADDITIONAL
DEFENSE, THIS DEFENDANT ALLEGES:**

19. The Plaintiffs' claim for punitive damages as to loss of consortium fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to S.C.R.C.P. 12(b)(6).

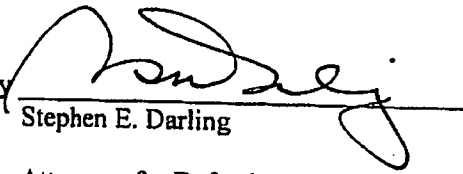
**FURTHER ANSWERING AND AS AN ADDITIONAL
DEFENSE, THIS DEFENDANT ALLEGES:**

20. The Plaintiffs' claim for punitive damages violates the South Carolina State Constitution and like portions of the United States Constitution and should be dismissed.

WHEREFORE, having fully answered the Plaintiffs' Second Amended Complaint, the Defendant Republic Parking System, Inc. prays same be dismissed as to it.

(Signature on next page)

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Telephone: 843-720-4454
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Email: sdarling@hsblawfirm.com

By 
Stephen E. Darling

Attorneys for Defendant Republic
Parking System, Inc.

January 13, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and The City of
Charleston,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

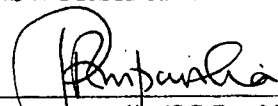
Case No. 2013-CP-10-1440

**DEFENDANT REPUBLIC PARKING
SYSTEM, INC.'S MOTION FOR
SUMMARY JUDGMENT**

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2014 NOV 19 PM 4:58
JULIE J. AUSTIN
CLERK OF COURT

Please take notice that, pursuant to Rule 56, SCRCP, Defendant Republic Parking System, Inc. ("Defendant"), by and through its undersigned counsel, will move before the presiding judge of the Ninth Judicial Circuit, at a time and place designated by the Court, for an Order granting Defendant Summary Judgment as to Plaintiff's claims. This motion is based on the grounds that there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law as to all allegations in Plaintiff's Complaint. This motion is further supported by the pleadings, the answers to interrogatories, responses to requests for production, the depositions taken, as well as any affidavits and memoranda of law presented at or prior to the hearing.

HAYNSWORTH SINKLER BOYD, P.A.



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rruparelia@hsblawfirm.com
*Attorneys for Defendant Republic Parking
System, Inc.*

November 17, 2014

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2013-CP-10-1400

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McCULLOUGH KHAN, LLC



Clayton B. McCullough, Esq.
359 King Street, Suite 200
Charleston, SC 29401
(843) 937-0400
(843) 937-0706 (fax)
clay@mklawsc.com

COUNSEL FOR PLAINTIFF

December 10th, 2014
Charleston, South Carolina

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2013-CP-10-1400

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IN LITIGANT
JULIE J. ARMSTRONG
CLERK OF COURT
this Court has

53

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and The City of
Charleston,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

**DEFENDANT REPUBLIC PARKING
SYSTEM, INC.'S MOTION TO
BIFURCATE LIABILITY AND
DAMAGES**

FILED
2014 DEC 11 PM 4:22
JULIE J. ARMSTRONG
CLERK OF COURT

In this case, where the issue of liability is highly contested and Robert Burke's injuries are allegedly severe, Republic Parking System, Inc. ("Republic") moves for bifurcation of the issues of liability and damages pursuant to Rule 42(b), FRCP. In addition, Republic moves to bifurcate any consideration of punitive damages pursuant to S.C. Code Ann. § 15-32-520(A). These issues are separate and distinct, and there is not an overlap in evidence between these phases of the trial. Counsel for Republic has consulted with counsel for the Plaintiffs prior to filing this motion; however, no resolution was reached.

ARGUMENT

Plaintiffs' claims arise out of Burke's fall in a parking lot on January 24, 2013. Plaintiff claims the fall occurred due to inadequate lighting in the parking lot. Republic contends that this is not the case and that it was not the responsible party for the lighting scheme in the parking lot. For these reasons, Republic will argue that it did not owe a duty in this case and that, even if it did, there was no breach of duty. Republic further contends it in no way caused Burke's injuries. Burke, already in poor health at the time of the fall, contends he was severely injured as a result. Republic denies that all of the injuries claimed resulted from the fall.

Given these issues in both the liability and the damages portions of this case, justice would be served and trial streamlined by bifurcating these issues. This approach has been applied previously in a trip and fall action where there were numerous questions regarding the injuries sustained and liability. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 109, 512 S.E.2d 510, 517 (Ct. App. 1998) ("The trial judge found it would be significantly shorter to try the liability phase of the case separately because of the extensive medical testimony regarding Ms. Creighton's injuries, as well as the numerous discovery problems related thereto.").

In this case, the Court should exercise its discretion similarly and bifurcate the liability and damages portions of the trial on this matter. Such an order would be in the interests of convenience, expedition, and judicial economy by allowing the jury to focus on these two distinct issues separately, and in the event no liability is found, the second portion of the trial would not need to take place. Plaintiffs have the burden of proving all elements of their claims and would suffer no prejudice under the proposed structure. The medical testimony regarding damages is simply irrelevant to the liability issues and therefore bifurcation would not hamper Plaintiffs ability to present a liability case. *See id.*

In addition S.C. Code Ann. § 15-32-520(A) provides mandatory language that evidence of punitive damages must be bifurcated if requested by a defendant. "All actions tried before a jury involving punitive damages, if requested by any defendant against whom punitive damages are sought, **must** be conducted in a bifurcated manner before the same jury." (Emphasis added). Given the presence of a demand for punitive damages in the Complaint, bifurcation is required.

WHEREFORE, Republic, respectfully requests that this Honorable Court grant this motion for bifurcation.

HAYNSWORTH SINKLER BOYD, P.A.



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*Attorneys for Defendant Republic Parking
System, Inc.*

December 11, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Robert J. Burke and Jane B. Burke)
Plaintiffs)
vs.)
Indigo Realty Company, LLC, Clarence)
D. Melton, Jr., 324 King, LLC and)
Republic Parking System, Inc.)
Defendants)

Indigo Realty Company, LLC)
Third Party Plaintiff)
vs.)
City of Charleston)
Third Party Defendant)

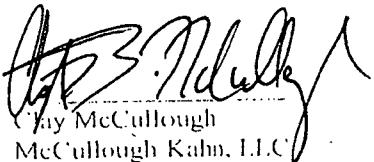
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL DISTRICT
CASE NO: 2013-CP-10-1400

**PARTIAL STIPULATION OF
DISMISSAL AS TO DEFENDANT AND
THIRD PARTY PLAINTIFF, INDIGO
REALTY COMPANY, LLC AND
CITY OF CHARLESTON**

FILED
2015 MAR -9 PM 2:48
JULIE J. ARMSTRONG
CLERK OF COURT

COME NOW the Plaintiffs, Robert J. Burke and Jane B. Burke (hereinafter "Plaintiffs")
and Defendant/Third Party Plaintiff, Indigo Realty Company, LLC and Defendant, City of
Charleston (hereinafter "Defendants"), pursuant to Rule 41(a)(1)(b), SCRCP, by and through
their counsel of record, and hereby stipulate to the dismissal with prejudice of all claims by
Plaintiff against Defendants, Indigo Realty Company, LLC and City of Charleston, including the
Third Party Complaint by Defendant, Indigo Realty Company, LLC in the above-captioned
action, as the matter involved has been settled by these parties.

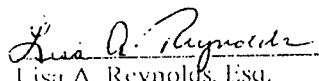
WE SO CONSENT:


Jay McCullough
McCullough Kahn, LLC
359 King Street, Suite 200
Charleston, SC 29401
Attorney for the Plaintiffs

WE SO CONSENT:


Bonum S. Wilson, III
Wilson & Heyward, LLC
P.O. Box 13177
Charleston, SC 29422
Attorney for Indigo Realty Co., Inc.

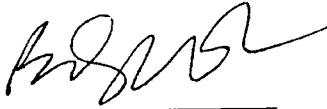
WE SO CONSENT:


Lisa A. Reynolds, Esq.
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29402
Attorney for the City of Charleston

WE SO CONSENT:

Clay McCullough
McCullough Kahn, LLC
359 King Street, Suite 200
Charleston, SC 29401
Attorney for the Plaintiffs

WE SO CONSENT:



Bonum S. Wilson, III
Wilson & Heyward, LLC
P.O. Box 13177
Charleston, SC 29422
Attorney for Indigo Realty Co., Inc.

WE SO CONSENT:

Lisa A. Reynolds, Esq.
Anderson Reynolds & Stephens, LLC
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Attorney for the City of Charleston

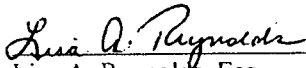
WE SO CONSENT:

Clay McCullough
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Attorney for the Plaintiffs

WE SO CONSENT:


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Attorney for Indigo Realty Co., Inc.

WE SO CONSENT:


Lisa A. Reynolds, Esq.
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29402
Attorney for the City of Charleston

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and The City of
Charleston,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

**DEFENDANT REPUBLIC PARKING
SYSTEM, INC.'S MOTION TO STRIKE
PARTIAL STIPULATION OF
DISMISSAL**

FILED
2014 DEC 11 PM 4:24
JULIE J. ARISTRONG
CLERK OF COURT

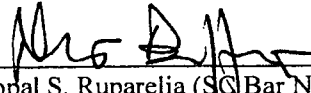
Republic Parking System, Inc. ("Republic") hereby moves to strike or vacate the Partial Stipulation of Dismissal ("Notice") filed by plaintiffs as to Defendants Indigo Realty Company, LLC and the City of Charleston. As a procedural matter, Plaintiffs' Notice is legally defective because Rule 41(a)(1)(B), does not permit a plaintiff to voluntarily dismiss its claims against a single party without the signature of "all parties who have appeared in the action." In this case, Republic, a party appearing in this action, has not signed and does not consent to the dismissal of these parties; therefore the purported dismissal is ineffective, a nullity, and must be stricken.

In any event, these are indispensable parties to this case and they must remain involved pursuant to Rule 19, SCRCP. Lastly, as an additional alternative, Republic moves that these parties be included on the verdict form used in this case so that the jury may allocate all or part of the liability for plaintiffs' injuries to these parties pursuant to S.C. Code Ann. §§ 15-38-15 and 15-78-100. These parties' presence is necessary for the full and fair trial of this case, and Republic will be gravely prejudiced by their absence in light of the provisions for allocation found in the South Carolina Code.

WHEREFORE, Republic, respectfully requests that this Honorable Court grant this motion to strike, or in the alternative, order that these parties remain on the verdict form for allocation purposes.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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Robert W. Buffington (SC Bar No. 7825)
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rruparelia@hsblawfirm.com
*Attorneys for Defendant Republic Parking
System, Inc.*

December 11, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke,

Plaintiff,

v.

Republic Parking System, Inc.,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2013-CP-10-1400
)
)
)

) **PLAINTIFF'S MOTION TO DISMISS**
) **JANE B. BURKE, INDIGO REALTY**
) **COMPANY, LLC, AND THE CITY**
) **OF CHARLESTON**
)
)
)

The Plaintiff, by and through his undersigned counsel, hereby moves pursuant to Rule 41(a)(2), SCRPC, for an Order from this Court dismissing Plaintiff Jane B. Burke and Defendants Indigo Realty, LLC and the City of Charleston from this action. These parties have reached an agreement in the above-referenced matter.

For the foregoing reason, Plaintiff respectfully requests that this Court dismiss Jane B. Burke and Defendants Indigo Realty Company, LLC and the City of Charleston from this action.

Respectfully submitted,

McCULLOUGH KHAN, LLC

Clayton B. McCullough, Esq.

Jamie A. Khan, Esq.

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Charleston, SC 29401

(843) 937-0400

(843) 937-0706 (fax)

clay@mklawsc.com

COUNSEL FOR PLAINTIFF

12-12, 2014
Charleston, South Carolina

FILED
2014 DEC 12 PM 3:18
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and The City of
Charleston,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

DEFENDANT REPUBLIC PARKING
SYSTEM, INC.'S MOTION IN REMEDY

2014 DEC 04 2 PM 2:45
JULIA KUNG
CLERK OF COURT
BY

Pursuant to Rule 104 and Rules 401-403, and 702-703, SCRE, Republic Parking System, Inc. ("Republic") hereby moves the Court for an order or orders excluding from the trial of this action all documentary evidence, witnesses, or testimony relating to the following:

1. Testimony of Dr. Marshall White that falls outside his fields of neurology and pain management.
2. Any evidence or argument that the Republic's management contract with the City of Charleston in any way created obligations to the Plaintiffs.
3. To the extent any party seeks to admit Republic's management contract with the City of Charleston into evidence, any reference to liability insurance must be redacted pursuant to Rule 411, SCRE.

Republic reserves its right to present additional memoranda and arguments at the hearing on this matter.

[SIGNATURE BLOCK ON NEXT PAGE]

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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rruparelia@hsblawfirm.com
*Attorneys for Defendant Republic Parking
System, Inc.*

December 12, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and The City of
Charleston,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

**DEFENDANT REPUBLIC PARKING
SYSTEM, INC.'S PRE-TRIAL BRIEF**

Defendant Republic Parking System, Inc. ("Republic Parking") by and through its undersigned counsel, submits this pre-trial brief pursuant to Rule 16(c), SCRCP.

I. A concise, non-argumentative, statement of the facts of this case.

On January 24, 2013, the Plaintiff, Robert J. Burke, traveled four and a half hours from his home to Charleston, South Carolina to watch a College of Charleston basketball game at the TD Arena. Upon his arrival in Charleston, Burke drove to the "George Society" parking lot located on George Street, where he had parked on previous occasions. Republic Parking operated and managed the parking lot in question under a management agreement with the City of Charleston. The lot is owned by Defendant Indigo Realty Company and leased to Defendant City of Charleston.

Plaintiff entered the parking lot from George Street at approximately 6:30 p.m.¹ After retrieving his parking ticket at the gate, Burke parked his vehicle on the right side of the parking lot. When he exited his vehicle, he noticed that it was raining slightly. He then walked across

¹ Burke's Amended Complaint indicates that he arrived at the parking lot at 7:00 p.m. on January 24, 2013; however, Mr. Burke testified at his deposition that he arrived at 6:30 p.m.

the parking lot toward the ticket booth where he had just entered the parking lot. At some point during his walk across the parking lot, Burke fell.

After his fall, Burke was escorted back to his car by a passerby, later identified as Robert Cammer. At Burke's direction, Cammer called Burke's daughter who was also in Charleston for the game. She arrived shortly after receiving the call. Emergency personnel arrived thereafter and transported Burke to the hospital for treatment.

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. He was also treated for blood loss. After discharge from MUSC, Burke was admitted to Roper St. Francis Rehabilitation Hospital ("Roper Rehabilitation") on February 13, 2013. While there, he underwent further physical therapy until he was discharged on March 2, 2013. After his discharge from Roper Rehabilitation, Burke continued physical therapy and occupational therapy through Wilson County Home Health. He also sought further treatment at Duke Medical Center after he was referred to there by his primary care physician, Dr. Thomas Hooper.

Over the course of the next several months, Burke sought additional medical treatment including a knee replacement surgery in the Summer of 2014.

Plaintiffs' claims in this case center primarily around the claim that there was inadequate lighting in the parking lot in question causing him to trip and fall on a concrete curb/median.

II. An objective statement of the facts in controversy.

There are issues of fact relating to whether there has been a breach of any duties to Plaintiff and causation as to all claimed damages. The parties dispute the cause of Mr. Burke's fall. Burke's deposition testimony indicated he was unsure of what actually caused his fall. In addition, the parties dispute whether the lighting in the parking lot was constituted a dangerous

condition. The parties further disagree over which defendant was responsible for the lighting in the parking lot. Finally, the parties dispute whether Burke's fall resulted in his deteriorating knee condition which resulted in total right knee replacement and dispute the amount of lost income claimed by the Plaintiffs as well as the causation of future medical treatment claimed by Plaintiff.

III. The legal issues involved. This includes the law applicable to the cause of action and the defense.

As to Republic Parking, Plaintiff alleges it was negligent and/or grossly negligent in failing to warn of the dangerous or unsafe conditions associated with the parking lot; in failing to take adequate safety measures including, but not limited to, maintaining a safe, effective level of lighting to allow Burke to observe and avoid dangerous conditions; in failing to have a safe ingress/egress passage way for pedestrians to exit the parking lot; in failing to design, construct, and maintain the George Street parking lot in a reasonably safe manner; in failing to inspect the property to discover repair deficiencies; in failing to maintain the property to adequately provide for the safety of parking lot customers; and in failing to follow accepted industry standards and applicable building codes.

To prove their claims, Plaintiffs have the burden of showing: 1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; (3) damages proximately resulting from the breach. *DeBerry v. McCain*, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981).

The legal issues involved are whether Republic Parking owed a legal duty to Burke with respect to the lighting in the parking lot given the absence of any notice to it that the lighting was inadequate, the absence of any history of complaints about the lighting or injuries in the parking lot, and the open and obvious nature of the lighting conditions of the parking lot. Existence and

scope of duty are questions of law for the Court. *Staples v. Duell*, 329 S.C. 503, 506-07, 494 S.E.2d 639, 641 (Ct. App. 1997). To the extent the Court determines there was a duty in this case, such duty would be a nondelegable duty that would reside with either Indigo Realty or the City of Charleston, not Republic Parking as it did not own the parking lot in question. *See Dolan v. City of Camden*, 233 S.C. 1, 4-5, 103 S.E.2d 328, 330-31 (1958).

Further, with respect to causation, the fact of a fall is not enough to satisfy his burden of proof. *See Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797 (Ct. App. 1991) (“[n]o inference of negligence arises from the mere fact of injury”); *see also Tillery v. Pentry, Inc.*, No. 4:06-1487, 2007 WL 1594380, at *4 (D.S.C. Jun. 1, 2007). Proximate cause requires proof of (1) causation in fact; and (2) legal cause. Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant’s negligence. Legal cause is proved by establishing foreseeability. A plaintiff proves legal cause by establishing the injury in question occurred as a natural and probable consequence of defendant’s negligence. *Whitlaw v. The Kroger Co.*, 306 S.C. 51, 54; 410 S.E.2d 251, 253 (1991). Moreover, Republic Parking also contends certain elements of Burke’s damages claim are not causally linked to the fall.

In addition, this is a comparative negligence case. Therefore, judgment as a matter of law is appropriate “if the sole reasonable inference which may be drawn from the evidence is that the plaintiff’s negligence exceeded fifty percent.” *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (upholding the trial courts grant of summary judgment because the plaintiff’s fault was overwhelming).

Plaintiffs also claim entitlement to punitive damages. “In order for a plaintiff to recover punitive damages in a negligence action, there must be evidence the defendant’s conduct was willful, wanton, or in reckless disregard of the plaintiff’s rights.” *Cohen v. Allendale Coca-Cola*

Bottling Co., 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) (citing *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985)). In *Cohen*, the court concluded that simple negligence does not constitute grounds for punitive damages. *Id.* Such damages are only appropriate when a party is conscious of the effect of their actions or acts with deliberate intentions. *Id.* There is no evidence in this case from which a jury could determine that Republic Parking's actions were such that punitive damages should be awarded against it.

IV. A listing of exhibits, indicating those to which there is a disagreement and a listing of witnesses who may be called and, if available, their address and phone number.

A. Exhibits

Defendant will provide opposing counsel and the Court with a copy of an Exhibit List. Counsel will confer prior to the start of trial to determine whether there are objections to the admission of any exhibits.

B. Republic Parking's Witnesses

1. Kenneth Dwight Potter,
Former Republic Parking employee
1005 Jervy Point Road, Charleston, South Carolina 29492, Phone: (843) 901-0125
2. Robert Cammer,
Fact witness who assisted Plaintiff after his fall.
1390 Tidal Creek CV, Charleston, South Carolina 29412
3. Kenneth Lee,
Former Republic Parking employee
198 Fishburne Street, Charleston, South Carolina 29403, Phone: (843) 460-3246.
4. Dr. Todd Shuman,
Expert witness
Roper St. Francis Rehabilitation Hospital, 316 Calhoun Street,
Charleston, South Carolina 29401
5. Jack Skelton
Vice President

Republic Parking
633 Chesnut Street, Suite 2000
Chanooga, TN, 37450
423-756-2771

6. Edward Anderson,
City of Charleston employee
2150 Allendale Planation Road, Wadmalaw Island, South Carolina 29487,
Phone: (843) 607-8187
7. Julius "Buddy" Denny,
Former Republic Parking employee
100 Bridgetown Road, Apt. 1A, Goose Creek, South Carolina 29445,
Phone: (843) 460-2265
8. Colleen Carducci,
City of Charleston employee
Phone: (843) 708-1001
9. Scott Maxie,
c/o Lisa Reynolds (counsel for City of Charleston) who has agreed to
accept service on behalf of Mr. Maxie.

V. Any unusual problems relating to evidence to be introduced, such as "Business Records as Evidence Act," hearsay, use of depositions, etc.

Republic Parking will move to exclude Dr. Marshall White's expert testimony to the extent he seeks to testify as to Plaintiff's knee condition and how the accident aggravated the condition to such an extent that Plaintiff was required to undergo complete knee replacement surgery. The basis of the objection will be that Dr. White, a specialist in the field of neurology and pain management, is not qualified to render an opinion as to the causation of Plaintiff's orthopedic treatment, i.e. the knee replacement surgery.

Republic Parking will also move to exclude any evidence or argument that Republic Parking's management contract with the City of Charleston in any way created obligations to the Plaintiffs.

Republic Parking further plans to designate portions of depositions for use at trial, pursuant to Rule 32, SCRCP.

In addition, to the extent any party seeks to admit Republic's management contract with the City of Charleston into evidence, Republic Parking will move to redact any reference to liability insurance pursuant to Rule 411, SCRE.

At this time, the parties have not exchanged exhibit lists but expect to prior to trial.

VI. Any unusual question or matter which should be brought to the attention of the court.

A. Bifurcation. Republic Parking seeks to bifurcate the liability and damages phases of the case, including any bifurcation of the issue of punitive damages.

B. Apportionment of liability. On the verdict form, Republic Parking will seek an apportionment of percentages of negligence between the Plaintiff Mr. Burke and the settling Defendants.

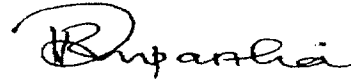
C. Republic Parking has filed an *in limine* motion seeking to strike Plaintiffs' dismissals of the settling defendants. Republic Parking did not consent to their dismissal as required under Rule 41, SCRCP.

D. Republic Parking also expects to challenge the allocation of a settlement between Plaintiffs and the remaining Defendants. A settlement of \$300,000 has been agreed to between the Plaintiffs and co-defendant City of Charleston. Depending upon nature of the allocation of the settlement amongst the Plaintiffs (whether a disproportionate amount of the settlement is allocated to Mrs. Burke for her consortium claim), Republic Parking may be challenging this allocation under the applicable case law.

VII. A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.

The parties unsuccessfully mediated this case on November 3, 2014 and on December 8, 2014. At the last mediation, the last demand as to Republic Parking was over \$2 million and the last offer was \$100,000.

HAYNSWORTH SINKLER BOYD, P.A.



December 12, 2014

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and The City of
Charleston,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

**DEFENDANT REPUBLIC PARKING
SYSTEM, INC.'S DIRECTED VERDICT
MOTION**

FILED
2014 DEC 17 AM 4:29
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

Republic Parking System, Inc. ("Republic") hereby moves pursuant to Rule 69, S.C. CP for a directed verdict on each and all of the following grounds:

1. Republic did not owe a duty to Plaintiffs in this case. 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).
2. Republic did not owe any duty with respect to the facts of this case as the danger was open and obvious. *Meadows v. Heritage Village Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 409 S.E.2d 349 (1991) (holding there is no duty to warn of "a natural condition, the peril of which [is] obvious.")
3. Republic did not owe any duty with respect to the facts of this case because Republic was not responsible for lighting in the City's lot and the City had a nondelegable duty with respect to the lighting. *See Dolan v. City of Camden*, 233 S.C. 1, 4-5, 103 S.E.2d 328, 330-31 (1958).

4. Republic did not owe or assume any duty with respect to the facts of this case because Republic did not assume any duty by virtue of its own internal manuals or its management agreement with the City of Charleston. See *Citizens & Southern Nat'l Bank v. Lanford*, 313 S.C. 540, 443 S.E.2d 549 (1994) (holding that an internal bank policy manual did not create a duty to ensure that the guarantor of a loan understood the guaranty agreement he signed). The Management Agreement expressly provides that it does not confer on any other party the rights of a third party beneficiary and that the City "controls and regulates" off street parking facilities, including the one in question here.

"Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). We recognize 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.

5. Republic did not owe any duty with respect to the facts of this case because it was not on notice of any danger. There had been no falls in the lot or complaints about the lighting.

6. Plaintiff has failed to establish Republic breached any duty of care.
7. Plaintiff has failed to establish why Robert Burke fell. The fact of a fall is not enough to establish liability under South Carolina law. *See Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797 (Ct. App. 1991) (“[n]o inference of negligence arises from the mere fact of injury”).
8. Robert Burke’s liability exceeded Republic’s as a matter of law. *Bloom v. Ravoir*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (upholding the trial courts grant of summary judgment because the plaintiff’s fault was overwhelming).
9. The sole negligence of the City or Charleston or Indigo Realty Company, LLC is the source of Plaintiff’s injuries. Therefore, Republic Parking is entitled to a directed verdict.
10. Plaintiff has failed to present any evidence that would entitle them to an award of punitive damages. There is simply no evidence, much less clear and convincing of reckless, willful, or wanton conduct in this case. *Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 40, 351 S.E.2d 897, 900 (Ct. App. 1986) (citing *Lengel v. Tom Jenkins Realty, Inc.*, 286 S.C. 515, 334 S.E.2d 834 (Ct. App. 1985)).
11. Plaintiff has not pointed to any statute that was violated by Republic. Therefore, a directed verdict must be granted as to any claim of negligence per se.
12. Plaintiff has not presented any evidence that Republic was grossly negligent. Therefore, a directed verdict must be granted as to any claim of gross negligence.

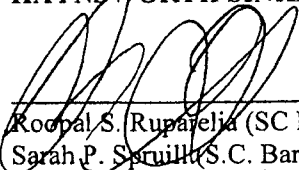
13. The evidence is insufficient as a matter of law to support a verdict against this Defendant on Plaintiff's claims.

14. The evidence establishes as a matter of law that Defendant is entitled to prevail on Plaintiff's claims.

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Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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December 16, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

Indigo Realty Company, LLC, Republic
Parking System, Inc., and The City of
Charleston,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

**DEFENDANT REPUBLIC PARKING
SYSTEM, INC.'S DIRECTED VERDICT
MOTION—Phase 2**

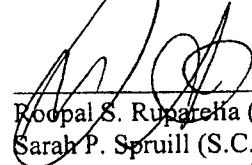
FILED
2014 DEC 22 AM 9:30
JULIE J. AMSTONG
CLERK OF COURT

Republic Parking System, Inc. ("Republic") hereby moves pursuant to Rule 55, S.C.R.P.,
for a directed verdict on each and all of the following grounds:

1. Plaintiff is not entitled to future damages because he has not presented any testimony that would allow a jury to make an award based on present value. South Carolina law requires that any award for future damages be reduced to present value. *Grimsley v. Atlantic Coast Line R. Co.*, 189 S.C. 251, 1 S.E.2d 157 (1939). Present value is an economic determination that requires expert testimony as it is outside the knowledge, skill, training, and experience of the jury. "The 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). Plaintiff has not presented expert testimony on this point and has therefore failed to meet his burden as a matter of law. *or any*

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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December 19, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Robert J. Burke,

Plaintiff,

vs.

Republic Parking System, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

VERDICT FORM

1. Do you find that the Plaintiff has proven by a preponderance of the evidence that the negligence of Republic Parking System, Inc. was the proximate cause of his injuries?

_____ Yes
_____ No

If you answered this question "No," deliberate no further.
If you answered this question "Yes," proceed to Question 2.

2. Was the Plaintiff also negligent?

_____ Yes
_____ No

If you answered this question "Yes," proceed to Questions 3 and 4.
If you answered this question "No," proceed to Question 4.

3. We find the percentage of fault of the Plaintiff to be as follows:

Plaintiff _____ %

4. Has the Plaintiff proved by clear and convincing evidence that Republic Parking System, Inc. was willful, wanton, malicious or reckless with respect to Plaintiff's rights such that you, as a jury, would like to consider evidence of punitive damages?

_____ Yes
_____ No

Foreperson

December ____, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke,

Plaintiff,

vs.

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Defendant.

IN THE COURT OF COMMON PLEAS

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Case No. 2013-CP-10-1400

ALLOCATION FORM

You have previously determined the Plaintiff was ____% negligent with respect to his injuries. As between Republic Parking System, Inc., Indigo Realty Company, LLC, and the City of Charleston, taking the combined negligence that proximately caused Plaintiff's injuries (____%), what percentage of that negligence is attributable to Republic Parking System, Inc. and the City of Charleston, respectively?

Republic Parking System, Inc. _____%

The City of Charleston _____%

Indigo Realty Company, LLC _____%

The percentages entered must total ____%.

Foreperson

December ____, 2014
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Robert J. Burke and Jane B. Burke,

Plaintiffs,

vs.

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IN THE COURT OF COMMON PLEAS
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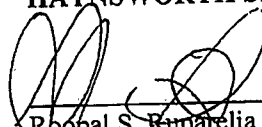
Case No. 2013-CP-10-1400

**DEFENDANT REPUBLIC PARKING SYSTEM, INC. PROPOSED REQUESTS TO
CHARGE PHASE ONE**

Defendant Republic Parking System, Inc. hereby submits the following proposed jury
instructions.

Respectfully submitted,

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December 16, 2014

Republic's Request to Charge No. 1

Accident

I charge you that merely because an accident occurred does not mean that someone is negligent.

Not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured.

See Brown v. Ford Motor Co., 287 F. Supp. 906 (D.S.C. 1968) (Judge Russell applying South Carolina Law); *Young v. Meeting Street Piggly Wiggly*, 288 S.C. 508, 343 S.E.2d 636 (Ct. App. 1986)

Republic's Request to Charge No. 2

Burden of Proof/ Fact of Injury

The fact that a plaintiff may have been injured is not, in and of itself, enough to entitle him to a recovery. The Plaintiff must establish by a preponderance of the evidence that the Defendant was negligent and that such negligence was the proximate cause of the injury. Proof of causation cannot rest on conjecture, and mere possibility of such causation cannot sustain Plaintiff's burden of proof.

Todd v. United States, 570 F. Supp. 670 (D.S.C. 1983); *Hanselmann v. McCardle*, 275 S.C. 46 (1980); *Bowling v. Primary Medical Management, Inc.*, 299 S.C. 192, 383 S.E.2d 249 (Ct. App. 1986)

Republic's Request to Charge No. 3
Sympathy, Passion, Prejudice or Emotion

I charge you that it is the imperative and sworn duty of the jury to hear and determine this case precisely upon the evidence. In determining questions of fact, you are not at liberty to indulge in conjectures not based upon evidence introduced in this case, nor are you at liberty to follow your own ideas of what the law is or ought to be. On the contrary, you should look solely to the evidence for the facts and to the instructions given by the Court for the law, and return a verdict according to the facts established by the evidence and the law as laid down by the Court. Sympathetic feelings have no place whatever in the trial of the case in a court of justice. You should disregard all influence and determine the case at bar according to the law and to the evidence given you in open court, regardless of who the parties are, and with fairness and impartiality. A verdict in this case cannot be based upon sympathy, passion, prejudice or emotion, or some other consideration not found in the evidence.

Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969)

Republic's Request to Charge No. 4
Foreseeability

Foreseeability of some injury from a negligent act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought. The law requires only reasonable foresight. When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability.

Landry v. Hilton Head Plantation Prop. Owners Ass'n, 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994); *Matthews v. Porter*, 239 S.C. 620, 124 S.E.2d 321 (1962)

Foreseeability is to be judged from the perspective of the actor at the time of the negligent act, not after the injury has occurred. It is not enough that the danger can be perceived by 'looking back at the mishap with the wisdom borne of the event.'

Shepard v. SC Dept. of Corrections, 299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989); *Greene v. Sibley, Lindsay, Curr Company*, 257 N.Y. 190, 192, 177 N.E. 416, 417 (1931) (Cardozo, J.)

Republic's Request to Charge No. 5

Bare Possibility

Failure to guard against the bare possibility of an incident is not negligence. If you find that the cause of the accident was so unusual and unexpected as to amount to a bare possibility, your verdict must be for the Defendant.

Brady v. Southern Ry., 320 U.S. 476, 483 (1943)

Republic's Request to Charge No. 6

Invitees

Notice

The Plaintiff must show that the unsafe condition was caused by an agent or employee of the Defendant or that the Defendant had actual or constructive notice of the unsafe condition.

Constructive notice may be proven by showing that the unsafe condition had existed for a long enough time for the Defendant to have discovered and fixed it. Just because an unsafe condition existed, this is not enough, in and of itself, to show that the Defendant had notice of the unsafe condition.

S.C. Civil Charges, June 2013 at 84-85

Reasonable Care

Next, the Plaintiff must show that the Defendant failed to use reasonable care to fix the unsafe condition. The Defendant does not insure its customer's safety, but owes the customer a duty of ordinary care in keeping the premises in a reasonably safe condition.

S.C. Civil Charges, June 2013 at 85

Invitee Duty of Care

An invitee has a duty to care for his own safety. If the Plaintiff does not use reasonable care to look out for his own safety, he cannot recover from the Defendant. A plaintiff must use his own senses to protect himself, and in the interest of safety, he must use that degree of care that any reasonable person would use under the same circumstances. A plaintiff must use all of his own senses in a reasonable measure- amounting to ordinary care – in discovering and avoiding those things that might cause injury to him.

Wainwright v. Thomas, 250 F. Supp. 963, 967 (D.S.C. 1966); *Callender v. Charleston Doughnut Corp.*, 406 S.E.2d 361 (S.C. 1991)

Open and Obvious Danger

There is no duty to warn or protect against “a natural condition, the peril of which [is] obvious.”

Meadows v. Heritage Village Church & Missionary Fellowship, Inc., 305 S.C. 375, 409 S.E.2d 349 (1991)

Republic's Request to Charge No. 7
Proximate Cause

A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. An act or omission that does no more than furnish the condition or give rise to the occasion by which the injury is made possible is not the proximate cause of the injury. Proximate cause is the efficient cause of the injury- the very thing which brings it about. In addition, foreseeability of some injury from the act or omission is a prerequisite to its being the proximate cause of the particular injury complained of.

Shepard v. SC Dep't of Corr., 299 S.C. 370, 385 S.E.2d 35 (S.C. Ct. App 1989); *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (S.C. 1977); *Kennedy v. Carter*, 249 S.C. 168, 153 S.E.2d 312 (S.C. 1967); *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 149 S.E.2d 761 (S.C. 1966)

Proximate cause requires proof of (1) causation in fact; and (2) legal cause. Causation in fact is proved by establishing the injury would not have occurred "but for" the Defendant's negligence.

Legal cause is proved by establishing foreseeability. A plaintiff proves legal cause by establishing the injury in question occurred as a natural and probable consequence of Defendant's negligence.

Whitlaw v. The Kroger Co., 306 S.C. 51; 410 S.E.2d 251 (1991)

Republic's Request to Charge No. 8

Proximate Cause—Burden of Proof

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.

S.C. Civil Charges, June 2013 at 41; *see O'Neal v. Carolina Farm Supply of Johnston, Inc.*, 279 S.C. 490, 309 S.E.2d 776 (Ct. App. 1983)

Republic's Request to Charge No. 9
Comparative Negligence

The Defendant claims that the Plaintiff's own negligence proximately caused the Plaintiff's injuries. If you find that the Defendant was negligent, you must then decide whether the Plaintiff was negligent. The Defendant must prove by a preponderance, or greater weight, of the evidence that the Plaintiff breached a duty of care which proximately caused the Plaintiff's injuries. The same law which I have told you to use in deciding whether the Defendant was negligent should be used in deciding whether the Plaintiff was negligent.

If you find that the negligence of both the Plaintiff and the Defendant proximately caused the Plaintiff's injuries, you must then decide how much the negligence of the Plaintiff contributed to the Plaintiff's injuries and how much the Defendant's negligence contributed to the Plaintiff's injuries. In deciding the percentages of negligence of the Plaintiff and the Defendant, you may consider, among other things, the following factors.

- (1) Whether each party's conduct was only inadvertent or whether it was engaged in with an awareness of the danger involved;
- (2) The magnitude of the risk created by each party's conduct, including the number of persons endangered and the possible severity of the injury;
- (3) The significance of the goal that each party was trying to reach and the need to achieve the goal in that manner;
- (4) Each party's capabilities and abilities to realize and eliminate the risk involved;
- (5) The particular circumstances confronting each party at the time the conduct

occurred, such as the existence of an emergency requiring a quick decision;

- (6) The relative closeness of the causal relationship of the negligent conduct of the Defendant and the harm to the Plaintiff; and
- (7) Whether the conduct of either party involved a violation of a safety statute or regulation.

S.C. Civil Charges, June 2013 at 42-45; F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.*, 43 D.C.L.Rev. 273 (1992)

Republic's Request to Charge No. 10
Expert Witnesses—General Charge

Although lay witnesses are limited to testifying about facts within their knowledge and are not allowed to give opinions, certain witnesses, who, by training, education or experience are considered as experts in a particular field, may give opinions in that field based upon the facts of a matter. Their conclusions and opinions constitute evidence to be considered by you in connection with all of the other testimony and evidence in the case. That is to say, you may consider the expert's opinion just as you do all other evidence in the case and it is for you, the jury, to give it such weight as you, in your experience and discretion, may determine. By this, I mean that you must weigh such evidence and accept or reject it in the same manner that you treat all other evidence in the case. In determining the weight to be given the expert's opinion, you should consider the qualifications and credibility of the expert and the reasons given for his opinion.

The testimony of experts on a subject which is little known to the general public is entitled to consideration. Such testimony, however, must be submitted to your judgment and consideration, to be weighed by you as a part of the evidence in connection with all the other facts in this case. The testimony of experts is to aid and assist you as jurors, not to dominate or control you in the decision of questions of facts. Their opinions and deductions from the evidence before you, and their judgments and opinions, do not preclude yours. You are required to decide disputed questions after comparison and consideration of all the evidence in this case.

Ralph King Anderson, Jr., *South Carolina Requests to Charge-Civil*, 2002, § 1-6; *see* Rules 701, 702, 703, 704, and 705, SCRE; *Tiller v. National Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843 (1999); *Means v. Gates*, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001); *Small v. Pioneer*

Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1998); *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); *Doe v. Greenville Hosp. Sys.*, 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994); *see also* the following pre-rule cases which are consistent with the current law: *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986); *Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104 (1943)

Republic's Request to Charge No. 11
Willful, Wanton, Reckless

You will also be asked if Plaintiff has presented clear and convincing evidence that Defendant's conduct was in willful, wanton, reckless disregard for the Plaintiff's rights. "Clear and convincing evidence is that degree of proof which will produce in [your mind] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt."

Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 265, 478 S.E.2d 282, 284 (1996)

Conduct is willful, wanton, or reckless when it is committed with a deliberate intention under the circumstances that a person of ordinary prudence would be conscious of it as an invasion of another's rights. It is the present consciousness of wrongdoing that justifies the assessment of punitive damages against the tortfeasor.

Carter v. R.L. Jordan Oil Co., 301 S.C. 84, 390 S.E.2d 367 (Ct. App. 1990).

STATE OF SOUTH CAROLINA

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Plaintiffs,

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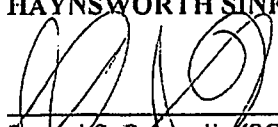
Case No. 2013-CP-10-1400

**DEFENDANT REPUBLIC PARKING SYSTEM, INC. PROPOSED REQUESTS TO
CHARGE PHASE TWO**

Defendant Republic Parking System, Inc. hereby submits the following proposed jury
instructions.

Respectfully submitted,

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*Attorneys for Defendant Republic Parking
System, Inc.*

December 19, 2014

Republic's Request to Charge No. 1
Proof of Damages

Neither the existence, causation or amount of damages can be left to conjecture, guess or speculation.

See Carlyle v. Tuomey Hospital, 305 S.C. 187, 407 S.E.2d 630 (1999)

Republic's Request to Charge No. 2
Components of Damages

Actual Damages

Actual damages are to compensate the Plaintiff for the Plaintiff's injuries or loss and to put the Plaintiff, as near as possible, in the same position that the Plaintiff was in before the incident occurred. In other words, actual damages would be the actual losses and expenses which the Plaintiff has suffered because of the Defendant's negligence.

S.C. Civil Charges, June 2013 at 229-30; *Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002); *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000)

Pain and Suffering

Pain and suffering compensates the Plaintiff for physical discomfort and emotional response to the sensation of pain caused by the injury itself. There is no definite standard by which to compensate the Plaintiff for pain and suffering. You have the authority to determine the amount, if any, to be allowed for pain and suffering, using calm and reasonable judgment to ensure that the damages are just and reasonable in light of the testimony and evidence presented in the case.

S.C. Civil Charges, June 2013 at 30; *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001); *Rhodan v. United States*, 754 F.Supp. 76 (D.S.C. 1991); *Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 54 (1962); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); *Haskins v. Fairfield Elec. Coop.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984)

I charge you that in determining damages, if any, for pain and suffering, you are not entitled to consider what you yourself would want or take to undergo such pain and suffering, if any, or what you yourself would want or take for any friend or any member of your family to undergo such pain and suffering. You are bound under the law to consider the damages, if any, to be awarded for pain and suffering not from a personal point of view but rather from a fair and impartial point of view being fair to both parties.

Boop v. Baltimore & Ohio R.R., 118 Ohio App. 171, 193 N.E.2d 714 (1963)

Loss of Enjoyment of Life

Loss of enjoyment of life compensates the Plaintiff for limitations on the Plaintiff's ability to participate in, and derive pleasure from, the normal activities of daily life.

S.C. Civil Charges, June 2013 at 230-31; *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001)

Personal Injuries

The Plaintiff must prove that expenses caused by the injury were necessary and reasonable. Those damages must "naturally, logically and necessarily" result from the Defendant's negligence.

Sossamon v. Nationwide Mut. Ins. Co., 243 S.C. 552, 135 S.E.2d 87 (1964).

Prospective Damages

A plaintiff is never entitled to recover conjectural or speculative damages, but if you find the Plaintiff is entitled to a verdict for actual damages, your verdict should include an amount to cover any past, present, and future damages which were proximately caused by the Defendant. Any future damages must be reasonably certain to occur in the future as a result of the Defendant's acts. Actual damages need not be proven to a mathematical certainty or be based on

evidence of the precise amount of damages the Plaintiff has suffered. Instead, the evidence must allow you to determine what amount of damages is fair, just, and reasonable.

S.C. Civil Charges, June 2013 at 235; *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794; *Pearson v. Bridges*, 344 S.C. 366, 544 S.E.2d 617 (2001) (1981); *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972); *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996)

Future Damages

Any future damages must be reasonably calculated to have resulted from the alleged injury or damage sustained in this case. Future damages must be reduced to their present cash value.

S.C. Civil Charges, June 2013 at 236; *Ford v. A.A.A. Highway Express, Inc.*, 204 S.C. 433, 29 S.E.2d 760 (1944); *Grimsley v. Atlantic Coast Line R. Co.*, 189 S.C. 251, 1 S.E.2d 157 (1939)

Pre-existing Injury

The Defendant claims that the Plaintiff had a pre-existing injury or condition prior to the date that the Plaintiff claims that the Defendant injured him. If you find that the Plaintiff received an injury as a result of the negligence of the Defendant and is entitled to recover for that injury, the fact that the Plaintiff had a pre-existing injury or condition would not prevent the Plaintiff from recovering. The Defendant is responsible for all ill effects which, considering the Plaintiff's condition of health when the Plaintiff was injured, naturally and necessarily follow the injury. The Defendant takes the Plaintiff as the Plaintiff is found whether the Plaintiff is in perfect health, in poor health, or somewhere in between. The Defendant's liability is in no way lessened or affected because of the fact that the injury would not have resulted or would not have been as serious or severe had the Plaintiff been in good health, or that the injuries were aggravated and rendered more difficult to cure by reason of the fact that the Plaintiff was not in good health. In other words, if the presence of a pre-existing injury or condition aggravates and prolongs the

injury and increases the damages, the Plaintiff should be compensated for the increased or added damages.

A person with a pre-existing injury or condition is not, however, entitled to any compensation for the pre-existing injury or condition. In addition, if the problems are the result of the natural progression of the worsening of a pre-existing injury or condition, then the Plaintiff would not be entitled to be compensated for those problems.

S.C. Civil Charges, June 2013 at 235-36

Republic's Request to Charge No. 3

Duty to Mitigate Damages

When the Plaintiff is injured or damaged by the wrongful act of another person, it is the duty of the Plaintiff to reasonably try to avoid and lessen the damages. Those damages which may be avoided by the use of reasonable efforts, care, and prudence by the Plaintiff cannot be the proximate result of the Defendant's wrongful act. Therefore, the Plaintiff cannot recover for damages which reasonably might have been avoided.

S.C. Civil Charges, June 2013 at 240; *DuBose v. Bullman*, 215 S.C. 468, 56 S.E.2d 95 (1949)

Republic's Request to Charge No. 4
Present Value

A plaintiff cannot recover conjectural or speculative damages. However, if you find the plaintiff is entitled to a verdict for actual damages, your verdict should include an amount to cover any damages that the evidence shows will be reasonably certain to occur in the future. Future damages need not be proved to a mathematical certainty and often must be approximated. These future damages must be the result of the defendant's negligence. Any future damages that you award must be reduced to their present-day value.

Anderson's Requests to Charge § 13-11 Damages - Future Damages

Republic's Request to Charge No. 5
Expert Witnesses—General Charge

Although lay witnesses are limited to testifying about facts within their knowledge and are not allowed to give opinions, certain witnesses, who, by training, education or experience are considered as experts in a particular field, may give opinions in that field based upon the facts of a matter. Their conclusions and opinions constitute evidence to be considered by you in connection with all of the other testimony and evidence in the case. That is to say, you may consider the expert's opinion just as you do all other evidence in the case and it is for you, the jury, to give it such weight as you, in your experience and discretion, may determine. By this, I mean that you must weigh such evidence and accept or reject it in the same manner that you treat all other evidence in the case. In determining the weight to be given the expert's opinion, you should consider the qualifications and credibility of the expert and the reasons given for his opinion.

The testimony of experts on a subject which is little known to the general public is entitled to consideration. Such testimony, however, must be submitted to your judgment and consideration, to be weighed by you as a part of the evidence in connection with all the other facts in this case. The testimony of experts is to aid and assist you as jurors, not to dominate or control you in the decision of questions of facts. Their opinions and deductions from the evidence before you, and their judgments and opinions, do not preclude yours. You are required to decide disputed questions after comparison and consideration of all the evidence in this case.

Ralph King Anderson, Jr., *South Carolina Requests to Charge-Civil*, 2002, § 1-6; *see* Rules 701, 702, 703, 704, and 705, SCRE; *Tiller v. National Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843 (1999); *Means v. Gates*, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001); *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1998); *Hankins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997); *Doe v. Greenville Hosp.*

Sys., 323 S.C. 33, 448 S.E.2d 564 (Ct. App. 1994); *see also* the following pre-rule cases which are consistent with the current law: *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986); *Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104 (1943)

Republic's Request to Charge No. 6
Proximate Cause

A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. An act or omission that does no more than furnish the condition or give rise to the occasion by which the injury is made possible is not the proximate cause of the injury. Proximate cause is the efficient cause of the injury- the very thing which brings it about. In addition, foreseeability of some injury from the act or omission is a prerequisite to its being the proximate cause of the particular injury complained of.

Shepard v. SC Dep't of Corr., 299 S.C. 370, 385 S.E.2d 35 (S.C. Ct. App 1989); *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (S.C. 1977); *Kennedy v. Carter*, 249 S.C. 168, 153 S.E.2d 312 (S.C. 1967); *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 149 S.E.2d 761 (S.C. 1966)

Republic's Request to Charge No. 7
Sympathy, Passion, Prejudice or Emotion

I charge you that it is the imperative and sworn duty of the jury to hear and determine this case precisely upon the evidence. In determining questions of fact, you are not at liberty to indulge in conjectures not based upon evidence introduced in this case, nor are you at liberty to follow your own ideas of what the law is or ought to be. On the contrary, you should look solely to the evidence for the facts and to the instructions given by the Court for the law, and return a verdict according to the facts established by the evidence and the law as laid down by the Court. Sympathetic feelings have no place whatever in the trial of the case in a court of justice. You should disregard all influence and determine the case at bar according to the law and to the evidence given you in open court, regardless of who the parties are, and with fairness and impartiality. A verdict in this case cannot be based upon sympathy, passion, prejudice or emotion, or some other consideration not found in the evidence.

Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969)

REQUEST TO CHARGE NO. ____

The Plaintiff, Bob Burke, has filed a lawsuit against Republic Parking for one cause of action for Negligence, Negligence per se, and Recklessness. In order to prove that Defendant was negligent, Mr. Burke needs to show, by the preponderance of the evidence, the following elements:

- 1) A duty of due care;**
- 2) The breach of that duty i.e. negligence or carelessness; and**
- 3) An injury causing damages proximately caused by said breach.**

REQUEST TO CHARGE NO. ____

Standard of Care - Duty

An invitee is a person who enters onto the property of another at the express or implied invitation of the business operator.

Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827, 831 (Ct. App. 1997); *Cook v. Food Lion*, 328 S.C. 324, 491 S.E. 690 (Ct. App. 1997); *Lowrimore v. Fast Fare Stores, Inc.*, 299 S.C. 418, 385 S.E.2d 218 (Ct. App. 1989) (duty is active).

REQUEST TO CHARGE NO. ____

Standard of Care - Duty

An independent contractor or servant to whom the owner or possessor of land turns over the entire charge of the land is subject to the same liability for harm caused to others, upon or outside of the land, by his failure to exercise reasonable care to maintain the land in safe repair as though he were the possessor of the land.

Restatement (second) of Torts § 387 – Persons Taking Over Entire Charge of Land

REQUEST TO CHARGE NO. ____

Standard of Care – Duty – Premises - 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, 494 S.E.2d 813 (S.C. 1997)

REQUEST TO CHARGE NO. ____

Premises Liability

The general rule with respect to general property defects is that a occupier or possessor of land owes an invitee "the affirmative duty to use reasonable care to discover unreasonably dangerous conditions of the premises and either put the premises in a reasonably safe condition for use in a manner consistent with the purpose of invitation or warn him of the danger."

Hughes v. Children's Clinic, P.A., 237 S.E.2d 753 (S.C.1977).

REQUEST TO CHARGE NO. ____

Premises Liability

A business invitee is entitled to at least a warning of any unsafe conditions of which the landowner or occupier knew or should have known, and of which the invitee was, reasonably, not aware.

Wilson v. Duke Power Co., 258 S.E.2d 101 (S.C.1979).

REQUEST TO CHARGE NO. ____

Premises Liability – Latent Defect

A latent defect is one which an owner has, or should have, knowledge of, and of which an invitee is reasonably unaware.

Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991).

REQUEST TO CHARGE NO. ____

Premises Liability - Duty Owed to Invitee - In General

In premises liability cases, the invitee is offered the utmost duty of care by the occupier of the premises. The occupier of the property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of this duty. It is the duty of the occupier to use reasonable care to prevent an invitee from suffering bodily injury.

The occupier has a duty to warn an invitee of latent or hidden dangers of which the occupier has knowledge or should have knowledge. That is to say, the defendant must warn an invitee of any unsafe conditions of which the defendant knew or should have known, and of which the invitee was reasonably unaware. The occupier owes a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils.

A defendant owes an invitee a duty of due care to discover risks and take safety precautions to warn of or eliminate foreseeable unreasonable risks. An invitee is entitled to expect that the occupier will take reasonable care to know the actual condition prevailing at the time the invitee is on the premises and either make those conditions safe or warn the invitee of the dangerous conditions. The degree of care required is commensurate with the particular circumstances involved, including the age, disability, impairment, or capacity of the invitee.

This duty is an active or affirmative duty. It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him. It is not necessary that the precise manner in which the injuries were sustained be foreseeable. Rather, it is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range.

Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §31-5

REQUEST TO CHARGE NO. ____

Standard of Care

A landowner or occupier of land owes an invitee the duty of exercising reasonable or ordinary care for the invitee's safety. The landowner or occupier has a duty to warn invitees of latent or hidden dangers when the landowner has knowledge or should have knowledge of the danger.

Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct.App. 2001)

REQUEST TO CHARGE NO. ____

Standard of Care

The duty of a landowner or occupier to an invitee is an active or affirmative duty.

Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct.App. 2001), citing *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (S.C. 1977); *Garvin v. Bi-Lo, Inc.*, 337 S.C. 436, 523 S.E.2d 481 (S.C.Ct.App. 1999), cert. granted, March 21, 2000.

REQUEST TO CHARGE NO. ____

Standard of Care

The precise nature in which injuries are sustained does not have to be foreseeable to the landowner or occupier; "[i]t is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range.... It was, therefore, a jury question whether the defendant had provided reasonable safe premises... for the use of the ... invitee."

Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct.App. 2001), citing *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 237 S.E.2d 753 (S.C. 1977); *Garvin v. Bi-Lo, Inc.*, 337 S.C. 436, 523 S.E.2d 481 (S.C.Ct.App. 1999), cert. granted, March 21, 2000.

REQUEST TO CHARGE NO. ____

Negligence may be proved by circumstantial evidence. In determining the sufficiency of circumstantial evidence, the facts and circumstances shown are to be evaluated in the light of ordinary experience and, conclusions should be reached about these facts and circumstances based on common sense.

McQuillen v. Dobbs, 204 S.E.2d 732 (S.C. 1974).

REQUEST TO CHARGE NO. ____

Duty – Known or obvious Dangers

1. A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
2. In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement (Second) of Torts § 343A Known or Obvious Dangers
Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (S.C. 2009).

REQUEST TO CHARGE NO. ____

When a business adopts internal policies or self-imposed rules, then violates those policies or rules, you may consider such violations as evidence of negligence if they proximately caused the plaintiff's damages.

Madison ex rel. Bryant v. Babcock Center, Inc., 638 S.E.2d 650, 659 (2006); *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 410 S.E.2d 21 (S.C.App. Oct 14, 1991) (NO. 1711), cert. den. (1992).

REQUEST TO CHARGE NO. ____

A company is presumed to have knowledge of any and all material facts which its employees receive notice of while acting within the scope of their job duties.

Crystal Ice Company of Columbia, Inc. v. First Colonial Corp., 273 S.C. 306, 257 S.E.2d 496 (1979).

REQUEST TO CHARGE NO. ____

A party's failure to call its own employees as witnesses to testify to facts which are reasonably known to them gives rise to an inference that the employees' testimony, if presented, would have been unfavorable to the party.

Brock v. Carolina Scenic Stages, 219 S.C. 360, 65 S.E.2d 468 (1951).

REQUEST TO CHARGE NO. ____

Damages – Eggshell Victim

As a general rule, liability for the consequences of a Defendant's negligent act is not lessened by reason of the fact that the injuries to the Plaintiff were aggravated by the Plaintiff's prior physical condition.

A Plaintiff must be accepted for better or worse, in sickness or in health. The Defendant takes the Plaintiff, Bob Burke, as he is found, and a Plaintiff is entitled to recover those damages which resulted from the Defendant's tortious conduct that aggravated or exacerbated a pre-existing condition.

Raino v. Goodyear Tire and Rubber Co., 309 S.C. 255, 422 S.E.2d 98 (S.C. 1992) and *Vaughan v. S. Bakeries Co.*, 247 F.Supp. 782 (D.S.C. 1965)

REQUEST TO CHARGE NO. ____

Damages – Actual

“The purpose of actual or compensatory damages is to compensate a party for injuries suffered or losses sustained. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred.”

Clark v. Cantrell, 529 S.E.2d 528, 533 (S.C. 2000)(citations omitted).

REQUEST TO CHARGE NO. ____

Damages - Elements of Actual Damages in Negligence Cases

When one person is injured by the negligent acts of another, the injured person is entitled to be fully compensated for all injuries directly or proximately resulting from any negligent acts or omissions by the defendant.

In determining the amount of compensation for injuries suffered by the plaintiff as a result of the defendant's negligence, it is proper for you to consider and award past, present, and future damages for:

1. out-of-pocket expenses;
2. medical expenses, including physicians, hospital, medicines, physical therapy expenses, rehabilitation expenses, and transportation expenses connected with medical treatment;
3. any future damages resulting from permanent injuries;
4. alteration of lifestyle;
5. psychological trauma;
6. mental anguish;
7. mental distress;
8. emotional injury;
9. depression;
10. pain and suffering; and
11. loss of enjoyment of life.

Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §13-3

REQUEST TO CHARGE NO. ____

Damages - Elements of Actual Damages - Mental Anguish

An injured party may recover for mental anguish brought about by bodily injury and suffering. Where a party's negligence is directly responsible for physical injury to another, the injured party may recover both for actual physical injury sustained and for concomitant mental and emotional suffering which flow as a natural consequence of the wrongful act.

Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §13-7

REQUEST TO CHARGE NO. ____

Damages - Elements of Actual Damages - Pain and Suffering

Pain and suffering is a material element of damages on which a recovery may be based. The plaintiff is entitled to compensation for his pain and suffering directly resulting from the wrongful acts of the defendant.

An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. In making an estimate of damages to be awarded for pain and suffering, you may consider:

1. The nature and extent of the injuries and the suffering occasioned by them and its duration or prospective duration;
2. The age, health, habits and condition of the injured party before the injury as compared with his condition afterwards;
3. The plaintiff's use of sedatives and other drugs to relieve pain and their effect; and
4. Any aggravation of pre-existing disorders by the incident in question.

Pain and suffering have no market price. They are not capable of exact measurement, and there is no fixed rule or standard whereby damages for them can be measured.

The amount of damages to be awarded by pain and suffering must be left to the judgment of you, the jury. Additionally, you may include such damage for pain and suffering as it is reasonably certain will of necessity result in the future from the injury. Future pain and suffering on the part of the plaintiff in consequence of the injury constitute a proper element of the damages which may be allowed, provided there is the requisite certainty that such pain and suffering will result.

Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §13-8

REQUEST TO CHARGE NO. ____

Damages - Elements of Actual

Damages - Loss of Enjoyment of Life

Loss of the capacity to enjoy life, resulting from a personal injury, is a proper element of damages. If you find evidence of "loss of enjoyment of life," you may award damages for this loss.

Damages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations. "Loss of enjoyment of life" damages compensate the plaintiff not only for the subjective knowledge that one can no longer enjoy all of life's pursuits, but also for the objective loss of the ability to engage in these activities.

Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §13-9

REQUEST TO CHARGE NO. ____

I charge you that you may award damages for "loss of enjoyment of life" where there is proof that the plaintiff proximately suffered loss of enjoyment of life as a result of the defendant's negligence. "[D]amages for "loss of enjoyment of life" compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue [her] talents, recreational interests, hobbies, or avocations."

Damages for loss of enjoyment of life are separate from, and in addition to, damages for pain and suffering. "An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages [may also be] given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as a result of the defendant's negligence."

Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 at 244 (S.C. 2001).

REQUEST TO CHARGE NO. ____

Damages - Future Damages

A plaintiff cannot recover conjectural or speculative damages. However, if you find the plaintiff is entitled to a verdict for actual damages, your verdict should include an amount to cover any damages that the evidence shows will be reasonably certain to occur in the future. Future damages need not be proved to a mathematical certainty and often must be approximated. These future damages must be the result of the defendant's negligence. Any future damages that you award must be reduced to their present-day value.

Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil, 2002, §13-11.

REQUEST TO CHARGE NO. ____

Damages – Punitive

The plaintiff has the burden of proving an entitlement to punitive damages by clear and convincing evidence.

S.C. Code Ann. § 15-33-135.

REQUEST TO CHARGE NO. ____

Damages – Punitive

A corporation is “regarded as a person in the eyes of the law.”

McCandless v. Richmond & D. R. Co., 38 S.C. 103, 16 S.E. 429, 431 (1892).

REQUEST TO CHARGE NO. _____

Damages – Punitive

Punitive damages are recoverable if “the defendant’s conduct is shown to be willful, wanton, or in reckless disregard of the rights of others.”

South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 478 S.E.2d 57, 58 (S.C. 1996) (citations omitted); *accord, Lengel v. Tom Jenkins Realty, Inc.*, 334 S.E.2d 834, 837 (S.C. Ct. App. 1985); *Camp v. Components, Inc.*, 330 S.E.2d 315, 316 (S.C. Ct. App. 1985).

REQUEST TO CHARGE NO. ____

Damages – Punitive

“[W]hen under proper allegations a plaintiff proves a willful, wanton, reckless, or malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages.”

Sample v. Gulf Refining Co., 183 S.C. 399, 410, 191 S.E. 209, 214 (1937); *Broom v. Southeastern Highway Contracting Co., Inc.*, 291 S.C. 93, 352 S.E.2d 302, 305 (Ct. App. 1986).

REQUEST TO CHARGE NO. ____

Damages – Punitive

“In South Carolina, ‘punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.’ Moreover, they serve ‘as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated. Lastly, punitive damages may be awarded only upon a finding of actual damages.’”

Scott v. Porter, 530 S.E.2d 389, 396 (S.C. Ct. App. 2000), citing *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991).

REQUEST TO CHARGE NO. ____

Damages – Punitive

“Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others.... Punitive damages have now come, however, to be generally, though not universally, regarded, not only as punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state.”

REQUEST TO CHARGE NO. ____

Damages – Punitive

In determining an amount of punitive damages, you should consider the following factors:

- (1) the defendant's degree of culpability;
- (2) the duration of the conduct;
- (3) the defendant's awareness or concealment;
- (4) the existence of similar past conduct;
- (5) the likelihood the award will deter the defendant or others from like conduct;
- (6) whether the award is reasonably related to the harm likely to result from such conduct;
- (7) the defendant's ability to pay; and
- (8) any other factors you deem appropriate.

Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350, 354 (1991).

Under our constitution, and under our laws, you, and only you, can make the findings of fact in this case. To determine the facts in this case, you will have to evaluate the credibility and believability of each witness. The fact that testimony is not contradicted directly does not necessarily render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of a witness which you of course are to decide. In deciding these issues, you may consider what was the manner and appearance of the witness who testified -- was he or she straightforward, or hesitant in answering? Was the testimony of a witness consistent -- or inconsistent? How did the witness come to know the facts that he or she testified to? -- or what was his ability to know these facts? Is there some reason a witness would want to give testimony which would help -- or hurt -- one side or the other? In other words, was the witness biased or prejudiced? Was the testimony of a witness strengthened -- or weakened -- by other testimony or evidence?

Our law allows you certain very broad discretions in deciding truth. You have the right to believe one witness and disbelieve another; you can believe a part of what a witness tells you and can disbelieve the rest; you can believe one witness against many or many witnesses against one. These considerations you do not exercise arbitrarily, but if, in your good judgment there is a sound reason in the record of this case for so doing, you do have that prerogative. During this process you do not determine the truth merely by counting the number of witnesses presented by each side. Your objective, ladies and gentlemen, is to find the truth, regardless of the source of evidence.

It is also your duty to accept the law from the court, regardless of what you personally believe the law is, or ought to be. You are to apply the law to the facts and in this way decide the case. The order in which the instructions are given to you has no significance as a whole, and you should not place undue emphasis on any particular instruction or part of an instruction.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits that have offered and received during the trial. The remarks of the attorneys are not evidence. Their statements and their arguments are intended to help you understand the evidence and apply the law. You should disregard any remark, statement or argument which is not supported by the evidence or the law

as given to you by the court. The law does not permit me to comment on the evidence. If it appears to you that i have so commented, during either the trial or the giving of these instructions, you must disregard such comment entirely. You are the judges of the facts and i cannot interfere with that responsibility.

The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, has become expert in some art, science, or profession, may give an opinion as to the subject the witness claims to be an expert in, and may also give the reasons for the opinion. You should consider any expert opinion given by a witness and, like any other evidence, give it the weight you think it deserves. If you decide that an expert witness' opinion is not based on sufficient education and experience, or if you decide that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. an expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert, and you do not have to accept an expert's opinion, even though it is not contradicted.

There are two kinds of evidence recognized by our laws. Evidence may be either direct or circumstantial. These two kinds of evidence apply to the parties alike, the plaintiff and the defendant, and both are equally good in the law. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. On a particular factual point, you may have direct evidence, circumstantial evidence or a combination of these kinds of evidence.

Direct evidence proves a fact without an inference and if true, conclusively establishes that fact. Direct evidence is testimony of a person who has perceived certain facts by means of his senses and comes in to testify what he perceived. If you, the jury, believe the evidence to which he testifies, that evidence will conclusively establish a particular fact.

Circumstantial evidence proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically

and reasonably be drawn from another fact or group of facts. In other words, you may infer that a particular event that occurred based on proof of circumstances warranting such an inference. The proof as to circumstantial evidence is sufficient if shown by the preponderance of the evidence or the greater weight of the evidence. The conclusion reached in the minds of you, the jury, must be the most probable and reasonable one. In a civil case such as this, every other reasonable conclusion need not be excluded. If there are several reasonable inferences that may be drawn from all the circumstances and evidence, it is for you, the jury, to say which is established by the greater weight of the evidence.

In every civil action, the burden is on the plaintiff to prove every essential element of the claim by a measure of proof called the preponderance or the greater weight of the evidence. To "establish by a preponderance of the evidence" does not mean to prove something to an absolute certainty. Rather, it means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means the evidence, when considered and compared to the evidence opposed to it, which has more convincing force and produces in your mind's belief that what plaintiff seeks to prove is more likely true than not true. Proof cannot rest on conjecture and mere possibility to meet plaintiff's burden of proof. Also the defendant does not have the burden of proving that the negligence of another caused the injuries or damages; instead the burden is upon the plaintiff to prove that the defendant was negligent in some manner and the negligence was at least one of the reasons he sustained some injury or damage.

With respect to the Defendant's affirmative defense of comparative negligence the Defendant has the same burden of proof as to each of the elements of that defense. That is the Defendant has to prove those elements by the preponderance of the evidence and the same restrictions indicated above as to Plaintiff's claim would likewise apply to the Defendant's defense.

Negligence

Negligence means that a person did not use the same amount of care that a person of ordinary reason and prudence would exercise in the same circumstances. The party claiming injury as a result of the negligence of another must establish a duty, which generally is defined as the obligation to conform to a particular

standard of conduct toward another. The party claiming negligence must also prove a breach of that duty and that some damage or injury as a result of that breach. The word "careless" means the same thing.

It can be said that a negligent person has done something that a reasonable person would not have done, if faced with the same situation; or, on the other hand, that he has failed to do something that a reasonable person would have done -- or both.

To determine whether a particular act is negligent, you should compare that act with the manner in which a person of ordinary reason and prudence would have acted in similar circumstances. When a business adopts internal policies or self-imposed rules, then violates those policies or rules, you may consider such violations as evidence of negligence if they proximately cause injuries or damages.

The mere fact that an injury has been sustained or that an accident occurs is not, in and of itself, sufficient to prove negligence. The foundation of liability is actionable negligence. Negligence may be proved by circumstantial evidence, the facts and circumstances shown are to be evaluated in the light of ordinary experience, and conclusions should be reached about these facts and circumstances based on common sense.

The plaintiff claims that the Defendant not only was careless but also that the defendant acted was grossly negligent, recklessness, willful and wanton. These words are used to describe a conscious failure to use reasonable care. In other words, while a negligent person or entity is one who acts carelessly, a person or entity whose behavior is grossly negligent, reckless, willful and wanton is not only careless in his actions, but also is aware that he is careless. Conduct is willful, wanton or reckless when it is committed with a deliberate intention under such circumstances that a person of ordinary prudence would be conscious of it as an invasion of another's rights.

Plaintiff has the burden of proving grossly negligent, willful, wanton or reckless conduct by a standard that is greater than that required for negligence. If you will recall that standard for negligence is by the preponderance or greater weight of the evidence. The clear and convincing standard is greater than the probability standard for negligence. The clear and convincing evidence standard is defined as

that measure or degree of proof which will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established. Clear and convincing proof leaves no substantial doubt in your mind. It means that the evidence is not ambiguous, doubtful, equivocal or contradictory. Clear and convincing proof establishes in your mind, not only that the fact is probable, but that it is highly probable.

PREMISES LIABILITY

An invitee is a person who enters upon the premises of another at the express or implied invitation of the occupant for a purpose for which the premises are held open to the public or for a purpose connected with the business of the occupier that does or may result in their mutual economic benefit. The term "invitee" includes patrons upon the premises of any business open to the public and business visitors. 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 of care.

The plaintiff claims that an unsafe condition on the defendant's premises caused him injury. In order to prevail the plaintiff must first prove by a preponderance, or greater weight, of the evidence that an unsafe condition existed on the defendant's premises. Next, the plaintiff must show that the unsafe condition was caused the defendant or that the defendant had actual or constructive notice of the unsafe condition. Constructive notice may be proven by showing that the unsafe condition had existed for a long enough time for the defendant to have discovered and fixed it. Just because an unsafe condition existed, standing alone is not enough to show that the defendant had notice of the unsafe condition. In that regard I charge you that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority.

A occupier owes an invitee the duty of exercising reasonable or ordinary care for his or her safety and is liable for any injury resulting from the breach of this duty. This degree of care must be commensurate with the particular circumstances involved including the age and capacity of the invitee. This duty is an active or affirmative duty. It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury. The occupier of the premises

further owes an invitee the affirmative duty to use reasonable care to discover any unreasonably dangerous conditions 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 the danger.

The precise manner in which the injuries might have occurred does not have to be foreseeable. It is sufficient that there is a greater than ordinary danger of injury of which the occupier knew or should have discovered by the use of ordinary care. The precise nature in which injuries are sustained does not have to be foreseeable to the occupier; it is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range. An invitee is entitled to expect that the owner will take reasonable care to know the actual condition prevailing at the time the invitee is on the premises and either make those conditions safe or warn the invitee of the dangerous conditions.

The occupier is not an insurer of the safety of invitees. The duty is only to exercise reasonable care. An occupier is not required to maintain the premises in such condition that no accident could happen to a patron using the premises. The plaintiff has the burden of showing that with the exercise of due care the defendant could have discovered the defect and remedied the situation. Therefore if a reasonable person would not have been aware of the risk or if the risk was not unreasonable, there is no liability.

An occupier is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to the invitee, unless the owner/occupier should anticipate the harm despite such knowledge or obviousness. An invitee or customer is expected to use reasonable care for his or her own safety and avoid obvious dangers but the occupier may be liable for injuries to an invitee, despite an open and obvious defect, if the owner should have anticipated that the invitee would nevertheless encounter the condition, or that the invitee was likely to be distracted.

Comparative Negligence

One of the defenses interposed by the defendant is what is known as comparative negligence. You will recall that I have already defined the word "negligence" to you as the lack of due or ordinary care. "Comparative negligence" is negligence on the part of one party which is greater in degree of fault than that of the other party and which combines and concurs with the negligence of the other party to act as a proximate cause of the accident and without which the accident would not have happened. In other words, it required the fault of each of us for the accident to have happened, but the other party was more at fault than I was. As I have said, with respect to the complaint, the plaintiff has the burden of proving the negligence and fault, if any, of the defendant. For the purposes of this defense, the defendant has the burden of proving the negligence and fault, if any, of the plaintiff and the degree of such.

Where negligence has been established on the part of both the defendant and the plaintiff, then you must weigh or compare the respective contributions of each person to the occurrence. Considering the conduct of each person involved as a whole, you must determine whether one made a larger contribution than the other.

In making such an allocation of fault, you may consider:

1. Whether the conduct was mere inadvertence or whether the party was aware of the danger involved, or reasonably should have been aware of the danger involved;
2. The seriousness of the risk created by this conduct, including the number of persons endangered and the potential seriousness of the injury;
3. The nature of the goal the party was seeking to attain by her conduct and the need to achieve the goal in this manner
4. The party's superior or inferior aptitude or capacity, and his ability to realize and eliminate the risk involved;
5. The particular circumstances confronting the party at the time his conduct occurred;

6. The relative closeness of the causal relationship of the negligent conduct of the defendant(s) and the harm to the plaintiff; and

7. The conscious failure to observe due care or conscious indifference with respect to the rights and safety of others.

8. Any other facts and circumstances in the case which you find are appropriate.

Comparative negligence will defeat a recovery by a party only if the fault of that party was greater than that of the other party. Another way of saying this is to say that a party can recover only if his fault, if any, is equal to or less than that of the other party. If you find some negligence by the plaintiff that was not greater than that of the defendant, while it will not prevent recovery by the plaintiff but it will have an effect on the amount of the plaintiff's recovery.

Now, your verdict in this case should do one thing. It should speak the truth of this controversy as you twelve folks see that to be. You have got no friends to reward. You have got no enemies to punish. That is evidence. You should not be motivated by or consider in any passion, prejudice, caprice, or arbitrary whim should be involved in this process. Neither should you be motivated by sympathy, for either side in reaching your decision. You should conscientiously adhere to your oath, take the law as I've given it to you, examine these facts as you see them to be, the documents that you'll have with you and reach a decision which speaks the truth. No one will then have any right to criticize your verdict if you conscientiously apply your oath.

Charge

To determine the facts in this case, you will have to evaluate the credibility and believability of each witness. The fact that testimony is not contradicted directly does not necessarily render it undisputed. There remains the question of the inherent probability and credibility of the testimony of a witness which you of course are to decide. In deciding these issues, you may consider what was the manner and appearance of the witness who testified -- was he or she straightforward, or hesitant in answering? Was the testimony of a witness consistent -- or inconsistent? How did the witness come to know the facts that he or she testified to? What was his ability to know these facts? Is there some reason a witness would want to give testimony which would help -- or hurt -- one side or the other? In other words, was the witness biased or prejudiced? Was the testimony of a witness strengthened -- or weakened -- by other testimony or evidence?

Our law allows you certain very broad discretions in deciding truth. You have the right to believe one witness ... These considerations you do not exercise arbitrarily, but if, in your good judgment there is a sound reason in the record of this case for so doing, you do have that prerogative. During this process you do not determine the truth merely by counting the number of witnesses presented by each side. Your objective, ladies and gentlemen, is to find the truth, regardless of the source of evidence.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits that have offered and received during the trial. The remarks of the attorneys are not evidence. Their statements and their arguments are intended to help you understand the evidence and apply the law. You should disregard any remark, statement or argument which is not supported by the evidence or the law as given to you by the court. The law does not permit me to comment on the evidence. If it appears to you that I have so commented, during either the trial or the giving of

these instructions, you must disregard such comment entirely. You are the judges of the facts and I cannot interfere with that responsibility.

The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, has become expert in some art, science, or profession, may give an opinion as to the subject the witness claims to be an expert in, and may also give the reasons for the opinion.

You should consider any expert opinion given by a witness and, like any other evidence, give it the weight you think it deserves. If you decide that an expert witness' opinion is not based on sufficient education and experience, or if you decide that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert, and you do not have to accept an expert's opinion, even though it is not contradicted directly.

Burden of proof

To "establish by a preponderance of the evidence" does not mean to prove something to an absolute certainty. Rather, it means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means the evidence, when considered and compared to the evidence opposed to it, which has more convincing force and produces in your mind's belief that what plaintiff seeks to prove is more likely true than not true.

Proximate cause

The plaintiff must establish by a preponderance of the evidence the negligence of defendant was a proximate cause of the injuries sustained. A given injury may result from multiple causes, and it is enough if the negligent act complained of is at least one of the causes without which the injury would not have

occurred. The law defines the proximate cause of an injury to be something that produces a natural chain of events which, in the end, brings about the injury. In other words, proximate cause is the direct cause, without which the injury would not have occurred. Proof of proximate cause requires proof that the injury or damage would not have occurred "but for" the defendant's negligence and that the consequence was foreseeable which is determined by looking to the natural and probable consequences of the act of which the plaintiff complains. I further charge you that foreseeability of some injury from a negligent act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought. The law requires only reasonable foresight. When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the defendant's negligent act. Foreseeability is to be judged from the perspective of the defendant of the defendant at the time of the negligent act, not after the injury has occurred. However, in order to establish liability it is not necessary that the party charged with negligence should have contemplated the particular event that occurred. It is sufficient that the defendant should have foreseen that its negligence would probably result in injury of some kind to someone.

Damages

In this case you will be concerned with actual damages. Actual damages are also called compensatory damages, meaning to compensate, to make the injured party whole, to put him or her in the same position he or she was in prior to the damages received insofar as this is possible. In other words, actual damages would be the actual losses and expenses which the person has suffered because of another's carelessness.

In determining the amount of compensation for injuries suffered by the

plaintiff, as a result of the defendant's negligence, it is proper to consider:

- (1) Expenses incurred for all reasonable and necessary medical treatment.
- (2) The character of the injury with regard to how has the injury impaired one's health or physical condition and the amount that would be necessary to make the injured person whole.

(3) Pain and suffering as well as mental anguish endured by the injured party, impairment of health or physical condition. Pain and suffering is recognized by the courts of this state as a material element of damages on which a recovery may be bottomed. Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. The amount of damage is left to you as to what amount of money is necessary to compensate him of the pain, suffering, mental anguish and emotional distress that evidence convinces you that he most probably has suffered and is likely to suffer.

(4) an award for actual damages may also include any proven loss of enjoyment of life. Loss of enjoyment of life is essentially an assessment of plaintiff's injury and how it impairs or interferes with such things in one's daily life as recreational activities, family activities, hobbies, and social activities. As with pain, suffering, emotional distress and mental anguish, this type of damage has no fixed rule or standard for measuring this type of damage. It too is left to your judgment as to what amount is necessary to compensate him for this damage that you are convinced from the evidence that he most probably has suffered or like will suffer.

(5) Actual damages would include reduced earning capacity. In determining the amount of compensation due to the plaintiff for loss or impairment of earning capacity, you shall consider the following:

- (a) loss of future earning power, which requires a consideration of

all matters that relate to the issue of any impairment;

(b) the effect which the impairment will have on the plaintiff's capacity to work;

(c) the extent to which the impairment will impair the plaintiff's earning capacity;

(d) the evidence of what the plaintiff had previously earned, when employed, in the past is a factor upon which to base any loss or impairment of earning capacity.

In awarding damages for loss or impairment to earning capacity, the law provides that a person who is injured may recover for the loss or diminution of his earning capacity during his entire expectancy of life and is entitled to such amount as will compensate him for such loss.

Pre-existing condition

I further charge you that it is the law of this state that one who negligently inflicts a personal injury on another is responsible for all ill affects which, considering the condition of health in which the plaintiff has when he received the injury, naturally and necessarily follows such injury. In other words a negligent defendant, who causes an injury, takes the plaintiff as he finds that plaintiff whether the plaintiff is in perfect health or in poor health or somewhere in between. Hence, a defendant's liability is in no way lessened or affected by reason of the fact that the injury would not have resulted or would not have been as serious or severe had the plaintiff been in good health; or that injury or injuries were aggravated and rendered more difficult to cure by reason of the fact that he (she) was not in good health. In other words, if the presence of condiiton or pre-existing injury aggravates and prolongs the injury and correspondingly increases the damages, and that is established by a preponderance of the evidence, then the plaintiff would be compensated for such increased or added damages.

I further charge you that a person with a pre-existing injury or a condition is not however entitled to any compensation for the existence of such pre-existing injury or condition. Also if the problems are the result of the natural progression of the worsening of a pre-existing injury or condition, then the plaintiff likewise would not be entitled to be compensated for such condition.

You are further instructed that a pre-existing infirmity does not excuse a negligent defendant because it causes the plaintiff to be more susceptible to injury, nor does such a pre-existing condition resulting in a greater susceptibility to injury diminish the plaintiff's entitlement to just and fair compensation for personal injuries. The plaintiff is entitled to recover all damages which she established by a preponderance of the evidence proximately result from the negligent acts of the defendant, which would include the aggravation of his pre-existing condition, if any.

Ladies and gentlemen, your verdict for actual damages, should include all damages which have been sustained which are naturally the proximate consequence of the negligence and it should also include as it pertains to such future and prospective damages, if any, as the evidence renders it reasonably certain to most probably occur in the future. The standard is most probable not simply possible because that would be speculative. Future damages are those which the evidence convinces you that the plaintiff will most likely suffer. These future damages must be the result of the defendant's negligence and these damages must be most probably permanent. If you do find that the plaintiff is entitled to future or prospective damages, you may consider the increased cost of living or the diminished purchasing power of money. Reasonable compensation means compensation in value. The value of money lies not in what it is but what it will buy. You are expected to use common sense and good judgment in this regard. Also if your award includes such damages, they must be reduced to their present

day value.

To aid you in this determination you may consider as evidence a statute enacted by the state legislature commonly called the "mortality table", section 19-1-150, 1976 code; according to the table, a (male) who is the age of the plaintiff today has a life expectancy of 13.99 years.

This fact, of which the court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages to be awarded, in the event you find that the plaintiff is entitled to a verdict. Also, before considering the mortality table you must first have concluded that the plaintiff had proved by a preponderance of the evidence that he has sustained an injury or damage as a proximate result of the defendant's negligence and that such injury was most probably permanent. If plaintiff has failed to prove this by the preponderance of the evidence then you should disregard the mortality table.

Now the life expectancy, as shown by a mortality table, is merely an estimate of the probable average remaining length of life of all persons in our state of a given age, and that estimate is based on not a complete but only a limited record of experience. So the inference which may be drawn from the life expectancy shown by the table of mortality, all other facts and circumstances in evidence bearing on the life expectancy of the plaintiff, including his occupation, habits and state of health.

Plaintiff would of course not be entitled to conjectural or speculative damages in any event, but he is entitled to a verdict for actual damages, which includes all damages which have been sustained which are naturally the proximate consequence of the negligent act. As with all other facts in this case, the plaintiff must prove his actual damages by the greater weight of the evidence but this does not mean that he must prove them to a mathematical certainty, or produce evidence of the precise amount of damages he has suffered--rather the evidence put forth

should be such as to enable you to determine what amount of damages is fair, just and reasonable.

Now, your verdict in this case should do one thing. It should speak the truth of this controversy as you twelve folks see that to be. You have got no friends to reward. You have got no enemies to punish. That is evidence. You should not be motivated by or consider in any passion, prejudice, caprice, or arbitrary whim should be involved in this process. Neither should you be motivated by sympathy, for either side in reaching your decision. You should conscientiously adhere to your oath, take the law as I've given it to you, examine these facts as you see them to be, the documents that you'll have with you and reach a decision which speaks the truth. No one will then have any right to criticize your verdict if you conscientiously apply your oath.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Robert J. Burke,
Plaintiffs,
vs.
Republic Parking System, Inc.,
Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 DEC 29 PM 3:41

FILED

**DEFENDANT'S MOTION FOR
JUDGMENT NOTWITHSTANDING THE VERDICT,
OR, IN THE ALTERNATIVE, A NEW TRIAL**

Pursuant to Rules 50 and 59, SCRPC, Defendant Republic Parking System, Inc. ("Republic" or "Defendant") hereby moves for judgment notwithstanding the verdict ("JNOV"), or, in the alternative, a new trial.

This matter was tried before a jury in Charleston County from December 15-19, 2014, resulting in a verdict for the Plaintiff for \$4,005,125. The verdict amount must be reduced by any setoff to be determined by the Court and by the jury's comparative negligence assessment assigning 20% of the negligence to the Plaintiff.

The Court granted the parties 10 days leave to file any post-trial motions. Republic moves for relief on the grounds set forth below. Republic further incorporates all evidence and arguments made during the trial and in its pre-trial motions and memoranda. Republic requests a hearing and reserves the right to submit a memorandum in support of this motion and to submit portions of the trial transcript when they are received.

GROUND'S FOR MOTION

I. The Court should grant JNOV in favor of Republic.

Republic renews its motions for a directed verdict made in each phase of the trial at the close of Plaintiff's case and renewed at the close of evidence. For the reasons set forth below, Republic contends it is entitled to JNOV. Each of these reasons independently supports a ruling as a matter of law in favor of Republic, and in combination, these arguments become even stronger. Quite simply, there is no basis for liability in this case because Republic did not have a duty.

A. Republic did not have any duty with respect to the Plaintiff.

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, for all of the reasons set forth below, Republic did not have any duty with respect to the Plaintiff, much less broad duties as an "occupier" as charged by the Court.

1. The Management Agreement does not create a duty.

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.

Republic is not an owner or occupier of the George Street parking lot where the Plaintiff fell. Instead, it is an independent contractor that performs certain services in the lot pursuant to a

Management Agreement ("Agreement") with the City of Charleston. As noted in section 10.7 of the Agreement, "Republic shall perform its duties and obligations hereunder for the City in the capacity of an independent contractor." The Agreement further provides in section 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"

Under the Agreement, Republic had no ability to change anything about the lot, and in fact, Republic was required to maintain the lot in the same condition as when the Agreement was entered. 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." The City designed the parking lot in the late 1970s or early 1980s, the City paid all expenses for the parking lot, the City continued to inspect and control the property, and Republic had no ability to change anything about the parking lot under the Agreement.

Even if Republic could be construed to be an owner or occupier, "[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). In this case, it is clear that the City of Charleston retained control and therefore Republic did not have a duty. Moreover, 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 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, the requisite control was lacking in Republic.

In addition to all of the above arguments, Republic contends that any negligence relating to the lot is the sole negligence of the City.

2. The City had a nondelegable duty with respect to the lot.

Moreover, under South Carolina law, the City had a nondelegable duty with respect to the parking lot and lighting. *See Dolan v. City of Camden*, 233 S.C. 1, 4-5, 103 S.E.2d 328, 330-31 (1958). Republic did not and could not acquire that duty by virtue of the Agreement.

3. Neither the City nor Republic was on notice of any latent danger.

“A plaintiff seeking damages suffered because of a dangerous or defective condition on a defendant’s property must demonstrate that the defendant committed a specific act that created the dangerous condition, which in turn caused [the] injury. Alternatively, [s]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 Central, Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779-80 (Ct. App. 2010) (citations omitted).

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. There was not any evidence that the lot in question violated any code at the time it was

built.¹ Neither the City nor Republic had any indication there might be a problem prior to the Plaintiff's fall. This absence of notice warrants judgment as a matter of law in this case.

4. Darkness is an open and obvious danger.

"Although 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). Darkness would certainly fall into this category. Accordingly, Republic is entitled to judgment as a matter of law. Given the darkness, Republic would further argue that Plaintiff's negligence exceeded Republic's as a matter of law.

B. The evidence in this case does not support a verdict against Republic.

1. Plaintiff has not established any breach of duty on the part of Republic.

For all of the above reasons, there is no evidence establishing any breach of duty on the part of Republic because there was no duty and because Republic could not change the lot in question.

2. Plaintiff has not met its burden on causation.

Plaintiff has failed to establish why Robert Burke fell. The fact of a fall is not enough to establish liability under South Carolina law. See *Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797 (Ct. App. 1991) ("[n]o inference of negligence arises from the mere fact of injury). Plaintiff has further failed to establish a causal link as to injuries arising long after the fall because of an infection following knee replacement surgery. Republic contends that any

¹ The only evidence was as to current "industry" standards. No evidence linked those standards to any code applicable here. Moreover, the Court expressly ruled that Republic could not ask questions that might have evinced testimony regarding earlier standards.

damages stemming from this later event are because of an intervening and superseding cause that was not foreseeable at the time of the fall and therefore are not compensable in this case.

3. Plaintiff is not entitled to any recovery of future damages because Plaintiff did not present any evidence that would allow a jury to determine present value.

Plaintiff is not entitled to future damages because he has not presented any testimony that would allow a jury to make an award based on present value. South Carolina law requires that any award for future damages be reduced to present value. *Grimsley v. Atlantic Coast Line R. Co.*, 189 S.C. 251, 1 S.E.2d 157 (1939). Present value is an economic determination that requires expert testimony as it is outside the knowledge, skill, training, and experience of the jury. "The 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). Plaintiff has not presented expert testimony or any testimony on this point and has therefore failed to meet his burden as a matter of law.

II. In the alternative, the Court should require a new trial in this matter.

A. The Court's charge to the jury 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, the parties submitted written jury charges for the Court's consideration. "Ordinarily, a trial court has the duty to give a requested instruction that correctly

states the law applicable to the issues and evidence.” *Williams v. Addison*, 314 S.C. 35, 40, 443 S.E.2d 582, 585 (Ct. App. 1994). Here, the Court failed to give requested charges, gave unrequested charges, and issued charges that unduly emphasized some language over other equally applicable language. Republic sought a mistrial at the end of the liability phase of the trial due to irregularities in the charge and the deliberation; however, the Court denied that request. Republic further sought to have the Court inquire as to why the forewoman was weeping during the Plaintiff’s damages testimony; however, the Court declined to do so.

Republic seeks a new trial based on all of the charges it submitted that were declined by the Court and notes the following specific matters, each of which resulted in prejudice to Republic:

1. Proximate cause.

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 charges submitted by Republic that would have clearly defined the term and apprised the jury as to the full scope of what it was being charged to determine. Proximate cause is part and parcel with the liability determination in a negligence action, and in this case there were numerous proximate cause issues ranging from Republic’s inability to change anything about the parking lot or its lighting to the Plaintiff’s condition at the time of his fall. Here, the Court repeatedly used the term in the charge without any context or explanation. 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.

2. Charging the case as a premises case.

As argued above, Republic was not an owner or occupier of the property and did not have any superior knowledge to that of the City. The Court erred in charging this case as a standard premises case, rather than charging the jury on the law applicable to Republic.

3. Principal and agent.

Neither party made any requests to charge based on the laws applicable to principals and agents. The Court added such a charge at its own whim. Nothing in the evidence supported such language, and it may have given the jury the erroneous idea that it could base a finding of negligence against Republic on actions taken by the City.

4. Inadequate instruction on sole negligence of others/ 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. The Court refused the charge.

5. Instruction to the jury that finding Burke more than 50% negligent would result in no recovery.

The jury's task was to assign comparative negligence. It is for the Court to render judgment in accordance with those percentages. In this case, the Court told the jury the Plaintiff would not recover if it assessed greater than 50% of the negligence to the Plaintiff. That information is not pertinent to the jury's role, and as such, the Court's instruction needlessly subverted the jury's fact-finding function to the prejudice of Republic.

6. Inquiry to jury regarding progress of deliberations.

The Court further subverted the jury's deliberation by inquiring as to their progress on filling out the verdict form. The jury should have been instructed that it was free to revise the form at any time until it had been fully executed.

7. Future Damages.

As argued above, the Plaintiffs 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.

8. Natural progression of pre-existing condition.

In the second phase of the case, both sides submitted requested charges as to pre-existing conditions. The Court inexplicably charged the law as to aggravation three times and only mentioned the natural progression of a pre-existing condition once. This additional emphasis on a hotly contested point in the damages phase of this case prejudiced Republic's ability to present its defense.

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 the fair trial it deserved.

1. Dr. Shuman.

Republic proffered Dr. Shuman to give expert medical testimony in this case. He had been listed as an expert by the City and had been deposed by the Plaintiff. Republic listed him on its witness list and had agreed to pay half of his fee. As of the Friday before trial, the City was still a party to this action. Plaintiff did not inform Republic of any objection to Dr. Shuman prior to moving for exclusion at the beginning of the trial. The Court excluded Dr. Shuman's testimony for the sole reason that Republic had not named him as an expert in earlier discovery responses.

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 emanating from the proffered witness; (3) the nature of the failure or neglect or refusal to furnish the witness' name; (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and (5) the prejudice to the opposing party. *Bryson v. Bryson*, 378 S.C. 502, 506-07, 662 S.E.2d 611, 613 (Ct. App. 2008) (citing *Jumper v. Hawkins*, 348 S.C. 142, 152, 558 S.E.2d 911, 916 (Ct. App. 2001)). Here, the witness had been named and deposed and was on Republic's witness list; therefore, there was no surprise and no prejudice to Plaintiff by allowing him to testify. Republic, on the other hand, was gravely prejudiced by not being able to refute the testimony presented by Plaintiff's expert Dr. White, particularly in light of the 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.

2. Dr. White.

Plaintiff's expert, Dr. White, admitted on the stand that his exclusive field of practice is neurology and pain management. Given this limited field and Dr. White's admission that he had not treated the Plaintiff, the scope of Dr. White's testimony should have been similarly limited. Over objection, the Court let him testify to numerous matters that fall well outside that expertise, including but not limited to knee replacement surgery, kidney function, and dialysis. In addition, the Court allowed Dr. White to testify over objection to matters that had not been previously disclosed to Republic, including assisted living and dialysis. This trial by ambush left Republic less able to defend itself, particularly given the exclusion by the Court of Republic's medical expert.

3. Exclusion of certain medical records.

The 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 Mr. Burke's testimony, under Rule 803(5), SCRE. The exclusion of these documents prejudiced Republic's ability to defend itself, particularly in light of the exclusion of Republic's expert.

4. Future damages.

As argued above, the Court erred in allowing the jury to consider future damages in light of Plaintiff'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 by the Court.

5. Pre-existing conditions.

In the liability phase of the trial, Republic sought to introduce evidence of Plaintiff'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 Court refused to allow these questions. Thus, Republic was unable to defend itself in the liability portion of the case. The prejudice of this exclusion was compounded by the Court's refusal to instruct the jury on the meaning of proximate cause in the liability phase of the case.

6. Conduct by the City with respect to the parking lot.

Republic sought to establish the City's control over the parking lot with evidence relating to the City's subsequent actions. The Court refused this evidence to the prejudice of Republic. Further, Republic did not get the opportunity to show why the City maintained the lights and the

lot as it did. Specifically, Republic was prohibited from introducing evidence that the City strives to protect the historic feel of its downtown and, thus, prevented Republic from making changes in order to preserve that ambience. Additional evidence of control would have allowed Republic to argue more forcefully that any negligence in this case belonged to the City alone.

7. Opinion testimony by lay witness with respect to future earning potential.

Over Republic's objection, the Court allowed Michael Cappaccio to give opinion testimony about the Plaintiff's prospective employment prospects. Such testimony was inadmissible opinion testimony from a lay witness and should have been excluded under Rule 701, SCRE.

C. Allocation.

Given the nature of the relationship between the City and Republic and the City's nondelegable duty and as previously argued when Plaintiff sought to dismiss the City as a party, the City needed to be on the verdict form to prevent prejudice to Republic. Prior to trial, the Court indicated that it would allow the dismissal of settling defendants, City of Charleston and Indigo Realty; however, the Court also indicated that it would allow for an allocation among these settling parties and Republic in the event of a verdict. After the verdict, the Court changed its mind. Republic's trial strategy was based, in part, on the Court's representation that there would be an allocation. The Court's decision not to allow this allocation after the fact resulted in prejudice to Republic.

D. The Court should exercise its discretion as thirteenth juror and order a new trial in this case.

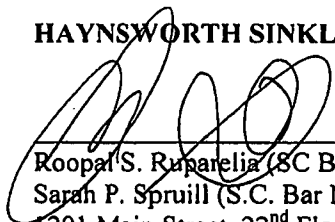
Republic has set forth numerous reasons above why it is entitled to JNOV or a new trial. In the event the Court is not persuaded by any of these arguments individually, Republic asks the Court to grant a new trial in its discretion as thirteenth juror.

CONCLUSION

As shown in this motion and to be further argued in a memorandum in support and at a hearing, JNOV is appropriate in this case. In the alternative, Republic is entitled to a new trial.

Respectfully submitted,

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FILED

STATE OF SOUTH CAROLINA 2015 JAN 14 PM 4:03

COUNTY OF CHARLESTON JULIE J. ARMSTRONG
CLERK OF COURT

Robert J. Burke,

BY

Plaintiff,

v.

Republic Parking System, Inc.,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2013-CP-10-1400

) **PLAINTIFF'S RESPONSE TO**
) **DEFENDANT'S MOTION FOR**
) **JUDGMENT NOTWITHSTANDING**
) **THE VERDICT AND MOTION FOR**
) **A NEW TRIAL**

Plaintiff Robert J. Burke ("Plaintiff" or "Burke"), by and through his undersigned Counsel, hereby submits his response to Defendant Republic Parking System, Inc.'s ("Republic" or "Defendant") Motion for Judgment Notwithstanding the Verdict, and in the Alternative, for a New Trial. For the reasons set forth herein, as well as all arguments and evidence presented at the trial in this case, the motion should be denied, and the verdict reached by the jury should stand.

This case was tried before a jury in the Court of Common Pleas for Charleston County from December 15, 2014 through December 19, 2014. Prior to the trial commencing, the Plaintiff moved to dismiss Plaintiff Jane Burke, Defendant City of Charleston ("City"), and Defendant Indigo Realty Company, LLC, as Jane and Robert Burke had settled with those parties, and the only remaining claims were those of Robert Burke against Republic. The Court dismissed those parties upon such motion and request.

Upon the pre-trial motion and request of Defendant Republic, the case was bifurcated as to liability and damages. The case was first tried as to liability, with the jury returning a verdict finding that Republic was 80 percent (80%) negligent and the Plaintiff was 20 percent (20%) comparatively negligent. The trial then resumed as to damages, with the jury finding that the

proximately caused damages resulting from the liability equaled \$4,005,125.00. The jury returned a general verdict in favor of the Plaintiff for this amount.

At the close of the liability phase of the trial, Republic moved for directed verdict on numerous grounds, to include arguing that Republic owed no duty to the Plaintiff and that it was entitled to judgment as a matter of law. Based on the evidence before the Court, the motion was denied. Also, at the close of the damages phase, Republic also moved for a directed verdict on one ground. Based on the evidence presented, the motion was denied.

I. REPUBLIC'S MOTION FOR JNOV SHOULD BE DENIED, AS MORE THAN SUFFICIENT EVIDENCE WAS PRESENTED ESTABLISHING A DUTY ON THE PART OF REPUBLIC DUE TO IT BEING IN CONTROL OF THE PROPERTY IN QUESTION AND OCCUPYING SUCH PROPERTY.

It should be noted that Republic, in its motion, glosses over and fails to even address the pertinent and substantial evidence supporting a duty owed by Republic and the evidence supporting the breach of the duty. It is this evidence that supports the duty owed in this case, as well as the evidence supporting such breach. The Court properly evaluated the evidence before it in denying Republic's motions for directed verdict, finding that sufficient evidence existed to support a duty owed by Republic based on its control and occupation of the property in question.

Management Agreement

Republic simply contends again that the Management Agreement ("Agreement") does not create a duty. In addition, Republic quizzically states that it is not the occupier of the parking lot in question. However, Republic ignores the most significant portions of the Agreement, which, together with other evidence presented at the trial, formed a basis of the duty and the breach.

As an example, the Agreement turned over complete control of every parking facility in the City of Charleston to Republic. Republic hired and fired the employees working in each of

the lots and garages, had maintenance personnel, had management personnel, and had an employee at the George Street lot every minute the lot was opened for approximately seventeen (17) years. However, the City had no parking personnel and specifically hired and relied upon Republic to take control of and operate the parking facilities in a safe and proper manner. Republic, by operation of the Agreement, certainly voluntarily *undertook* the requisite duties to provide a safe parking lot.

Moreover, and most importantly, the Agreement *required* Republic to keep the lot in question (and all lots and garages in the City) free from *all* hazardous conditions. The Agreement also required Republic to report any safety or hazardous conditions to the City so that the City and Republic could take appropriate action. Republic failed on each of these requirements – it failed to keep the lot free of hazardous conditions and also failed to report the same to the City. Republic's approach to these requirements was best shown in its lack of reporting even the Plaintiff's injury. The Vice-President of Republic responsible for this territory (Jack Skelton) was not even aware of the incident and injury until over a year later. The City was not aware until after the suit was filed. The only shred of documentation of the incident was a few sentences written on lined paper from an employee of Republic after suit was filed.

Republic had the requisite control in occupying the property to give rise to a duty owed and a breach of that duty. Republic continues to argue that it had no control and that it had no ability to make major modifications to the lot. However, the Plaintiff proved that Republic had the requisite control. Republic also had a duty to notify the City of major issues, which the City testified it would have addressed, but Republic did not notify it.

Control and Occupier

After multiple days of evidence and testimony presented on Republic's control and occupation of not only the lot where the injuries occurred, but City-wide, Republic *still* contends and argues with a straight face in its Motion that Republic had no control and was not an occupier of the lot in question. This position is contrary to all of the evidence presented.

The testimony supporting Republic's control and occupation of the property is voluminous, but is best summarized as follows:

- Republic contracted to keep the lot free of all hazardous conditions;
- Republic operated the lot;
- The physical facilities of the lot became the responsibility of Republic;
- Republic was responsible for maintaining the equipment required to operate the parking facilities;
- The lighting in the lot where Mr. Burke was injured was 1/10th of the industry standard;
- Republic had the obligation to inspect the lot for lighting sufficiency;
- Republic had the obligation to report to the City any issues requiring attention, and it did not;
- Republic had an obligation to inform the City of the need for major repairs, and it did not;
- Republic had an employee in the lot during every hour of its operation for seventeen (17) years, and the City has no parking personnel;

- In addition to having an employee in the lot every hour it was opened, Republic had a management team, as well as a maintenance team, responsible for the parking facilities;
- Republic's witness testified that control of the parking facilities was turned over to it after entering into the Agreement with the City;
- Republic's witness testified that trip hazards and lighting sufficiency are important safety concerns in the lots they manage;
- Republic's witness testified that it assessed the City's parking facilities for trip hazards and lighting sufficiency because those are safety issues and the obligation of Republic; however, they simply "eyeballed" the lots;
- Republic's witness testified that he agreed that if the lighting was poor, it is considered a hazardous condition, and it should be reported to the City, and it was obligated to report such to the City;
- Despite Republic's claim of having a first-class incident reporting mechanism, there was no documentation of Mr. Burke's injuries until after suit was filed. The City was not even notified by Republic as to the injury until after suit was filed. Jack Skelton, the Regional Vice President in charge of half of the U.S.A for Republic's operations, to include South Carolina, did not even know of this incident until over a year after it occurred;
- Republic performed all maintenance in the lot unless it requested assistance from the City for items it could not handle, or it would hire third-party contractors;

- Republic had the ability to take immediate corrective action with respect to the lots for safety issues, but did not. In fact, as it related to Mr. Burke, not only did Republic fail to act, it failed to report the matter to the City;
- The City testified that it relied upon Republic to operate and manage the parking lot in accordance with the Agreement and the special knowledge of Republic;
- The City testified that Republic was responsible for keeping the George Street lot free from hazardous conditions;
- The City testified that it did not own the George Street lot;
- The City testified that once the City contracted with Republic, control of the George Street lot was turned over to Republic, and Republic became responsible for the physical facilities of the lots and garages, including the George Street lot;
- The City testified that Republic had all the control of the George Street lot – controlling access, hiring and firing employees, and the management of the day to day operations in the lot;
- The City testified that Republic had its employees at the lot during all hours of operation and also had a staff of management and maintenance personnel;
- The City testified that while at times the City assisted Republic with maintenance requests upon the request of Republic, Republic was responsible for maintenance in the lots;
- The City testified that Republic never notified it of any deficiencies as to lighting at the George Street lot; and
- The City testified that had Republic notified it of deficient lighting at the George Street lot, it would have been addressed appropriately and paid for.

Whether the law recognizes a particular duty is an issue of law to be determined by the Court. *Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996). Where the application of a rule concerning duty raises fact issues, these issues are for the jury. *E.g.*, *Carson v. Adgar*, 326 S.C. 212, 217, 486 S.E.2d 3, 5 (1997) (“In some circumstances . . . , the question of whether a duty arises depends on the existence of particular facts. Where the existence or non-existence of a duty depends on facts, 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.”).

The duty of Republic in this instance is best summarized by the law stated in *Miller v. City of Camden*: 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. 329 S.C. 310, 314 (1997) (emphasis added). Here, based on the evidence, Republic controlled the lot. If Republic exercised *no* control, it would have no duty. The evidence clearly established control on the part of Republic.

Based on the facts and evidence heard by the Court, the Court properly instructed the jury and properly denied Republic’s motion for a directed verdict on the issue of duty and whether Republic was an occupier or in control of the property in question.

Non-Delegable Duty

Republic contends that the City has a non-delegable duty with respect to the lot and lighting based on *Dolan v. City of Camden*, 233 S.C. 1, 103 S.E.2d 328 (1958). However, this argument is unpersuasive and distinguishable from the duty relied upon in *Dolan*.

In *Dolan*, the state and Kershaw County authorities were performing road repairs to a stretch of highway. A portion of the stretch of highway being repaired extended within the city limits of the City of Camden. A person was injured as a result of the road repairs on a portion of the highway within the City of Camden. The City argued that responsibility for the injuries

rested with the state and county authorities performing the work. The Supreme Court disagreed, relying on a state statute which waived immunity of a municipality for injury or death occurring on a highway within such a municipality. The Court reasoned that it is clear that the legislature intended to preserve the state's immunity from suits arising on a state highway and preserved the fundamental responsibility of the *municipality*, which has full and complete control of those public streets and highways within their limits. The Court opined that the municipality is liable due to the failure to use reasonable care and keep the streets and highways in a safe condition for public travel due to the full and complete control. *Id.*

The *Dolan* case does not stand for what Republic contends. In *Dolan*, a state statute preserved liability against the municipality for injuries or death by reason of construction, maintenance, or reconstruction of highways within the limits of the municipality, largely due to the full and complete control of those highways by the municipality. That is not the situation in this case. In this case, Republic exercised the level of control of the lot in question for which a duty arose to Mr. Burke. The City did not exercise full and complete control of the lot.

Latent Danger

As a preliminary matter, this issue raised by Republic in its Motion for JNOV has been *waived*. Republic did not move for a directed verdict on this issue that it was unaware of a latent defect. Only grounds raised in a directed verdict motion may properly be reasserted in a JNOV motion. *In re: McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001).

Nevertheless, Republic contends it was not on notice of dangerous condition in the lot. As previously stated, Republic had an obligation to inspect the lot and keep it free of all hazardous conditions. Republic did, in fact, make those inspections – failing to recognize the defects. Multiple witnesses testified as to how dark the George Street lot is at night, and

Plaintiff's expert testified as to the lighting measurements in the lot compared to the industry standard. The measurements in the area Mr. Burke fell were about 1/10th of the industry standard and below what one would find in a darkened movie theatre. Furthermore, Plaintiff's expert testified that a competent parking manager would have been able to determine that the George Street lot was simply too dark.

Republic had an employee in the lot every moment the lot was in operation. In addition, the lot had a support staff of managers and maintenance personnel. These persons had a duty to inspect the lot for lighting and hazardous conditions. In addition, Republic's executive management testified that they simply "eyeball" the lot to meet these obligations.

A latent defect is one which an occupier has, or should have, knowledge of, and of which an invitee is reasonably unaware. *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991).

Constructive notice of the unsafe condition, caused by the combination of the extremely low lighting levels, the concrete over which Mr. Burke tripped, and the placement of vehicles in the purported egress pathway, may be proven by existence of the conditions for a long enough time for Republic to have discovered and addressed the issue. "The concept of constructive notice is not limited to situations involving slip and fall accidents in stores. It has also been applied to slip and fall cases in parking lots." Hubbard and Felix, *THE SOUTH CAROLINA LAW OF TORTS* 166 (3d. ed. 2004) (citing *Henderson v. St. Francis Community Hosp.*, 303 S.C. 177, 399 S.E.2d 767 (1990)). Evidence showing that the condition existed after Plaintiff's injury is also relevant to its existence at the time of injury and to constructive notice. *Anderson v. Racetrac Petroleum, Inc.* 296 S.C. 204, 371 S.E.2d 530 (1988).

Moreover, an occupier like Republic owes an active and affirmative duty (commensurate with Republic's duty under the Management Agreement) to exercise reasonable care to discover hazardous conditions and make them safe and/or warn of their presence. *Sims v. Giles*, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001). Significant evidence supported Republic's failure to do so in this case.

Darkness is an Open and Obvious Danger

Although Republic agrees that questions of negligence are for the jury, it still contends in its motion that the danger was open and obvious, and therefore it is entitled to judgment as a matter of law. Furthermore, even though the jury disagreed, Republic contends that Mr. Burke's negligence exceeded Republic's as a matter of law. The jury, after hearing the evidence and assessing the credibility of the witnesses, obviously disagrees with Republic, and the jury found that the conditions were not open and obvious and, further, found that Republic was 80 percent (80%) negligent, as opposed to Mr. Burke being 20 percent (20%) negligent.

Republic simply argues and cites to the law, which states that Republic is not liable for risks that are open and obvious. However, the complete point of law continues (as was properly charged by the Court) that the occupier is not liable for dangers known or obvious to the invitee, *unless* the occupier should anticipate the harm despite such obviousness or that the occupier should anticipate that the invitee would nevertheless encounter the conditions prevailing. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

Causation

Republic again contends that the Plaintiff has failed to establish why he fell. The testimony and evidence was clear. Mr. Burke fell over a concrete curb that was obscured and obstructed from view due to the grossly low lighting conditions in the lot managed, controlled,

and occupied by Republic. Furthermore, there was no clear method of egress offered to Mr. Burke that would have allowed him a safe path to travel upon and avoid the danger.

Mr. Burke suffered massive and grave injuries as a result of the fall and the injuries sustained, to include massive external and internal bleeding, acute kidney trauma, massive swelling, injury to his right knee, and injuries to his chest, hands, and arms.

The jury, after being properly charged, found that the requisite proximate causation of Mr. Burke's injuries was the negligence.

Present Value of Future Damages

The jury was properly charged as to damages and reduction to present value. In addition, the only evidence presented on future damages was Mr. Burke's need for dialysis and his current and present costs of assisted living. There was no error in not bringing in an expert to reduce the value given his 13.99 years of life expectancy.

II. REPUBLIC'S MOTION FOR A NEW TRIAL SHOULD BE DENIED.

Republic moved the Court to bifurcate the trial as to liability and damages. The Court agreed to do so at the insistence of Republic. However, in order for the bifurcation to take place, the Court stated that a condition of the bifurcation would be that the Court would direct a verdict as to some damage having occurred to the Plaintiff during the liability phase. Republic did not object to this. It was appropriate and proper for the Court to do so because the parties would not be permitted to present evidence of the proximately-caused damages in the liability phase, but some level of damage needed be present for the jury to complete their analysis of negligence. The proximately-caused damages were reserved for the damages portion of the trial and were properly charged.

A. The Court properly charged the jury during both phases of the trial, based on Republic's Motion to Bifurcate the trial.

As an initial matter, Republic contends in its motion that it requested a mistrial after the liability phase of the trial due to Republic's perceived irregularities in the charge and deliberations. That is not accurate. Republic never made a motion for a mistrial.

Furthermore, Republic also contends that the Court erred in not inquiring as to why the presiding juror was weeping during Plaintiff's damages testimony. Counsel for the Plaintiff does not recall Republic requesting the Court inquire as to why the presiding juror was weeping. A short break was taken and the trial proceeded. Republic made no objection or inquiry that the Plaintiff can recall. Even if it did, it is of no significance because multiple other jurors cried during the damages phase of the trial at various points, due to the emotional testimony offered as to the injuries to Mr. Burke and his recovery. Several breaks were given to the jurors at that time. Republic did not inquire to the Court to make any inquiries as to the crying jurors and made no motions or objections. It was no form of error for the Court to not inquire as to why the presiding juror was crying during Mr. Burke's significant damages testimony, to the extent Republic even sought the Court to do so.

The Court's jury instructions are to be confined to the issues raised by the pleadings *and* supported by the evidence. *Mouzon v. Moore & Stewart, Inc.*, 282 S.C. 233, 317 S.E.2d 756 (Ct. App. 1984). The Court, having heard all the evidence applicable to each phase of the trial, properly instructed the jury as to the applicable law based on the supporting evidence presented at trial.

Proximate Cause

The bifurcation of the trial between the liability and damages phases was upon the motion and insistence of Republic. The Court ruled in favor of Republic on the bifurcation, with the

condition that the Court would instruct and direct a verdict in the liability phase that some form of damages were proximately caused to Mr. Burke. Republic did not object to this ruling and wished to continue with the bifurcation. Due to the bifurcation, the parties were not permitted to elicit any substantial testimony as to proximately caused damages in the liability phase of the trial, as those issues were being preserved for the damages portion of the trial, should the jury have found liability.

Notwithstanding this procedure at the request of Republic, Republic now contends that the Court did not adequately define proximate cause during the charge in the liability phase and requests a new trial on that basis. The instructions given by the Court were adequately and properly confined to the evidence, as well as the ruling on the bifurcation. The issue of proximately caused damages, and the extent of the damages, were reserved for the damages portion of the trial.

Charging as a Premises Case

Again, Republic continues to argue that they were not an occupier and had no control of the property and, therefore, the charge related to premises liability was error. Republic's position is at odds with hours of testimony and an overwhelming amount of evidence of control and Republic being an occupier. The Court properly instructed the jury based on the supporting evidence presented at trial.

Principal and Agent

Republic contends that neither party requested such a charge, but the Plaintiff did request a charge related to principal and agency (Plaintiff's Request to Charge #15) based on the fact that Republic had an employee in the lot during every single hour of operation for seventeen (17)

years. In addition, such a charge was supported by the evidence at trial and was appropriate to charge.

Republic's Claim of Inadequate Instruction as to Sole Negligence, Intervening, Superseding Cause

Republic contends that it is entitled to a new trial because the Court did not charge its requested charge of sole negligence of others/ intervening, superseding cause. The Court correctly refused to charge on these issues, as there was zero evidence presented that the City was negligent in any respect. A charge is only appropriate if it is supported by the evidence presented, and this was not supported in any form. *Mouzon v. Moore & Stewart, Inc.*, 282 S.C. 233, 317 S.E.2d 756 (Ct. App. 1984).

Republic's Claim of Error on Instructing the Jury that Finding Mr. Burke More than 50% Negligent would Result in No Recovery

The Court properly instructed the jury as to comparative negligence and properly explained the issues and law of comparative negligence to the jury in its instruction.

Republic's Claim of the Court Inquiry Regarding Progress of Deliberation

After approximately eleven (11) hours of deliberation, and at approximately 1:00 a.m., the Court convened the attorneys to discuss whether to allow the jury to continue or to potentially allow the jury to retire for sleep. The Court indicated that it would first like to see how far the jury had come on a decision as to the verdict. Republic never objected to this proposed action by the Court. The Court briefly inquired and returned to tell the attorneys that the jury was on the last question and that they wished to stay and complete deliberations. Republic never expressed any objection to the action. In addition, in its charge to the jury, the Court properly instructed the jury that it was free to revise the verdict form during deliberations until it was executed by the presiding juror and presented to the Court.

Republic's Contention with Future Damages

Republic contends it was error to charge the jury that its award could include any measure of recovery of future damages. That is not what was charged to the jury. The jury was properly charged related to damages and expressly told that the amount of future damages, if any were awarded in this case, had to be reduced to present value. In addition, Republic never objected to the testimony as it was presented.

Republic's Contention with Pre-Existing Condition

Republic's description of the Court's charge related to aggravation of pre-existing conditions and "egg shell plaintiff" doctrine is inaccurate. The Court properly explained both the aggravation of pre-existing conditions and natural progression of a pre-existing condition. Republic's argument that mentioning aggravation more than natural progression prejudiced its ability to present a defense has no merit.

Republic had every opportunity within the bounds of the law and South Carolina Rules of Civil Procedure to present a defense. Whether or not a term was mentioned more than once in explanation has no bearing on the argument of whether Republic had an opportunity to present a defense. Republic could have defended itself in the form of evidence and testimony to better support its contention that Mr. Burke's injuries were caused by a natural progression of pre-existing condition versus aggravation, but Republic was unable to do so.

For the above reasons, to include all evidence and arguments during the course of the trial, the Court properly instructed the jury in this case, and the Defendant's motion for a new trial should be denied.

B. The Court made proper evidentiary rulings during the course of the trial.

The Court made proper evidentiary rulings during trial and therefore, Republic's motion for a new trial should be denied. The Plaintiff addresses those matters raised by Republic below.

Allocation

The Court did not reverse its ruling on this issue. The Court *reserved* its full ruling on the issue of allocation until the time the Court heard all the evidence and had a full opportunity to review and research the law regarding Republic's request for allocation. Republic never requested that the City be placed on the verdict form (which would have been improper) and never objected to the verdict form used by the Court.

After hearing the evidence and analyzing the applicable law, the Court properly ruled on this issue, not requiring allocation as to the settling Defendants who were no longer parties in the case. There were simply no other Defendants to which to allocate liability. Based on the governing statute and case law, this was a proper ruling by the Court.

S.C. Code Ann. §15-38-10, et seq. simply does not provide for apportionment / allocation to anyone who is not a "defendant." If there is more than one Defendant, the statute provides limited recourse for apportionment / allocation between the "defendants."

Where there is only one Defendant, such as in this case with Republic, the only right the single Defendant retains is the "empty chair" defense and the ability 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. S.C. Code Ann. §15-38-15(E). Republic had this right and made a conscious decision in the damages phase of the trial to *not* recall previous witnesses or new witnesses to support its position under S.C. Code Ann. §15-38-15(E). Republic waived the right to do so and cannot now complain of the results.

Furthermore, the Court properly found that wording and intent of S.C. Code Ann. §15-38-65 prohibits application of the act to governmental entities, such as the City of Charleston.

Case law also supports this ruling by the Court. The Plaintiff had the right to settle with, and dismiss, other alleged tortfeasors, and Republic cannot require that these tortfeasors remain joined for Republic's benefit. *Chester v. S.C. Department of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010).

Furthermore, the Court properly found that, based on Section 7.2 of the Agreement, Republic is bound to indemnify the City against all claims or injuries to persons in the course of Republic's performance of its duties under the Agreement.

Republic's Contention as to Dr. Shuman

Republic has been a party to this action since the filing of the complaint, and Republic has been defended by the same law firm since Republic made an appearance. At no time has Republic ever named or disclosed an expert witness in this case. The Plaintiff had no notice of any kind that Dr. Shuman was some form of "shared" expert between the City and Republic and was never notified that he would be testifying on behalf of both Defendants. Rather, only the City of Charleston disclosed Dr. Shuman as a testifying expert for itself. If in fact Dr. Shuman was going to be testifying for Republic and was being paid by Republic, Republic could have easily disclosed Dr. Shuman in its written discovery responses, which it did not.

Republic knew for weeks prior to trial that the City was in the process of being dismissed from this case. In fact, Republic objected to the method of dismissing the City, which then required the Plaintiff to file a motion to dismiss the City with leave of Court. This motion was filed the Friday before the trial began. The Plaintiff did not know that Republic intended to

utilize an expert witness (because the Plaintiff had no notice of Republic having an expert witness) until the Plaintiff received Republic's witness list before trial.

Dr. Shuman played a part in the decision of the Plaintiff to settle with, and dismiss, the City from this action. Therefore, the Plaintiff was prejudiced and surprised to learn on the eve of trial that Republic supposedly had an expert witness in this case. The Plaintiff was prejudiced because Republic never disclosed Dr. Shuman as an expert, and the Plaintiff would have sought competing testimony of Dr. Shuman for trial. Dr. Shuman was properly excluded by the Court in its discretion.

Republic's Contention as to Dr. White

As a preliminary matter, Dr. White has been disclosed as an expert witness by the Plaintiff since May 15, 2014 (215 days before trial began). Republic could have deposed him to determine precisely the testimony he planned to offer at trial, but Republic elected not to do so.

Dr. White is a practicing medical doctor, treating patients of all diagnoses and complications, from the standpoint of neurology and pain management. The Court ruled that based on his training, education, and experience as a medical doctor, Dr. White was competent to testify on the matters he did. To the extent that Republic feels surprised, it had a full and fair opportunity to depose Dr. White and to properly name an expert to offer competing testimony.

Republic's Contention as to Exclusion of Certain Medical Records

As a preliminary matter, Republic's attempted use of the medical records at trial was highly improper and prejudicial. While cross-examining Mr. Burke, Republic attempted multiple times to have Mr. Burke read and publish from medical records with which he was unfamiliar and of which he did not have personal knowledge of the contents. Republic's attempts with respect to these records were cloaked under a writing used to refresh recollection

under Rule 612 of the South Carolina Rules of Evidence ("SCRE"). However, Mr. Burke's memory was not refreshed by the writings, but Republic continued to ask Mr. Burke to read the documents in the presence of the jury.

In addition, Republic attempted to admit the medical records into evidence, which the Plaintiff objected to under Rule 803(6), SCRE because Republic failed to authenticate the documents with testimony of a custodian or other qualified witness.

After taking a recess in order to review the records and to determine what language was clearly statements for purposes of medical diagnosis, the Court allowed Republic to publish certain aspects of the records which fell within Rule 803(4), SCRE (Statements for Purposes of Medical Diagnosis or Treatment). Republic was authorized to publish the portions which the Court was able to ascertain from the records those portions which fell within Rule 803(4).

The Court properly ruled on these medical records, and Republic was able to publish the records and cross-examine with the records fitting within the Rule 803(4) exception. To the extent that Republic claims it was entitled to use all the records without proper authentication, Republic could have had a proper witness authenticate the documents and would then have been allowed to enter the records into evidence.

Republic's Contention of Future Damages

Republic never objected to the presentation of the future damages and never objected on the basis that the figures were not reduced to present value. The Court properly charged the jury on these issues and the present value of the damages.

Republic's Contention as to Pre-Existing Conditions

As stated, Republic moved to bifurcate the trial as to liability and damages. Both parties were precluded from offering testimony related to the medical condition and/or injuries of Mr.

Burke in the liability phase. This was a product of Republic's desire to bifurcate the trial.

Republic had a full and fair opportunity in the damages phase of the trial to present and rebut evidence related to preexisting conditions and the injuries of Mr. Burke. Furthermore, Republic had a full and fair opportunity to present evidence related to proximately caused damages (and whether certain injuries were pre-existing and not proximately caused) during the damages phase. This is a product of Republic's insistence to bifurcate the trial, of which they now cannot complain.

Furthermore, Republic continues to insist that somehow its rights were prejudiced by the alleged inadequate definition of proximate cause in the liability phase. Again, the issue of proximately caused damages was preserved for the damages phase, the jury was properly instructed, and Republic had a full and fair opportunity to present its case as to these matters.

Conduct of the City with Respect to the Parking Lot

What Republic sought to do was to introduce evidence of a subsequent remedial measure taken well after Republic's contract had ended with the City, thus making this evidence and testimony irrelevant, as an entirely new contract was entered into with the City and ABM (the current parking operator) with different terms. This is prohibited under Rule 407, SCRE.

The evidence would have no useful purpose, as the measure sought to be introduced had no other purpose, as new parties were operating under an entirely different set of responsibilities.

Republic had adequate opportunity to present evidence as to control and did so through various witnesses. Specifically, Republic introduced evidence as to the City performing repairs on lights, as well as other work and inspections performed. Republic again had an opportunity to present this evidence in the damages phase, but chose not to call any witnesses for this purpose

or present further testimony on this issue. Republic had intended to do so, but consciously decided to not call further witnesses or recall any witnesses for these purposes.

Opinion Testimony by Lay Witness

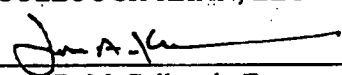
Michael Cappaccio testified that he was a basketball coach on many levels and coached multiple players into the highest levels of the sport. He also testified as to his vast familiarity with the coaching history of Mr. Burke, as well as his success on many levels.

Mr. Cappaccio, based on his rationally based perception of Mr. Burke and his abilities (with which he was very familiar), simply and briefly testified that Mr. Burke had the fundamentals, knowledge, and respect to coach again. He compared Mr. Burke to another person with whom Mr. Cappaccio had the same knowledge. Furthermore, this testimony did not require special knowledge, skill, or training. This testimony was not precluded under Rule 701, SCRE.

CONCLUSION

For these reasons, the evidence presented at trial, the Court's previous rulings, as well as the findings of the jury, Republic's motion for JNOV and a new trial should be denied.

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COUNSEL FOR PLAINTIFF

JANUARY 12TH, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Robert J. Burke,

Plaintiffs,

vs.

Republic Parking System, Inc.,

Defendant.

2013-CP-10-1400
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2013-CP-10-1400

FILED
2013 JAN 29 PM 1:27
JILLIE J. ARMSTRONG
CLERK OF COURT

**DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR
JUDGMENT NOTWITHSTANDING THE VERDICT,
OR, IN THE ALTERNATIVE, A NEW TRIAL
AND REPLY TO PLAINTIFF'S RESPONSE**

Defendant Republic Parking System, Inc. ("Republic" or "Defendant") submits this memorandum in further support of its motion for judgment notwithstanding the verdict ("JNOV"), or, in the alternative, a new trial and in reply to Plaintiff's response. Republic reserves all grounds raised in its motion whether or not discussed in this memorandum.

BRIEF FACTUAL BACKGROUND

On January 24, 2013, Robert J. Burke, the Plaintiff, fell in a parking lot. The lot is owned by Indigo Realty, LLC ("Indigo") and leased to the City of Charleston ("City"). Republic performed certain services within the parking lot pursuant to a Parking Garage Management Agreement ("Agreement") it entered with the City in 2008.

STANDARDS OF REVIEW

I. JUDGMENT NOTWITHSTANDING THE VERDICT.

In reviewing a motion for judgment notwithstanding the verdict ("JNOV"), the 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 judgment notwithstanding the verdict are properly denied. However, if only one reasonable inference can be drawn from the evidence, the motion must be granted. *Hainer v. American Medical Int'l, Inc.*, 320 S.C. 316, 465 S.E.2d 112, 115 (Ct. App. 1995). In addition, the Court's rulings will be reviewed to determine if they are supported by any evidence or governed by an error of law. *Watson v. Ford Motor Co.*, 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010).

II. NEW TRIAL.

"The 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) (quoting *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996)).

ARGUMENTS

I. THE COURT SHOULD GRANT JNOV IN FAVOR OF REPUBLIC.

A. Republic did not owe a duty to Burke in this case.

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 owe any duty to Burke with respect to his fall, or in the alternative, any duty was limited to the terms of the Agreement.

1. The Agreement does not create a duty.

As previously argued in Republic's motion, the Agreement is not a lease. Republic is an independent contractor that performs certain services. *See* Agreement at ¶10.7. In addition, the Agreement expressly states that it does not confer any rights on third parties. *Id.* at ¶10.1. All of this is consistent with other portions of the Agreement that prohibit Republic from making changes to the lot. *See id.* at ¶4.1(b).

Republic disagrees with Burke's characterization of the evidence in this case and defers to the transcript taken in this matter and the terms of the Agreement. On this point, Republic attaches the transcript of the cross examination of Carleen Carducci as Exhibit 2. In her testimony, Carducci made it clear that Republic had no control over the lighting in the lot and the layout of the lot. Carducci further testified that the City continued to inspect the lot on a monthly basis and pay for any repairs or changes to the lot. The evidence further showed that Republic had never been asked by the City to correct anything about the lighting. Thus, under the cases cited in Republic's motion, there is no duty. *See Dunbar v. Charleston & W. C. Ry. Co.*, 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947); *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 257, 607 S.E.2d 362, 365 (Ct. App. 2004).

2. Neither the City nor Republic was on notice of any danger.

This argument was raised in Item 5 of Republic's directed verdict motion. "A plaintiff seeking damages suffered because of a dangerous or defective condition on a defendant's property must demonstrate that the defendant committed a specific act that created the dangerous condition, which in turn caused [the] injury. Alternatively, [s]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 Central, Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779-80

(Ct. App. 2010) (citations omitted). Here, the City designed the lot, and there was no evidence that Republic had actual or constructive notice of any problem. There was no evidence of any prior complaints or incidents in the lot. Therefore, there was no duty.

With respect to Burke's argument on page 9 of his memorandum that "[e]vidence showing that the condition existed after Plaintiff's injury is also relevant to its existence at the time of the injury and constructive notice," Republic attempted to introduce evidence showing changes to the lot after Burke's fall to show both the absence of notice and its lack of control; however, the Court did not allow Republic to adduce this evidence. Republic contends this factor weighs in favor its arguments for JNOV.

3. Darkness is an open and obvious danger.

Burke appears to concede that darkness is an open and obvious danger that does not ordinarily give rise to a duty; however on page 10 of his memorandum he cites the basic proposition that there is no liability in a case of open and obvious danger unless the owner "should anticipate that the invitee would nevertheless encounter the conditions prevailing." As discussed above, there was no history of problems in this lot over its long history. 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, such as the well-lit walkway. In such a case, there is no duty. See *Meadows v. Heritage Village 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.*, 305 S.C. at 378, 409 S.E.2d at 351.

II. IN THE ALTERNATIVE, THE COURT SHOULD REQUIRE A NEW TRIAL IN THIS MATTER.

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

1. Proximate cause.

It is true Republic sought to bifurcate damages and liability in this case. It is also true Republic agreed to the concept that the Court would direct a verdict as to some damages in the event the jury returned a verdict for the Plaintiff on liability. Republic did not agree, however, that proximate cause would not need to be proven by Plaintiff in its case. That is the root of Republic's new trial argument on this point. 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 Court, even when the jury asked questions that clearly reflected a need for additional instruction on this concept. Yes, damages were reserved of the second phase of the trial, but proximate cause should have been included in the liability determination.

Moreover, as raised by Republic at the close of Plaintiff's damages case, there was no foreseeability and thus no proximate cause with respect to damages suffered by plaintiff following knee surgery more than a year and half after his fall. "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. Therefore, the Court erred in failing to grant Republic's directed verdict motion as to those damages.

2. Principal and agent.

Republic has reviewed Burke's proposed Request to Charge 15. It reads, "A company is presumed to have knowledge of any and all material facts which its employees receive notice of while acting within the scope of their job duties." This is not a principal/ agent charge as argued by the Plaintiff at page 13 of his memorandum. The Court's charge on this point was not requested, not mentioned during the charge conference, and was not supported by the evidence.

3. Inadequate instruction on sole negligence of others/ 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. The Court refused the charge. Contrary to Burke's argument, the evidence warranted the charge that the City was liable based on the Agreement, the testimony that the City designed the parking lot, and the evidence that the City was responsible for any changes to the parking lot.

4. Future damages.

Republic objected both *in limine* and during the evidence to testimony regarding future damages. Neither the plaintiff nor the Court told the jury how to calculate future damages or indicated how to discount an award to present value as required by South Carolina law. For these reasons, the jury should not have been allowed to consider future damages and the charge

was in error. Moreover, the jury's verdict does not appear to include any such discount. Thus, a new trial is appropriate on this ground.

B. Republic was prejudiced by the Court's decision to allow Dr. White to opine outside his field as to categories of injury that had not been disclosed to Republic during discovery.

Plaintiff's expert, Dr. White, admitted on the stand that his exclusive field of practice is neurology and pain management. Given this limited field and Dr. White's admission that he had not treated the Plaintiff, the scope of Dr. White's testimony should have been similarly limited. Over objection, the Court let him testify to numerous matters that fall well outside that expertise, including but not limited to knee replacement surgery, kidney function, and dialysis. This error was compounded by the Court's exclusion of Republic's expert.

The Court also excluded certain medical records and questions about those records that would have been relevant for impeachment purposes. Dr. White testified he had reviewed all of Plaintiff's prior medical records; however, when asked questions about certain records *in camera* Dr. White testified he had not seen them. The Court then refused to allow Republic to ask Dr. White questions about those records to see what effect they might have had on his opinions. This testimony would have been highly relevant as to the underlying basis for Dr. White's opinions as well as credibility and reliability.

In addition, the Court allowed Dr. White to testify over objection to matters that had not been previously disclosed to Republic, including assisted living and dialysis. Although the Court refused to allow Republic's expert to testify based on disclosure matters, the Court allowed Dr. White to expand his testimony well beyond previous disclosures and in violation of the

scheduling order in this case. Plaintiff's counsel did not update those disclosures prior to trial.¹ As a result, the first time Republic heard about these damages was at trial. This type of trial by ambush is exactly with the Rules of Civil Procedure and scheduling orders were designed to prevent.

In this case, the Court excluded Republic's expert witness that had been disclosed and deposed and therefore did not present any surprise to the Plaintiff and allowed Plaintiff's expert to testify far afield from his own expertise and previously disclosed opinions. The combination of these rulings gravely prejudiced Republic's defense of this matter. As a result, a new trial is warranted here.

C. Allocation.

The Court indicated at all times prior to the return of a damages verdict that there would be an allocation in this case. Republic made strategic decisions based on those rulings. Republic objected to the dismissal of the City and Indigo prior to trial and reiterated its request for an allocation repeatedly through the trial. Further, as reflected above, the Court excluded certain pieces of evidence that would have been relevant on an empty chair defense based in its finding that the evidence was premature in a particular portion of the trial given the trial structure proposed by the Court, including an allocation.

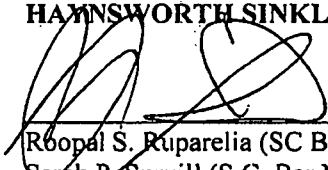
¹ Republic notes that it made efforts to depose Plaintiff's medical witnesses regarding his recent knee surgery and subsequent treatments, but Plaintiff rejected Republic's efforts to do so. See email strings attached as Exhibit 1. Of note, the knee surgery was in August and many of the damages asserted by the Plaintiff at trial occurred after the October 1 discovery deadline.

CONCLUSION

For the above reasons and those presented at trial and in its earlier motions, JNOV is appropriate in this case as the result is not supported by the law or the evidence. In the alternative, Republic is entitled to a new trial.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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(803) 765.1243 - fax
rruparelia@hsblawfirm.com

*Attorneys for Defendant Republic Parking
System, Inc.*

January 28, 2015

From: Ruparelia, Roopal
Sent: Wednesday, November 19, 2014 12:54 PM
To: 'Alicia Benton'
Cc: Askew, Emily
Subject: RE: Burke v. Indigo, et al.

Perfect. Also I was thinking we need to go ahead and get Dr. White done and a couple others. I am about to start a trial so will get back to you guys tonight. Emily where are we with getting Dr. Kelley lined up?

Roopal Ruparelia
Haynsworth Sinkler Boyd, P.A.

-HSB-

-----Original Message-----

From: Alicia Benton [Alicia@mklawsc.com]
Sent: Wednesday, November 19, 2014 12:49 PM Eastern Standard Time
To: Ruparelia, Roopal
Cc: Askew, Emily
Subject: RE: Burke v. Indigo, et al.

Thank you, both.

Mrs. Burke's deposition was taken on 12/11/13. I've attached the transcript.

Thank you!

*****Please note our new address below.*****

Alicia Benton, Paralegal



McCullough Khan, LLC
359 King Street, Suite 200
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Phone: (843) 937-0400
Fax: (843) 937-0706
alicia@mklawsc.com
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EXHIBIT 1

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Please consider the environment before printing this email.

From: Ruparelia, Roopal [<mailto:rruparelia@hsblawfirm.com>]
Sent: Wednesday, November 19, 2014 12:46 PM
To: Alicia Benton
Cc: Askew, Emily
Subject: RE: Burke v. Indigo, et al.

Emily does my scheduling. Emily can you help? Also I don't believe Mrs Burke depo has been done. Correct? I do need to get her deposed prior to trial. So we need to work on a date for her as well. Thanks

Roopal Ruparelia
Haynsworth Sinkler Boyd, P.A.

-HSB-

-----Original Message-----

From: Alicia Benton [Alicia@mklawsc.com]
Sent: Wednesday, November 19, 2014 12:25 PM Eastern Standard Time
To: Ruparelia, Roopal
Subject: FW: Burke v. Indigo, et al.

Can you please let me know your availability for 12/3, 12/4, and 12/5, instead? Bo is not available on 12/8.

Thank you!

Please note our new address below.

Alicia Benton, Paralegal



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Please consider the environment before printing this email.

From: Alicia Benton
Sent: Wednesday, November 19, 2014 11:44 AM
To: Lisa A Reynolds (lreynolds@arslawsc.com); Bonum S. Wilson, III (bwilson@wilsonheyward.com);
Roopal S. Ruparelia (rruparelia@hsblawfirm.com)
Cc: Elissa Jones (ejones@arslawsc.com); Wendy McCravy (wmccravy@wilsonheyward.com); Clay McCullough
Subject: Burke v. Indigo, et al.

Good morning,

I hope you are all well. Please let me know as soon as possible if you are available on the morning of 12/8 for the video deposition of Sarah Lustig (our life care planner) in the above-referenced matter. This deposition will be for use at trial.

Thank you.

*****Please note our new address below.*****

Alicia Benton, Paralegal



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From: Clay McCullough [<mailto:clay@mklawsc.com>]
Sent: Wednesday, November 19, 2014 2:07 PM
To: Ruparelia, Roopal
Subject: RE: Dr Kelley

Are you going to file a motion for continuance or request for status conference? I am getting this ready for a Dec. 15 trial date. I suppose all of this needs to get figured out – let me know what you plan to do.

From: Ruparelia, Roopal [<mailto:rruparelia@hsblawfirm.com>]
Sent: Wednesday, November 19, 2014 2:06 PM
To: Clay McCullough
Subject: RE: Dr Kelley

Got ya. I am afraid I do need to take his depo.

Roopal Ruparelia
Haynsworth Sinkler Boyd, P.A.

-HSB-

-----Original Message-----

From: Clay McCullough [clay@mklawsc.com]
Sent: Wednesday, November 19, 2014 02:03 PM Eastern Standard Time
To: Ruparelia, Roopal
Subject: RE: Dr Kelley

No – the knee surgery was included as something he was going to need in the life care plan provided one year ago (11-26-13). He finally had the surgery and we updated the actual damage figures to include the actual cost of the surgery (rather than the life care planner's estimate). I told all of the lawyers this summer that Bob was having the knee surgery – Steve talked to Bob about when Bob was deposed.

From: Ruparelia, Roopal [<mailto:rruparelia@hsblawfirm.com>]
Sent: Wednesday, November 19, 2014 1:58 PM
To: Clay McCullough
Subject: RE: Dr Kelley

Wasn't the knee surgery is sept? Also that the claim that knee surgery is related was made after oct 1 and closer to mediation in nov?

Roopal Ruparelia
Haynsworth Sinkler Boyd, P.A.

-HSB-

-----Original Message-----

From: Clay McCullough [clay@mklawsc.com]
Sent: Wednesday, November 19, 2014 01:45 PM Eastern Standard Time
To: Ruparelia, Roopal
Subject: RE: Dr Kelley

Roopal – the deadline per the scheduling order for discovery depositions was Oct. 1. The City depositions scheduled for this Friday were rescheduled, by consent, based on a conflict. Additionally, we are close to resolving our case with Bo meaning the depositions will likely not proceed. It is my understanding there are no depositions on the schedule otherwise.

We are not going to consent to any additional discovery. The entire basis for the order was to get all discovery done prior to the mediation. This was the second scheduling order pushing everything off and was only done after significant input by all parties. I know you are new to the case, however, Steve was well aware and agreed to these deadlines. I am not trying to be difficult, however, this case has already been continued twice. Thanks.

Clay

From: Ruparelia, Roopal [<mailto:rruparelia@hsblawfirm.com>]
Sent: Wednesday, November 19, 2014 1:29 PM
To: Alicia Benton; 'Lisa A Reynolds (lreynolds@arslawsc.com)'; 'Bonum S. Wilson, III (bwilson@wilsonheyward.com)'
Cc: 'Elissa Jones (ejones@arslawsc.com)'; 'Wendy McCravy (wmccravy@wilsonheyward.com)'; Askew, Emily; Clay McCullough
Subject: Dr Kelley

Had surgery and is out for 6 weeks.

Roopal Ruparelia
Haynsworth Sinkler Boyd, P.A.

-HSB-

-----Original Message-----

From: Alicia Benton [Alicia@mklawsc.com]
Sent: Wednesday, November 19, 2014 01:23 PM Eastern Standard Time
To: Lisa A Reynolds (lreynolds@arslawsc.com); Bonum S. Wilson, III (bwilson@wilsonheyward.com); Ruparelia, Roopal
Cc: Elissa Jones (ejones@arslawsc.com); Wendy McCravy (wmccravy@wilsonheyward.com); Askew, Emily; Clay McCullough
Subject: Sarah Lustig's Deposition - Burke

Hi all,

As of right now, we have Ms. Lustig's video deposition scheduled for 12/3/14, beginning at 2:00 p.m. here in our office.

Please let me know if you have any questions or concerns. Thank you all for your help in getting this scheduled!

*****Please note our new address below.*****

Alicia Benton, Paralegal



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STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Robert J. Burke,	)	
	)	
v.	)	Case No. 13-CP-10-1400
	)	
Republic Parking System, Inc.	)	
	)	
Defendant.	)	

**TRANSCRIPT OF CROSS EXAMINATION OF
TESTIMONY OF COLLEEN CARDUCCI**

The within cross-examination of Colleen Carducci was heard on December 16, 2014 before The Honorable R. Markley Dennis in Courtroom 4B of the Charleston County Courthouse, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

Clay McCullough, Esq.
 Jamie A. Kahn, Esq.
 Appearing for Plaintiff

Sarah P. Spruill, Esq.
 Roopal S. Ruparelia, Esq.
 Appearing for Defendant

EXHIBIT 2

Deborah Garrison
Circuit Court Reporter – 9th Judicial Circuit
 P O Box 901
 Johns Island, South Carolina 29457
dgarrison@sccourts.org

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(DIRECT EXAMINATION)

THE COURT: Cross-examination.

MS. RUPARELIN: Thank you, Your Honor. I beg the Court's indulgene, please?

THE COURT: Sure. Take your time.

CROSS-EXAMINATION

BY MS. RUPARELIN:

Q. Ms. Carducci, good morning?

A. Good morning.

Q. Let me ask you a question. You mentioned that the City leases the property on which the parking lot sits from multiple property owners?

A. Correct.

Q. And who is Indigo Realty?

A. They're one of the landlords or property owners.

Q. Okay. And do you pay rent to, for instance, Indigo Realty?

A. We do.

Q. Okay. And before Republic became the manager of that parking lot, isn't it true that the City of Charleston managed that parking lot?

A. Correct.

1 Q. And the parking lot has, in fact,
2 been in existence since close to 1978, 1980,
3 something like that; in that timeframe?

4 A. I believe so.

5 Q. Yes, ma'am. And from 1978 or '80 up
6 until 1997, '98, the City of Charleston
7 managed that parking lot?

8 A. That's my understanding.

9 Q. Now, we talked a little bit-- or
10 you talked a little bit earlier about the
11 bidding process. It's a beauty contest, is
12 it not, essentially for vendors to bid for
13 the City's park?

14 A. I don't understand the question.

15 Q. And that was a poorly worded
16 question. But if the City wants to contract
17 out parking management services, it puts out
18 a request for proposal; isn't that what it's
19 called?

20 A. Correct.

21 Q. And how many people, let's say, do
22 you get input from or proposals from once you
23 put out an RFP?

24 A. It varies.

25 Q. Okay. Do you have any idea how many

1 people competed the last time in 2013?

2 A. I don't remember exactly but I
3 believe there was three or four.

4 Q. Okay. And so you take submissions
5 from three or four vendors?

6 A. Yes.

7 Q. And you pick a winner?

8 A. We have a selection committee that
9 is appointed. And the committee reviews the
10 proposals and has the ability to have
11 presentations as well.

12 Q. Okay, interviews in person?

13 A. Correct.

14 Q. And at the end of that whole process
15 after everybody has turned in their proposals

16 ---

17 A. Right.

18 Q. --- which I think you have one in
19 front of you?

20 A. I do. I have Republic's.

21 Q. And so you would have four of these
22 or five of these or however many people that
23 bid?

24 A. Correct.

25 Q. And you have an interview process?

1 A. Yes.

2 Q. And then at the end of that inter
3 view process you pick -- in this instance,
4 in 2007, it was Republic?

5 A. Correct.

6 Q. And then you enter into a contract?

7 A. Yes.

8 Q. Which is that contract in front of
9 you?

10 A. That is correct.

11 Q. Plaintiff's Exhibit Number 7?

12 A. Correct.

13 Q. Isn't it true that not everything
14 that is in this proposal is then incorporated
15 into that contract?

16 A. I'm not exactly sure if it's in here
17 but typically our contracts attach the
18 proposal as an exhibit.

19 Q. Okay. But in terms of -- and I know
20 it's probably not a very good question either
21 -- but everything that Republic says that it
22 can do, because in this proposal it outlines
23 its capabilities; correct?

24 A. Yes.

25 Q. And then the City picks and chooses

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1 what it wants Republic to do; correct?

2 A. They responded specifically to the
3 RFP, which required certain things.

4 Q. Okay.

5 A. The response and the contract were
6 based on those expectations.

7 Q. And when the contract is entered
8 into, at the end of the day, the contract
9 outlines who's supposed to do what?

10 A. Correct.

11 Q. Okay. And I'm just going to refer
12 you to some sections of that agreement. On
13 the very first page, under the recitals?

14 A. Yes.

15 Q. Under the first whereas clause?

16 A. Yes.

17 Q. It says, "Whereas, the City owns,
18 controls and regulates offstreet parking
19 facilities owned by the City."

20 A. Yes.

21 Q. Isn't that correct?

22 A. Yes.

23 Q. And that would include all of those
24 light posts and lighting fixtures tha are in
25 that parking lot; is that correct?

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1 A. (No verbal response)

2 Q. Those light fixtures don't belong to
3 Republic?

4 A. Correct.

5 Q. And then if you will flip over to
6 the Article 4, Section 4.1 talks about
7 maintenance of the parking facility; is that
8 correct?

9 A. Correct.

10 Q. And it talks about for instances, in
11 (c) it said (reading): "Maintain the parking
12 facilities in a clean and neat fashion
13 ensuring that all trash, bottles and papers
14 and other dirt and debris are routinely
15 removed and disposed of;" is that right?

16 A. Yes.

17 Q. For instance, (d) says -- or (e)
18 says, "Furnish the supplies and housekeeping
19 equipment needed."?

20 A. Yes.

21 Q. And then in (f) says, "Perform minor
22 repairs to the parking facilities, including
23 but not limited to ramping..."

24 A. Correct.

25 Q. Which what do you understand

1 relamping to be?

2 A. Replacing light bulbs or ballasts in
3 the ---

4 Q. So it was Republic's job obviously
5 to replace -- it essentially does say
6 "...including, but not limited to, relamping,"
7 meaning replacing. And then, "...minor
8 electrical repairs...", and then it says,
9 "...which its staff is capable of performing in
10 a safe and efficient manner?"

11 A. Correct.

12 Q. Does that tell you that the City
13 would do those tasks that the staff is not
14 capable of performing in a safe and efficient
15 manner?

16 A. Yes, I believe it says that they are
17 to notify us of those items that they cannot
18 handle.

19 Q. Yes, ma'am. And, for instance, if a
20 bucket truck is needed to change out a light
21 bulb that cannot be reached by a ladder, the
22 City would bring the bucket truck?

23 A. We could, yes.

24 Q. And they have in the past?

25 A. They have done that. Uh-huh.

1 Q. Yes, ma'am. And if you flip over to
2 the next page, under the subsection that's
3 marked (b) under Facilities, under number
4 (1)?

5 A. Yes.

6 Q. It said, "The physical facilities
7 provided to Republic for the term of the
8 Agreement, become the responsibility of
9 Republic and shall be returned to the City
10 upon termination of this Agreement in the
11 same condition in which they were provided to
12 Republic;" is that correct?

13 A. Correct.

14 Q. If you flip over to the next page
15 under the big paragraph (2). Part (b) says,
16 "Republic shall be responsible for the
17 maintenance of all equipment required;" is
18 that correct?

19 A. Correct.

20 Q. And then Part (c) says, "Republic
21 shall maintain said equipment furnishing and
22 fixtures during the terms of this agreement?"

23 A. Yes.

24 Q. And nowhere in there does it say
25 anything about adding lighting; is that

1 correct?

2 A. It doesn't say that.

3 Q. Yes, ma'am. Part (e) says, "...shall
4 replace all equipment, materials and supplies
5 worn out or expended in the operation or
6 maintenance of the parking facilities" is
7 that correct?

8 A. Correct.

9 Q. And relamping or replacement of
10 light bulbs would be something that would
11 fall under that. The light bulbs are worn
12 out or they die out, and Republic would
13 replace the light bulbs?

14 A. Yes.

15 Q. Now, Ms. Carducci, you understand
16 and I think you've testified earlier today,
17 that the City does, in fact, inspect this
18 parking lot as well as other parking
19 facilities; is that correct?

20 A. There is someone who does that.

21 Q. Yes, ma'am. And that gentleman is
22 Mr. Scott Maxie?

23 A. Yes, currently.

24 Q. He goes around and inspects these
25 parking lots?

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1 A. Uh-huh.

2 Q. And he inspects, for instance, for
3 parking signage and posting; is that correct?

4 A. Yes.

5 Q. And he inspects the meters?

6 A. Inspects the meters; right.

7 Q. Yes, ma'am. Are you familiar with
8 the inspection checklists that are---

9 A. I don't always review those.

10 Q. Okay. You don't review those?

11 A. Uh-uh.

12 Q. And those -- would it surprise you
13 that he inspects, for instance, the meters?

14 A. (No verbal response)

15 Q. And rates them as whether they're
16 acceptable or not?

17 A. Whether they're working or not?

18 Q. Yes, ma'am?

19 A. Uh-huh.

20 Q. Okay. And he inspects the parking
21 entrance?

22 A. Right.

23 Q. And you understand that he inspects
24 -- is it your understanding also that he
25 inspects the lighting?

1 A. He does these during daytime hours.
2 So in the garages, yes, if the lights are
3 out, he would report that.

4 Q. Okay. And, in fact, these
5 inspections are done every month; is that
6 correct?

7 A. Yes. It was a rating system.

8 Q. And you're right. It was
9 acceptable, needs improvement, concern,
10 unacceptable?

11 A. Right..

12 Q. That's the rating scale?

13 A. Yes, rating Republic's, what they're
14 providing.

15 Q. And then these inspections are then
16 provided to, for instance, Republic, who
17 manages the parking lot?

18 A. Yes.

19 Q. And if there are concerns that are
20 noted in the inspection, Republic is provided
21 and told what to do; is that correct?

22 A. They're provided that list. I don't
23 know that it comes with they're told what to
24 do. But they're provided where there are
25 deficiencies.

1 Q. Okay. So, for instance, and I'm
2 going to show you what's marked--

3 MS. RUPARELIN: We're just going
4 to mark it for identification purposes.

5 THE COURT: All right.

6 MADAM COURT REPORTER: Thank you.
7 Defendant's Exhibit Number 5.

8 MS. RUPARELIN: Yes, ma'am. And I
9 apologize.

10 (SO MARKED AS DEFENDANT'S EXHIBIT 5)

11 CROSS-EXAMINATION CONTINUED

12 BY MS. RUPARELIN:

13 Q. Ms. Carducci, what is the caption or
14 the header on that particular piece of paper?

15 A. It's procurement division-- you
16 mean the caption?

17 Q. Yes, ma'am.

18 A. In the box?

19 Q. In the header, yes, ma'am?

20 A. George Society Street Parking Lot.

21 Q. Okay. And what is the date on that
22 document?

23 A. June of 2013.

24 Q. Okay. And then I have another one.

25 MS. RUPARELIN: Madam Court.

1 Reporter if you can mark that as the next
2 one?

3 MADAM COURT REPORTER: Defendant's
4 Exhibit 6 for identification.

5 (SO MARKED AS DEFENDANT'S EXHIBIT 6)

6 CROSS-EXAMINATION CONTINUED

7 BY MS. RUPARELIN:

8 Q. Is this another similar document?

9 A. Yes, it is.

10 Q. And it's dated what?

11 A. January 4th, 2013.

12 Q. And that is a reflection of the
13 inspection that was done by Mr. Maxie on
14 January of 2013?

15 A. Correct.

16 Q. And it was for the George Society
17 Parking Lot?

18 A. It was.

19 Q. Okay. And you will see where it
20 says at the bottom whether there were any
21 concerns for that particular lot? What does
22 it say?

23 A. It says, "Noted improvements in the
24 leaf and trash debris from previous
25 inspection and no discrepancies found during

1 inspections."

2 Q. Okay.

3 MS. RUPARELIN: Your Honor, I'm
4 going to move the -- introduce these exhibits
5 into evidence.

6 MR. KAHN: No objection.

7 THE COURT: Without objection,
8 Defendants 5 and 6 are admitted.

9 (SO ENTERED AS DEFENDANT'S EXHIBIT 5)

10 (SO ENTERED AS DEFENDANT'S EXHIBIT 6)

11 CROSS-EXAMINATION CONTINUED

12 BY MS. RUPARELIN:

13 Q. And Ms. Carducci, you didn't get
14 word of Mr. Burke's fall until there was a
15 lawsuit in this case; is that correct?

16 A. Correct.

17 Q. And after you received notice of Mr.
18 Burke's fall, did you initiate any action on
19 behalf of the City?

20 MR. KAHN: Objection, Your Honor.
21 May we approach?

22 (OFF RECORD BENCH CONFERENCE)

23 THE COURT: At this point, I'm
24 going to sustain the objection in this
25 portion of the proceeding, okay?

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1 MS. RUPARELIN: Okay. All right.

2 THE COURT: You may revisit that
3 if necessary later.

4 MS. RUPARELIN: Yes, sir.

5 THE COURT: Thank you.

6 (BRIEF PAUSE)

7 THE COURT: Approach, please, one
8 other thing.

9 (OFF RECORD BENCH CONFERENCE)

10 BAILIFF WILLIAMS: Your Honor, can we
11 have a break at this time?

12 THE COURT: Sure, absolutely.
13 We'll take a recess at this point. Take
14 about ten or fifteen minutes. Thank you.

15 (JURY OUT @ 10:36 A.M.)

16 THE COURT: We'll be at ease.

17 MR. KAHN: Thank you, Your Honor.

18 THE COURT: You may -- Ms.
19 Carducci, you may step down. I'd ask you not
20 to have any conversation with any of the
21 attorneys, please.

22 THE WITNESS: Okay.

23 (BRIEF RECESS)

24 (JURY IN 10:48 A.M.)

25 CROSS-EXAMINATION CONTINUED

1 BY MS. RUPARELIN:

2 Q. Ms. Carducci, your primary point of
3 contact with Republic is Mr. Potter, Dwight
4 Potter?

5 A. Correct.

6 Q. And you'd worked with him before on
7 the management issues?

8 A. Yes.

9 Q. Okay. And in your opinion, Republic
10 Parking did a good job managing that George
11 Street Parking Lot?

12 A. I mean, they managed the facilities,
13 all of them.

14 Q. Yes, ma'am. And you were satisfied
15 with their performance; is that correct?

16 A. In some aspects, yes.

17 MS. RUPARELIN: Your Honor.

18 (Tenders Deposition)

19 THE COURT: Exhibit 3?

20 MADAM COURT REPORTER: Yes, sir.

21 (SO MARKED AS COURT'S EXHIBIT 3)

22 THE COURT: Court's Exhibit 3 will
23 be the Original Transcript of the Deposition
24 of Ms. Colleen Carducci, which was taken in
25 this matter on September the 23rd, 2014.

1 Portions will be published now pursuant to
2 our rules.

3 (SO ENTERED AS COURT'S EXHIBIT 3)

4 MS. RUPARELIN: Thank you.

5 CROSS-EXAMINATION CONTINUED

6 BY MS. RUPARELIN:

7 Q. (Tenders Deposition) Ms. Carducci,
8 can you flip to page 53 of your deposition,
9 please?

10 A. Yes, I'm there.

11 Q. Okay. In line 10 you were asked the
12 question, "Did they do a good job in managing
13 the parking lot?" What was your answer?

14 A. (Upon review) I said, "I believe
15 they did."

16 Q. And the question later on was-- at
17 21, "To your knowledge was the City satisfied
18 with what Republic did regarding the
19 maintenance and lighting in the parking lot
20 prior to Mr. Burke's fall?" What was your
21 answer?

22 A. "As far as I'm aware, they responded
23 if there were any issues."

24 Q. And the question was, "And so the
25 City was satisfied?"

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1 A. "Yes."

2 Q. Okay. And are you telling us
3 something different today?

4 A. In this case I wasn't aware of any
5 issues. And so generally in this context,
6 you're correct, that I was satisfied because
7 I wasn't aware of any other issues relating
8 to this. Yes.

9 Q. And when you say "this," you mean...

10 A. The operation of the lot, yes.

11 Q. That's what you were -- when you
12 said, "relating to this," I just wanted to be
13 ---

14 A. Yes. Yes.

15 Q. Okay. Okay. And before Mr. Burke's
16 fall, there had been no other reported
17 similar incidents or any in that George
18 Street Parking Lot; is that correct?

19 A. Not that I'm aware of.

20 Q. Yes, ma'am. And you were not aware
21 of any complaints that were ever made by the
22 City to Republic about the lighting prior to
23 Mr. Burke's fall?

24 A. Correct. Not that I'm aware of.

25 Q. And to your knowledge, the City was

1 satisfied with Republic's efforts to maintain
2 that lighting prior to Mr. Burke's fall; was
3 it not?

4 A. I'm not aware of anything, other
5 than that, yes.

6 Q. When you say "other than that,"...

7 A. I'm not aware that there were any
8 other reports of lighting issues.

9 Q. Okay. Other than the issue that has
10 since risen with Mr. Burke's fall?

11 A. Correct.

12 Q. Okay. And it's your understanding
13 that between the City and Republic if there
14 was any major work that needed to be done in
15 the George Street Parking Lot, that the City
16 was responsible for doing the work and would
17 coordinate with Republic?

18 A. Say that again?

19 MR. KAHN: Objection. Compound
20 and I think she needs to restate it.

21 THE COURT: All right. Restate
22 your question, please?

23 CROSS-EXAMINATION CONTINUED

24 BY MS. RUPARELIN:

25 Q. If there was any major work that

1 needed to be done to the parking lot beyond
2 what Republic could do, and if that was
3 indeed the case, then the City would be
4 responsible for doing that work and they
5 would work with Republic to get it done.

6 THE COURT: That's compound again.
7 Just break it down please. You can't handle
8 that question with one answer.

9 MS. RUPARELIN: Okay.

10 CROSS-EXAMINATION CONTINUED

11 BY MS. RUPARELIN:

12 Q. And essentially what I'm asking you
13 Ms. Carducci is if there's anything that
14 needed to be done, the City would do it?

15 A. Not always. And by that it depends,
16 it depended on the definition of major.

17 Q. Okay.

18 A. And so if it was something that
19 could be contracted, the City would sometimes
20 ask Republic to facilitate contracts to
21 complete work. Sometimes the City would
22 choose to do it.

23 Q. Okay. And, in fact, if you look at
24 the management agreement -- if I could just
25 have you flip over to it real quick. And

1 flip over to the Facilities Section. I
2 believe that was Section 4.1, where it starts
3 talking about maintenance of the parking
4 facility.

5 A. Yes.

6 Q. And you flip over to the next page
7 on the bottom.

8 A. Yes.

9 Q. It says, "The City may, at its sole
10 discretion, direct the City Personnel to make
11 necessary repairs or provide the necessary
12 replacements or upgrades to the parking
13 facilities at the City's expense." Is that
14 correct?

15 A. Yes.

16 Q. You are not aware of any, when I say
17 "major," major improvements to that parking
18 lot since it was built back in the 1980s?

19 A. Since I've been with the City in
20 2003, I'm not aware of any.

21 Q. And to be clear, those lights in the
22 parking lot were not installed by Republic?

23 A. Correct.

24 Q. And they were not -- the lighting
25 scheme in that parking lot was not designed

1 by Republic?

2 A. Correct.

3 Q. And Republic was not involved in any
4 part of the construction of that parking lot?

5 A. Correct, as far as I'm aware.

6 Q. Yes, ma'am. Well, the parking lot
7 was constructed back in 1978---

8 A. Prior to them.

9 Q. --- during that time?

10 A. Yes, yes.

11 Q. And Republic didn't come on the
12 scene until 1997?

13 A. Correct.

14 Q. It was already a parking lot by
15 then?

16 A. Correct.

17 Q. With the lighting already in it?

18 A. Correct.

19 Q. Now, Republic did not take over the
20 job to upgrade the lighting as part of that
21 management contract; is that correct?

22 A. Say that again?

23 Q. They did not take on the
24 responsibilities under that contract to
25 upgrade the lighting; is that correct?

1 A. They did not.

2 Q. Yes, ma'am. Did Republic have any
3 control over the type of light fixturesthat
4 get installed in that parking lot?

5 A. In that lot, no.

6 Q. Yes, ma'am. And isn't it true that
7 the City of Charleston has control over the
8 type of light fixtures that get put in that
9 parking lot?

10 A. I believe the answer is yes.

11 Q. Okay. Could Republicgo put staging
12 lights in that parking lot?

13 A. No.

14 Q. Okay. And did Republic have any say
15 over the type of light bulbs that went into
16 the light fixtures?

17 A. I don't believe so.

18 Q. And prior to Mr. Burke's fall, was
19 your department aware of any lighting
20 problems with that particular parking lot?

21 A. I was not.

22 Q. And after Mr. Burke's fall, did the
23 City complain to Republic about, "Hey, this
24 lighting was not good enough. Why didn't you
25 tell us?" Did you do that?

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1 A. I don't believe there was specific;
2 in that manner.

3 Q. Yes, ma'am. You didn't ---

4 A. We had discussion but, yes. Okay.

5 Q. You didn't complain to Republic
6 yourself that, "Hey, guys, you should have
7 upgraded this parking lot?"

8 A. I did not. Correct.

9 MS. RUPARELIN: I beg the Court's
10 indulgence.

11 THE COURT: Certainly.

12 MS. RUPARELIN: I think that's all
13 the questions I have, Your Honor.

14 THE COURT: Okay.

15 [END OF REQUESTED TRANSCRIPT OF RECORD]

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	
Robert J. Burke and Jane B. Burke,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 13-CP-10-1400
	)	
Indigo Realty Co., L.L.C.,	)	
Republic Parking System, Inc., and	)	
City of Charleston,	)	
	)	
Defendants.	)	

TRANSCRIPT OF JURY TRIAL

The within Jury Trial in the above-captioned matter was held December 15 -19, 2014, before The Honorable R. Markley Dennis in Courtroom 4C of the Charleston County Courthouse, 100 Meeting Street, Charleston, South Carolina; attended by counsel as follows:

APPEARANCES:

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Deborah Garrison
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dgarrison@sccourts.org

1 MS. SPRUILL: Just Mrs. Burke?

2 THE COURT: Do them one at a time
3 for my purposes.

4 MS. SPRUILL: Certainly. At this
5 late date, we do object for the reasons that
6 we mentioned earlier. This is not
7 appropriate as a voluntary nonsuit. It can
8 only be done with leave of court after we've
9 answered, our Motion for summary judgment in
10 this case has been filed. Both have been
11 filed. You have to have consent of all
12 parties. Republic does not ---

13 THE COURT: It has to be without
14 prejudice, I think. Wouldn't you agree with
15 that?

16 MS. SPRUILL: No, Your Honor.

17 THE COURT: Okay. Well, that's
18 noted. I don't need to hear a lot of
19 argument. I am not going to grant it without
20 prejudice. It is dismissed with prejudice as
21 to this defendant.

22 MS. SPRUILL: Your Honor, certainly
23 they have moved to dismiss pursuant to
24 41(a)(2), which is by Order of the court,
25 voluntary nonsuit, and within that rule -- if

1 the court is so inclined, and I understand
2 that the court is -- it provides that the
3 court may make that dismissal upon such terms
4 as the court deems proper. We would ask that
5 the terms include, should there be a verdict
6 against our client, that we be allowed to
7 make argument regarding setoff with respect
8 to ---

9 THE COURT: Ms. Spruill, there is
10 nothing about the withdrawal that has to do
11 with setoff. I appreciate it -- you and I
12 just differ. I don't think that it has a
13 thing in the world to do with it. That's
14 going to be all monies paid by anybody at the
15 time that becomes necessary. So, that's
16 fine. You haven't waived that right.

17 MS. SPRUILL: That's all that we
18 ask, Your Honor. Thank you.

19 THE COURT: Everybody understands
20 that this doesn't remove -- the court's
21 consideration -- two things. The amount that
22 was paid and what it was paid for. Because,
23 you know, -- for instance, consortium in some
24 exorbitant sum, the court may have to look at
25 that as to whether it's a legitimate -- to

1 contribute that to the consortium claim.

2 But, be that as it may, it will be
3 reviewed at the appropriate time for that
4 purpose.

5 MS. SPRUILL: Thank you, Your Honor.
6 Appreciate it.

7 THE COURT: The term would be
8 "with prejudice as to this defendant (sic)."

9 Now, they also settled with other
10 joint tort feasers, alleged joint tort
11 feasers. I say that intentionally because I
12 think the case law is pretty clear that there
13 have been some decisions that the plaintiff
14 can elect whichever joint tort feasers that
15 they want to proceed. That is -- they
16 control that. So they've settled.

17 Clearly the statute outlines how
18 that settlement is to be applied, how it to
19 be -- so the fact that they are not here
20 doesn't affect anything concerning setoffs.
21 Clearly that is already defined in the
22 statute, as I understand it and read it.

23 The only other issue we talked about
24 is your right to have the jury make an
25 assessment as to apportionment as to the

1 percentage of fault as attributed to the
2 joint tort feasors. The statute is somewhat
3 -- not vague but not exactly clear and
4 precise as to how that is to be done.

5 I'm not familiar with any decision
6 yet, recently, that deals with this other
7 than the fact of how it is allocated, that
8 the court has to evaluate it.

9 From the standpoint -- I've tried
10 two, I think, where we had to introduce
11 evidence and there was an objection made by
12 the plaintiff -- and certainly feel free to
13 object during the trial -- to evidence that
14 related to parties other than those here --
15 to protect your record.

16 My ruling will be that you will be
17 allowed to ask those questions concerning
18 someone else, the "empty chair" fault, so to
19 speak. I don't know of any other way that
20 the jury is going to have to get that
21 information.

22 The clearer way of doing it would
23 obviously be to bifurcate it but the statute
24 doesn't provide for that. It just says, as I
25 understand, that there is a separate argument

1 but it doesn't allow for the production of
2 any additional evidence. So the only time
3 that you can have that evidence is during the
4 trial itself.

5 Clearly I will allow you to do that.
6 But you have objection to them settling the
7 case and removing those parties?

8 MS. SPRUILL: I do. Again, I don't
9 think the voluntarily stipulation, which is
10 what they initially did, I don't think that
11 provision applies because we did not consent.
12 There's prejudice to us.

13 Certainly they have moved for
14 dismissal by Order of the court. I under-
15 stand your ruling, subject our objection and
16 our Motion. We understand that you're
17 allowing us to introduce material evidence.
18 I would ask for an allocation on the verdict
19 form to see -- should there be a liability
20 verdict, to see what the allocation would be
21 among tort feasons.

22 THE COURT: Well, we're putting
23 the cart before the horse. We've got to get
24 there.

25 There will be a separate verdict

1 form. It's not going to be on the primary
2 because it's -- first of all, as I understand
3 it, they've got to determine fault. There is
4 no reason to have anybody else on the verdict
5 form.

6 We don't talk about allocation. I
7 will let you argue about that if they find
8 fault, because now you come back and you'd
9 get a chance to do. It really is -- the only
10 -- it's akin to talking about comparative
11 negligence, in the sense of arguing that.
12 You have a specific argument now that 'who is
13 the party' or which party is more egregious
14 than the other. Certainly there are cases
15 where they are, in some situations.

16 I'll allow that. We will work
17 through that part of it.

18 From the standpoint of just the
19 simply removing them, I don't think that has
20 to do with anything and I've granted that.
21 They've settled it. I didn't pull the
22 statute and looked at -- it's been a while
23 since I've read, so I'll read it again. If
24 they agree, if everybody agrees, that has
25 something to do with whether or not it's

1 going to allocated or attributed. There is
2 something to do with that in that statute.
3 But since you didn't, there's nothing --
4 there's no question in this case, it's a
5 setoff and there's no question that it would
6 be applied.

7 MS. SPRUILL: Thank you, Your Honor.

8 THE COURT: Thank you very much.

9 But just for the record, though, your
10 objection is noted for, uh, the removal of
11 the parties, I believe is proper and I'll
12 grant the Motion to dismiss the two
13 defendants that we have not named: Indigo
14 Realty Company and the City of Charleston.

15 MR. MCCULLOUGH: Yes, sir.

16 THE COURT: All right. Any other
17 Motions *in limine*?

18 MS. SPRUILL: Yes, Your Honor, both
19 sides have some Motions *in limine* and there's
20 a Motion to bifurcate out there also.

21 THE COURT: All right. Let me
22 hear the plaintiff's Motions *in limine*.

23 MR. MCCULLOUGH: Your Honor, the
24 first was the settlement, which we have
25 already dealt with.

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

12 I bring to the court's attention to
13 get some sort of advisory opinion on how you
14 want us to handle that.

15 THE COURT: What is the
16 defendant's position?

17 MS. SPRUILL: We would take the
18 position essentially just like the rule says
19 that it is not admissible as a subsequent
20 remedial measure, but it is admissible for
21 some other purpose such as to show control by
22 the City of Charleston.

23 THE COURT: Okay.

24 MR. MCCULLOUGH: That's -- I don't
25 know -- if it's all in, it's all in and

1 that's fine. We can get into the cones, the
2 painting, everything, that's fine.

3 THE COURT: It sounds as though it
4 depends on the purpose for which it is being
5 introduced. The only way that I can make
6 that call is to hear the testimony. So I
7 can't -- won't rule in a vacuum on that
8 issue.

9 There are some instances where it
10 can't come in, it's clearly violative of the
11 rule.

12 But there are other reasons why
13 you'd allow that sometimes. I've seen that
14 before.

15 So I can't give you a ruling --
16 based on what I have just heard, if it is
17 solely for remedial purposes, then I probably
18 would exclude it. If it was for any other
19 purpose, I might allow it.

20 Now, the inference that a jury draws
21 from what the reason is, that's one of those
22 ticklish areas that I love about the practice
23 of law. Strategies. So, here we go.

24 What else?

25 MR. MCCULLOUGH: There are two

1 witnesses, Buddy Denny and Dr. Todd Shuman.

2 THE COURT: All right.

3 MR. MCCULLOUGH: Buddy Denny was
4 listed -- not in response to our interroga-
5 tories -- as a codefendant. We have notice
6 of that and I'm going to withdraw that Motion
7 because they've sent an e-mail and the -- so,
8 I apologize.

9 THE COURT: Okay.

10 MR. MCCULLOUGH: One thing that
11 honestly I didn't know was an issue until the
12 trial brief came in and their witness list
13 came in was that they plan on relying on a
14 gentleman by the name of Dr. Todd Shuman.
15 Dr. Shuman was the City's expert witness, the
16 only expert witness that the defendants
17 listed. Part of the strategy at mediation
18 that was discussed with the defense was,
19 'Let's take the City out of this, because
20 they are the only ones with an expert.' So
21 now they're attempting, I believe, to use the
22 City's expert.

23 Your Honor entered a scheduling
24 Order that had deadlines for the production
25 of expert witnesses. I will tell you that

1 Mr. Darling, who is running their case, never
2 disclosed an expert witness. Now for them to
3 try to use the City's expert, I believe is
4 improper.

5 THE COURT: Okay.

6 MS. RUPARELIA: Your Honor, at the
7 time that Dr. Shuman was retained, obviously
8 one lawyer takes the lead in dealing with the
9 expert. Lisa Reynolds, who represents the
10 City of Charleston, had agreed with Mr.
11 Darling to split the cost of Dr. Shuman.
12 Dr. Shuman never got around to sending out an
13 invoice. In fact, today he has not been paid
14 because he's never gotten around to sending
15 out an invoice.

16 I had a conversation with Miss
17 Reynolds, talked about Dr. Shuman, and he is
18 ready to go. He's been deposed, his
19 discovery deposition was taken and he has
20 given testimony. So really essentially all
21 we're doing is bringing him to testify in
22 front of the jury.

23 THE COURT: Okay.

24 MR. MCCULLOUGH: I'd not argue
25 insofar as what he is going to say, I'm

1 saying that was part of our trial strategy
2 and settlement strategy based on the fact
3 that Republic had not listed an expert
4 witness. It still hasn't.

5 THE COURT: But they -- they
6 haven't identified him.

7 MR. MCCULLOUGH: The first time
8 that we knew that he was going to testify now
9 was on Friday.

10 MS. RUPARELIA: Your Honor, we
11 identified witnesses on our witness list as
12 the ones that we would bring in. In
13 addition, we've indicated every time that
14 we've responded that in addition to other
15 parties called as witnesses that we will call
16 those or are adding those, incorporating
17 their witnesses into our list.

18 MR. MCCULLOUGH: Not experts. I
19 look yesterday. It's totally on fact
20 witnesses, not expert witnesses. They did
21 not. They said "no experts listed at this
22 time."

23 THE COURT: Did you ever
24 supplement your interrogatories?

25 MS. RUPARELIA: No, Your Honor.

1 THE COURT: Very well, I am going
2 to grant his Motion. He's not going to
3 testify. I don't quarrel with the fact that
4 they can't claim surprise but there's a duty
5 to identify an expert.

6 MS. RUPARELIA: Well, Your Honor
7 the problem was Mr. McCullough is talking
8 about a scheduling Order with a discovery
9 deadline of October 1st.

10 THE COURT: I am not banking on
11 the scheduling Order.

12 MS. RUPARELIA: Yes, Your Honor.

13 THE COURT: I am banking on the
14 fact that you have answered interrogatories
15 and today you've still not identified an
16 expert witness.

17 MS. RUPARELIA: Yes, Your Honor.

18 THE COURT: That's what I am
19 banking on. It has nothing to do with the
20 scheduling Order. Clearly I understand the
21 what you -- I understand the issue. 'I
22 attempted to use him, he was useful to me and
23 I didn't need him anymore.' But when was the
24 settlement achieved?

25 MR. MCCULLOUGH: End of last week.

1 THE COURT: All right. So what
2 was to stop you from then saying, 'we are
3 going to have this person.' All you had to
4 do was to send them a letter. Did you ever
5 say anything?

6 MS. RUPARELIA: Your Honor, we put
7 him in our witness list and ---

8 THE COURT: As a fact witness, not
9 an expert.

10 MS. RUPARELIA: Well, he's only an
11 expert witness, Your Honor.

12 THE COURT: Well, I appreciate
13 that but did you -- there was a specific
14 interrogatory as to experts. Did you ever
15 identify and list an expert in response to
16 that interrogatory?

17 MS. RUPARELIA: We simply added
18 him to our pretrial brief.

19 THE COURT: I appreciate it.
20 Thank you. You're protected. I'm not going
21 to allow it.

22 MR. MCCULLOUGH: Thank you, Your
23 Honor. Those are all of our Motions.

24 THE COURT: All right. Be happy
25 to hear from you.

1 MS. SPRUILL: Your Honor, we have
2 a few requests *in limine*. The first is that
3 to the extent of -- the plaintiff's have a
4 witness, Dr. Marshall White. To the extent
5 that they seek testimony outside his field of
6 expertise, which is neurology and pain
7 management, we would ask that that be
8 excluded.

9 THE COURT: I can't rule on that.
10 I don't know what he is going to talk about.
11 But I think I have been pretty consistent on
12 that one over the years.

13 MS. SPRUILL: And ---

14 THE COURT: Especially now after
15 *Watson* and it's progeny, I -- you know, I've
16 even stopped a chiropractor from testifying
17 about brain injury, without further
18 qualification. So I'd be happy to restrict
19 that. No problem.

20 MS. SPRUILL: Thank you, Your Honor.
21 The other topics listed are, to some degree,
22 related. We've got -- I'm happy to hand a
23 copy up so that everybody is talking off the
24 same page, (tendering).

25 THE COURT: Thank you.

1 a request to bifurcate and we've got -- there
2 are two pieces to it. One is pursuant to
3 court rule and one is pursuant to the statute
4 on punitive damages. We'd ask that you
5 separate out liability and damages and we'd
6 ask that punitive damages be separated out as
7 well.

8 THE COURT: Are you going for
9 punitive damages?

10 MR. MCCULLOUGH: Yes, sir. That is
11 important not only because from the punitive
12 aspect if they find it is reckless, then the
13 apportionment statute doesn't apply. I don't
14 know how you -- it's all drawn up together,
15 Your Honor, and I don't know how you would --
16 you tell us how you want us to handle all
17 that.

18 THE COURT: The easiest thing, and
19 I've done, is -- bifurcation on punitives is
20 not difficult. You have to obviously get in
21 testimony which would be factually reckless,
22 for the jury to conclude that it was
23 reckless, willful and wanton.

24 MR. MCCULLOUGH: Yes, sir.

25 THE COURT: But insofar as the

1 ability to pay and all the other aspects that
2 would flow from that, that part would be
3 bifurcated. We did it in the WCSC case, we
4 bifurcated it and it wasn't a problem at all.
5 That evidence comes in, then you do another
6 jury and we set another jury verdict.

7 MR. MCCULLOUGH: So everything pre-
8 recklessness comes in?

9 THE COURT: What I have on the
10 verdict form is, "Do you find the conduct not
11 only negligent but reckless, willful and
12 wanton?" Yes or no. From that point -- if
13 the jury says no, then that closes that door.
14 If it comes in as "yes", we go into a second
15 phase.

16 MR. MCCULLOUGH: Yes, sir.

17 THE COURT: But, again, no
18 question you've got to have something for the
19 jury to make a call as to whether something
20 is more than negligent.

21 MS. SPRUILL: And, Your Honor, also
22 we sought separation between liability and
23 damages. We think in this case where there
24 are issues related to the fact of liability
25 and there are also issues relating to the

1 degree of damages, it would be easier to try
2 it in two separate phases as required by Rule
3 42, that that would be in furtherance of
4 convenience.

5 THE COURT: Well, let me throw
6 this ball back at you, because I've done it
7 before. I tried a case in Berkeley County
8 about seven or eight years ago, maybe nine
9 now, where the issue was whether or not there
10 was liability. There wasn't any question
11 that the person was severely injured. We
12 tried the case on whether or not there was
13 liability. The jury came back for the
14 defendant. End of the case. We didn't have
15 to bring any medical testimony, didn't have
16 to do anything.

17 The only problem that I have is that
18 we've gotten into about three areas now of
19 separating this and I don't how that is
20 prudent in this particular case.

21 Are you willing to try just the
22 liability portion?

23 MR. MCCULLOUGH: No, sir, they're
24 so intertwined. Every witness ---

25 THE COURT: How is the liability

1 intertwined with the damages?

2 MR. MCCULLOUGH: The witnesses,
3 being Bob Burke, Jane Burke, Ashlyn Burke,
4 his friends. To separate this case basically
5 doubles the amount of trial time.

6 THE COURT: Those people don't
7 have anything to do with liability.

8 MS. SPRUILL: That's correct, Your
9 Honor.

10 MR. MCCULLOUGH: Yes, sir, every
11 one of those witnesses has to do with
12 liability?

13 THE COURT: How is that?

14 MS. SPRUILL: Only Mr. Burke.

15 THE COURT: How do they have
16 anything to do with liability if they weren't
17 there?

18 MR. MCCULLOUGH: Well, our
19 liability case -- separating it out requires
20 us to do separate jury charges, two separate
21 -- well, three separate trials because you'd
22 go to punitive damages.

23 The rules, the only cases that allow
24 separate highly complicated med mal cases and
25 things of that nature. Trip and fall ---

1 MS. SPRUILL: Your Honor, that's not

2 ---

3 THE COURT: Ms. Spruill.

4 MS. SPRUILL: Excuse me, Your Honor.

5 I'm sorry.

6 THE COURT: I'll give you a
7 chance.

8 MS. SPRUILL: My apologies.

9 MR. MCCULLOUGH: This is a trip and
10 fall case. We're setting a precedent if we
11 start separating every trial on the day of
12 trial based on liability and damages. We've
13 prepared this entire case based on a flow
14 dictated through creating the impact that
15 this has had on Bob Burke. We believe it is
16 our right to do just that.

17 THE COURT: The question that I
18 have is this -- and, unfortunately, you've
19 just alluded to it. I don't know why you'd
20 want to create an appellate issue, Ms.
21 Spruill, to be honest with you. Frankly, I
22 don't see how it prejudices your client at
23 all, because the degree of damages has
24 nothing to do, and will never have anything
25 to do, with the liability. It will never

1 have a thing in the world to do with, really
2 and truly, an award of damages because,
3 really and truly, they should either have to
4 pay or not to have to pay. Then the degree
5 that it's caused, that is a different
6 ballgame. There is no question that reckless
7 conduct goes insofar as liability.

8 So from the standpoint of damage, of
9 creating any kind of detriment to you, you
10 still have all the evidence -- you have a
11 right to produce how willful and wanton it
12 was, but we just don't take any damages
13 testimony.

14 MR. MCCULLOUGH: Yes, sir, but
15 what you're do is -- basically the defendants
16 are dictating the trial ---

17 THE COURT: The defendants are
18 not. I'm dictating it.

19 MR. MCCULLOUGH: Yes, sir. I
20 believe that the jury should be able to
21 listen to Jane Burke, should be able to
22 listen to all the witnesses so that they can
23 make a decision as to the totality of the
24 case.

25 THE COURT: Listen, ---

1 MR. MCCULLOUGH: Negligence is a
2 three-prong test that includes duty,
3 causation and damages.

4 THE COURT: Mr. McCullough, again,
5 you haven't addressed one thing in your
6 argument that says anything. I agree with
7 you. I don't disagree with anything that you
8 just said. We don't have to worry about
9 proximate cause here. We have to prove were
10 they liable.

11 MR. MCCULLOUGH: Yes, sir.

12 THE COURT: It seems to me to be
13 -- to streamline it, it seems to me to be --
14 two things: number one, it would facilitate
15 minimizing expense to your client from having
16 to have doctors come in here and testify;
17 number two, it minimizes and -- now creates
18 another situation, which I don't know if it
19 is important or not.

20 If you want to do this, we can do
21 what they're doing downstairs. If you want
22 to give them a figure and if he proves
23 liability, you pay it?

24 MR. MCCULLOUGH: If it is a big
25 enough number.

1 THE COURT: That's what I'm
2 saying. Expedites everything. 'Here's the
3 number. You pay this number and I will do
4 that.' Speeds up the process, folks. As
5 sure as they determine liability, there's no
6 question about that.

7 'Here's the number.' You now move
8 from a mediator to a panel of twelve
9 arbiters. They say yeah, there's liability
10 and now you pay it.

11 Do y'all want to talk about that?

12 I am not opposed to it.

13 My concern, quite frankly, Ms.
14 Spruill, is -- I don't disagree with Mr.
15 McCullough. I did plaintiff and defense
16 work. There is no question about it from the
17 standpoint of how you present your case. I
18 know what's important about that and I
19 understand that's part of what happens in a
20 trial, it's a wonderful aspect of it. You do
21 minimize that to some extent. I like it
22 because it, from the standpoint of damages it
23 takes out all the potential for being upset;
24 to some extent, although it is always going
25 to be there. I mean, the degree of

1 reprehensibility of misconduct on the part of
2 a defendant comes in liability. So, really
3 and truly, all it limits is how does this
4 affect it? So it really doesn't -- I don't
5 think that the statute creates any kind of
6 pockets where you are just eliminated from
7 that, because really and truly it allows the
8 jury to focus on -- you've already determined
9 that they are responsible, and now 'this is
10 what it has caused.' You talk about framing
11 your argument, that's a lovely position to be
12 in. 'Y'all have dealt with the difficult and
13 now there is no question about it, this man
14 is entitled to this.'

15 I think it's a pretty good strategy
16 but -- be that as it may, y'all talk at lunch
17 and let's get back together at 2:00. If
18 y'all want to talk a number we can do it by
19 agreement -- I'll put it this way, if it's
20 not going to be an agreement I'm not going to
21 force the issue.

22 MS. SPRUILL: Thank you, Your
23 Honor. I would just note that there is
24 precedent in a slip-and-fall, the Craig v.
25 Coligny case, to clarify for the record.

1 THE COURT: Okay. And the court
2 said -- what? Let me look at that over
3 lunch. What's the cite?

4 MS. SPRUILL: The cite is 334 South
5 Carolina 96. That case was a slip and fall
6 in a shopping center. They severed liability
7 and damages because the medical testimony was
8 disputed, it was going to long. The judge
9 decided that it's be easier, cheaper, 'let's
10 just do it in pieces.'

11 THE COURT: I don't need to hear
12 what the rationale is. I agree with the
13 rationale. I mean, you're preaching to the
14 choir. As I said, I've done it and it
15 worked.

16 MS. SPRUILL: Thank you.

17 MR. MCCULLOUGH: Thank you.

18 THE COURT: Thank y'all, we'll
19 see you at 2:00 o'clock.

20 (LUNCH RECESS)

21 THE COURT: Yes, sir.

22 MR. MCCULLOUGH: We were able, I
23 believe by consent, to premark and admit
24 Plaintiff's Exhibits 1 through 8; one that
25 contains the redactions that we talked about,

1 which was the Agreement itself.

2 THE COURT: Very well.

3 Plaintiff's Exhibits 1 through 6 are photo-
4 graphs and Plaintiff's Exhibit 7 is the
5 management Agreement. They are admitted by
6 agreement, is that correct?

7 MS. RUPARELIA: That's correct.

8 THE COURT: Very well. We also
9 -- as I understand, the blowups are used for
10 demonstrative purposes. We have small
11 versions that will actually be a part of the
12 record.

13 MR. MCCULLOUGH: Yes, sir.

14 THE COURT: Okay.

15 (SO ENTERED AS PLAINTIFF'S EXHIBITS 1-7)

16 THE COURT: All right.

17 MS. RUPARELIA: And we have one
18 more, Your Honor.

19 COURT REPORTER: Defendant's
20 Exhibit 1 for identification.

21 THE COURT: We have a Motion --
22 the Motion for bifurcation is still open, as
23 I understand. I've read the case. It's
24 interesting that none of the panel except
25 Judge Curry (phonetic), who sits from time to

1 time, but the rest of them are involved in
2 the Court, it's also interesting that while
3 it is -- the language is that 'we don't find
4 there was an abuse of discretion.' That's
5 basically what Rule 42 allows.

6 There were certain things that
7 weren't reserved for the purpose of review
8 and that's pending, which I find interesting
9 as well.

10 I also note, and this is no
11 disrespect to the Court of Appeals, but it is
12 a Court of Appeals' decision, the -- and I
13 understand the logic of the Court. I don't
14 disagree. And as I have stated, I've done
15 this before, so it's not foreign to me to
16 separate the two. But I would also say that
17 one of the issues that you've raised, at
18 least in your trial brief, is that these --
19 that this didn't cause him the damage that is
20 claimed, that it was minimal. There we get
21 into the inner weaving of some issues because
22 we talk about proximate cause.

23 I am prepared to bifurcate it for
24 this reason, with this understanding, we're
25 going to have to bifurcate punitive damages

1 anyway, so why not just go ahead and do the
2 first part, liability. If we find negligence
3 and we find recklessness, once that decision
4 is made, I'm going to direct a verdict as to
5 some damage -- actual. Obviously I will
6 instruct the jury that just because they
7 award actual damages, that doesn't mean that
8 they have to award punitives. But clearly
9 that having been determined, that way we only
10 have to bifurcate it once. We don't have to
11 worry about dealing with punitive issues,
12 because we will go over all of that in the
13 second phase -- all damages, punitive and
14 actual. You want your bifurcation, I will
15 give it to you.

16 MS. SPRUILL: If I may ask a follow
17 up question, that would be only if they came
18 back with a 'yes' as to the recklessness
19 question.

20 THE COURT: No, if they come back
21 with actual damages. Obviously if ---

22 MS. SPRUILL: The ---

23 THE COURT: -- well, Ms. Spruill,
24 hold on a minute. Was that a trick question
25 or do you really want me to answer that

1 then I am going to tell the jury, 'fine, now
2 we are going to move into' -- I am going to
3 tell them that it is going to be bifurcated -
4 --

5 MS. SPRUILL: Your Honor, ---

6 THE COURT: Just one second,
7 please, and then I will let you response, Ms.
8 Spruill. I remember being anxious to. As I
9 said, I am prone to cut people off, as you
10 have already seen.

11 So it really is -- it would
12 facilitate, I think, the trial of this case
13 and would really make it more compact and
14 will separate damages where we've got some
15 issues, because now we get into the issue of
16 'well, I don't know how many times that they
17 have done it' and those sorts of issues, it
18 becomes a punitive issue. So it makes it
19 easier for the court and makes it flow,
20 because now we're focusing on just the
21 damages.

22 If we start that phase, then I'm
23 going to tell the jury in my opening remarks
24 that we've found and I've directed a verdict
25 that there has to be some award of damage. I

1 will explain the two types of damages. Then
2 y'all can go to opening statements. We'll
3 have two separate -- basically we'll do two
4 separate trials, opening statements and
5 closing arguments. Obviously everything
6 hinges on what they decide in the first one.
7 So it really does simplify it in that vein.
8 I don't have any problem with that, so I will
9 do that.

10 Now, I interrupted you.

11 MS. SPRUILL: No, no. My only
12 question was -- I think you're telling us
13 that phase one would have essentially two
14 questions. The first one, plaintiff percent
15 and defendant percent. Then the second
16 question would be, 'Do you find reckless-
17 ness?'

18 THE COURT: No. There would be
19 two questions:

20 'We find that the defendant was
21 careless.'

22 'We find that the defendant was not
23 only careless but that they were reckless.'

24 Those are the two questions.

25 MS. SPRUILL: Okay. How are we

1 going to handle the comparative negligence
2 portion of it?

3 THE COURT: Well, that's wonderful
4 because we haven't even talked about that.
5 So you're now -- well, I mean, obviously I
6 will structure that. We can simply do that,
7 'We find the defendant -- we find the
8 plaintiff was x-percentage -- that's not a
9 problem.

10 MS. SPRUILL: That's all that I
11 was getting at.

12 THE COURT: Obviously comparative
13 negligence would have application in that --
14 that particular aspect of the trial, anything
15 that deals with liability.

16 MS. SPRUILL: Right.

17 THE COURT: Okay. I will
18 structure the verdict form, I promise you.

19 MS. SPRUILL: Thank you. That's
20 all.

21 MR. MCCULLOUGH: May I ask a
22 question, Your Honor?

23 THE COURT: Sure.

24 MR. MCCULLOUGH: Under your ruling,
25 in this opening that is about to take place

1 person got hurt. Not one person complained.

2 So you kinda have to look at it from
3 a common sense perspective. Mr. Burke, you
4 will hear, had some medical issues that
5 affected his balance.

6 THE COURT: You're going into
7 damages now.

8 MS. RUPARELIA: Yes, Your Honor.

9 THE COURT: Wait. I'll give you
10 an opportunity to address that.

11 MS. RUPARELIA: Yes, Your Honor.

12 THE COURT: Thank you.

13 MS. RUPARELIA: You will hear that
14 he had been driving for six hours. You will
15 hear a lot of things from Mr. Burke directly
16 about how he fell. One thing that he is
17 going to tell you, because he told us, is
18 that he didn't know how he fell. He said, 'I
19 was walking and it happened really fast and I
20 was flying.' So we are just presuming, all
21 of us are, that he fell on this cement block.

22 You're going to hear different names
23 for this (indicating in photograph). We call
24 it an apron, a cement block, a curb. All of
25 this words are terms used interchangeably.

1 utilities are buried, so it's not a simple
2 process. Republic Parking was not doing
3 that, all they were doing was they were
4 replacing things, they were maintaining
5 things. If there were things that needed
6 repair, something that needed to be painted,
7 some of the parking stripes needed to be
8 repainted, those are the kind of things that
9 Republic did.

10 So it such a huge jump, which is why
11 we are here today, because we just can't come
12 to an agreement on this. We are here before
13 you for you to resolve this dispute with us
14 because we just can't agree.

15 You are going to hear from the City,
16 you're going to hear from Republic and you're
17 going to have to determine who was supposed
18 to do what.

19 If this parking lot was dark, if you
20 find that it was too dark, then it's not --
21 it was not within the responsibility of
22 Republic Parking. It had to be -- because
23 they were not the owners. They were not even
24 a tenant. They just managed. So I'd like
25 for you to keep that in mind as you listen to

1 the testimony of all the witnesses today.

2 Thank you very much.

3 THE COURT: Ladies and gentlemen,
4 there are a couple of matters that I need to
5 take up out of your presence. I appreciate
6 your patience. I'll ask you to go to your
7 jury room for just a few moments. Do not
8 begin your deliberations, don't discuss this
9 case. We will be with you very shortly.

10 (JURY OUT @ 3:01 P.M.)

11 THE COURT: All right. I'll be
12 glad to hear from you.

13 MS. RUPARELIA: Your Honor, with
14 respect to the issue of Mr. Burke's condition
15 at the time of the fall, it does go to
16 liability.

17 THE COURT: I understand that it
18 goes to comparative negligence. But it just
19 simply wasn't necessary in opening statement
20 to talk about it. You mentioned that he'd
21 had problems before, and that goes to the
22 issue of whether or not it was exacerbated by
23 the fall, whether or not it is a worsening of
24 the condition.

25 You're preserved. You don't have to

1 -- the record is clear. What else do you
2 want to say?

3 MS. RUPARELIA: Your Honor, all I
4 wanted to say ---

5 THE COURT: Take it to Columbia.

6 MS. RUPARELIA: --- was that the
7 reason for his fall was not the curb. The
8 reason for his fall was his own ---

9 THE COURT: I understand that.
10 You're going to have a chance. Quite frankly
11 -- you know what? Quite frankly, that's
12 argument. It really is. It's best served in
13 closing argument. You'll have a chance then
14 to discuss that to your heart's content,
15 because we'll have testimony about it. Thank
16 you very much. I appreciate it.

17 All right. Anything from the
18 plaintiff at this point?

19 MR. MCCULLOUGH: No, sir.

20 THE COURT: Let's go ahead and
21 bring him up and then we will be ready to go.
22 We will be at-ease for about five minutes.

23 (BRIEF RECESS)

24 (WITNESS TAKES STAND)

25 THE COURT: You will have to pull

1 Q. Thanks, Bob. You're in a wheelchair
2 today. Correct?

3 A. That's correct.

4 Q. Were you in a wheelchair or in this
5 condition prior to January 20, '13?

6 A. No.

7 MS. RUPARELIA: Object.

8 THE COURT: I'll allow that
9 question.

10 DIRECT EXAMINATION CONTINUED

11 BY MR. KHAN:

12 Q. Bob, what profession and line of
13 work were you in for your career?

14 A. I was involved with basketball at
15 all levels for approximately forty-five
16 years.

17 Q. Which levels?

18 A. JV, varsity, high school, junior
19 college, Division III (three), Division II
20 (two), Division I (one), and the NBA.

21 Q. Are you married?

22 A. Yes, I'm married to Jane Burke.

23 Q. Is she here today?

24 A. Right there in that pretty sweater,
25 black and white.

1 Q. How long have you been married?

2 A. As of this coming January 11th it
3 will be forty-five years.

4 Q. Do you have any children?

5 A. I have two children.

6 Q. What are their names?

7 A. Robert Joseph, Jr. and my daughter
8 is Ashlyn Burke.

9 Q. Is Robert and Ashlyn with us today
10 in the courtroom?

11 A. They are.

12 Q. Where are they?

13 A. Sitting next to my wife. My
14 daughter is challenging my wife on best
15 looking sweater of the day. My son is there
16 next to her.

17 Q. Where do you live? Where do you
18 reside?

19 A. I live in Wilson, North Carolina.

20 Q. What city is that near?

21 A. Well, the city is Wilson. It's
22 about fifty thousand. It's about forty miles
23 east of Raleigh, North Carolina.

24 Q. Okay. Where did you go to college?

25 A. I went to Campbell University.

1 Q. Did you obtain an undergraduate
2 degree from there?

3 A. I have an undergraduate degree from
4 there and I have a master's degree, and post
5 thirty hours from that point.

6 Q. Where did you get your master's
7 degree from?

8 A. A combination of places because of
9 me moving around: Appalachian State
10 University in North Carolina, in Boone; North
11 Carolina A&T in Greensboro; and East
12 Carolina. The degree is sanctioned by North
13 Carolina A&T. The majority of my thirty
14 hours beyond is at East Carolina.

15 Q. What year did you start coaching?

16 A. 1969.

17 Q. Can you please tell the jury
18 generally where you've coached during your
19 career, specifically?

20 A. Exactly where?

21 Q. Sure.

22 A. Well, my first job at twenty-three
23 was Walter Rose Hill School, which is a
24 little north Wilmington.

25 Then from there, at twenty-five, I

1 coached at Greensboro College in Greensboro,
2 North Carolina.

3 From there I moved back to Campbell
4 University and was an assistant coach there.

5 Because of -- several reasons, but the
6 big thing was my wife got her first
7 principal's job and there was an opportunity
8 to coach at Guilford College as an assistant,
9 and I decided to go that route so that we
10 could stay together.

11 Q. Any other college level or
12 universities?

13 A. Yeah. The majority of my college --
14 when the head job at Chowan, which at that
15 time was a private junior college, and I took
16 the opportunity. It's a beautiful school,
17 fantastic facility. I thought I could build
18 a dynasty there, and I did that. Then it
19 eventually turned into a four-year school,
20 like many private junior colleges have done
21 in the last fifteen years. To give you
22 examples: Anderson, North Greenville,
23 Spartanburg Methodist here in the state. We
24 were all in conference together.

25 After twenty-two years, our kids were

1 grown and on their own, going their own way,
2 so to speak, and I decided -- I was an offer
3 to the offensive coordinator at the
4 University of Hawaii. I looked at my wife
5 and I said, 'Hey, we're fifty-seven. We
6 ain't never going to Hawaii, I ain't got
7 enough money to pay for that. They're going
8 to make us an offer that we can't refuse and
9 give us an unbelievable place.' So it really
10 wasn't much of a decision to make. So with
11 the approval of our children, we went to
12 Hawaii for three years.

13 One of my former players, who was a great
14 player in the NBA, former assistant Olympic
15 coach Mike Bokosky, nee McMillian, became the
16 coach at the Portland Trail Blazers. He
17 called me and he said, 'Coach, this is
18 yeoman's work here. We've got a terrible
19 team and I need you to kind of help me, guide
20 me.' And we went for it. I went to
21 Portland, always knowing that we would come
22 back to eastern North Carolina, but it
23 somewhat of an adventure.

24 Q. How long were you with the Portland
25 Trail Blazers?

1 A. I was with them for three years.

2 Q. Were you ever a professor?

3 A. Yeah, I was a professor at Chowan, a
4 tenured professor.

5 Q. Did you ever have a medical incident
6 while at the -- while coaching the NBA?

7 A. While I was in the NBA?

8 Q. While you were coaching the NBA?

9 A. I can't recall any incidents.

10 Q. Have you ever had a heart issue
11 while you were with the NBA?

12 A. No, not while I was in the NBA.

13 Q. Was it sometime around the NBA?

14 A. It was as I was closing out my
15 career, I was giving a speech in Palms
16 Springs, California, in front of three
17 hundred coaches and I had what they call A-
18 Fib. I can't tell you what happened because
19 I went to the floor. Iseman, a coach, came
20 out of the stands, I was told, gave me CPR,
21 eventually the EMT truck came and got me to
22 the hospital. They gave me a quadruple
23 bypass.

24 Q. Did you have surgery?

25 A. Yes.

1 Q. Did you recover from that surgery?

2 A. Yes.

3 Q. Did you fly home?

4 A. Eventually after two months there.

5 Q. Did you continue to do work for the
6 Trail Blazers after that?

7 A. That year, (affirmative nod). I
8 did, yes. I was made special assistant.

9 Q. Did you ever go on any term of
10 disability due to that?

11 A. At that time?

12 Q. Yes.

13 A. Working for the Blazers?

14 Q. Correct.

15 A. No.

16 Q. We are going to talk about your
17 children. What does your son, Rob, do now?

18 A. He's the assistant basketball coach
19 at The Citadel.

20 Q. Approximately how long has he been
21 in that position?

22 A. He's in his fifth year.

23 Q. Okay.

24 A. Before that he was five years, or
25 six, six years at Spartanburg Methodist in

1 basketball -- which she didn't go there to
2 coach, she was asked to coach and she did it
3 for three years.

4 Q. She coached for three years? Is
5 that what you said?

6 A. She coached three years.

7 Q. Do you know roughly what years that
8 was?

9 A. I'd say '09, '10, '11, maybe. It
10 might have been '08, '09, '10.

11 Q. Okay.

12 A. Something like that.

13 Q. Did you ever assist her in her
14 coaching?

15 A. Well, for the first two years I did
16 because I helped my son down at Spartanburg
17 Methodist once I left the Blazers. Anybody
18 that is married will know that your wife has
19 got to just look at you in a certain way, and
20 she said to me 'well, you helped your son,
21 are you telling me that you are not going to
22 help your daughter?'

23 Q. So what does that mean? What did
24 you do to help her while she was at Brunswick
25 Community?

1 A. I was on the floor teaching drills,
2 conducted practices when she wasn't there.
3 Coaching women is a little bit different, I
4 found that out for sure. But I'm a coach,
5 I was born a coach.

6 Q. So how often were you on the floor
7 coaching with her?

8 A. Unless my wife and I had a special
9 engagement, I was there at least ninety
10 percent of the time.

11 Q. You mentioned your son, too. Did
12 you assist him with his coaching?

13 A. At Spartanburg Methodist, I did. He
14 asked me my opinion. If he wants my opinion
15 when The Citadel is playing, I'll give it,
16 but he answers to Coach Breazeale.

17 Q. Before January 2013, did you attend
18 The Citadel games, basketball games?

19 A. Oh, yeah. He's my pride and joy. I
20 taught him how to play basketball when he was
21 two years old. I coached him in college.

22 Q. When you say you were out on the
23 floor, were you dressed in athletic attire?

24 A. Yeah, I looked like any other jock.

25 Q. Did you have any physical

1 limitations that kept you from doing that?

2 A. No.

3 Q. What about your exercise regimen
4 prior to January 2013, did you have any?

5 A. Well, I try to walk a mile a day,
6 maybe a little bit more; do some light
7 weights.

8 Q. The time period that we just talked
9 about when you were helping your children,
10 were you retired at that point?

11 A. Yes.

12 Q. At that point in time did you give
13 any consideration to getting back into
14 coaching?

15 A. Oh, yeah, but I wanted -- one of the
16 reasons that I coached with my son was
17 because I wanted to see how strong I was
18 again. You know, that kind of open-heart
19 surgery can knock you out.

20 MS. RUPARELIA: Your Honor, I
21 believe that this goes to damages.

22 THE COURT: Yes. You've gone as
23 far as you need to go into that area. Let's
24 move on to the issue of liability, please.

25 MR. KHAN: Yes, sir.

DIRECT EXAMINATION CONTINUED

BY MR. KHAN:

Q. Where were you going on January 24th,
2013?

A. I was going to the College of
Charleston v. The Citadel basketball game at
the College of Charleston.

Q. Was that a night game or a day game?

A. It was a night game.

Q. Who were you meeting there?

A. I was going to meet my daughter
inside the building.

Q. Was your son coaching in that game?

A. He was coaching that night, yes.

Q. Where did you drive from that
evening?

A. I drove from home. Wilson.

Q. Do you remember approximately what
time you got to Charleston that night?

A. At the site? At the parking lot?

Q. Right.

A. I had plenty of time to get in the
game. It was a 7:00 o'clock game. I'd say
6:25, 6:30.

Q. Did you take any stops on the way

1 down from Wilson to Charleston?

2 A. I might have gotten -- I don't
3 really know whether I got anything to eat but
4 I know that I made a few stops. We travel
5 that interstate quite a bit, so we knew where
6 the stops were, where there were some
7 restaurants or whatnot. I don't remember if I
8 ate anything or not.

9 Q. Where did you park your car that
10 night?

11 A. I parked it at the George Street
12 parking lot.

13 Q. Okay. I am showing you what has
14 been already marked as Plaintiff's Exhibit 2.
15 Do you recognize that picture?

16 A. Yes.

17 Q. Is that the parking lot that you
18 parked in?

19 A. Yeah.

20 Q. Showing you what has been marked as
21 Plaintiff's Exhibit 1, do you recognize this
22 picture?

23 A. Yeah.

24 Q. What does this picture, Exhibit 1,
25 depict?

1 A. The entrance.

2 Q. Can you tell by Plaintiff's Exhibit
3 2 where you entered this lot?

4 A. I entered it off George Street.

5 Q. Can you identify where you entered
6 this lot?

7 A. You've got it a little too far away
8 from me. This is the entrance.

9 Q. If you need me to turn it around, I
10 will.

11 A. This is the entrance. This is
12 George Street and this is the entrance right
13 here (indicating).

14 Q. Can you point to the jury where you
15 entered and where you parked?

16 A. I came down here, turned into here
17 and I parked somewhere right here in this
18 area right here, facing the buildings.

19 Q. And was it dark at that point in
20 time?

21 A. It was very dark.

22 Q. This parking lot, did you pay to go
23 in there?

24 A. You punch a ticket to get in, then
25 you pay as you go out.

1 Q. Do you know if it is open to the
2 public?

3 A. (Affirmative nod), it's a public
4 parking lot.

5 Q. Have you parked in there before?

6 A. I had parked there a couple of times
7 during the daytime to go over and see a good
8 friend of mine that works there.

9 Q. Okay. When you got out of your car,
10 what did you do next?

11 A. I get out of the car, I turn left, I
12 walk approximately fifteen seconds. There
13 was a light in the booth, I used that as my
14 guide. I went between two cars that were
15 plenty separated. I hit something and went
16 flying. The something turned out to be the
17 curb, or the block. I don't know why they
18 have that block there.

19 Q. When you got out of your car that
20 night, did you see any indication of how to
21 exit the lot?

22 A. To what?

23 Q. Did you see any indication of how to
24 exit the lot?

25 A. No.

1 Q. Did you see any walkway?

2 A. No.

3 Q. Did you see any steps?

4 A. No.

5 Q. You mentioned a light on a booth.

6 I'm showing you Exhibit 2. Is that what
7 you're referring to, that booth?

8 A. Yeah, where the guy collects the
9 money.

10 Q. So did you take a path from your car
11 to the area of the booth?

12 A. I used it as a guide. Like I said,
13 there was a pretty wide open between two
14 cars, I went between those two cars, trying
15 to get out onto the street, then would cross
16 the street into the building where I was
17 going to meet my daughter.

18 Q. I am showing you next what has been
19 marked as Plaintiff's Exhibit 8. Can you see
20 this?

21 A. Yes. Two cars and then there's the
22 booth.

23 Q. Does this photograph, Plaintiff's
24 Exhibit 8, accurately depict what you saw
25 that night?

1 A. Yes.

2 Q. You said you walked between two
3 cars.

4 A. (Affirmative nod).

5 Q. What happened next?

6 A. Well, I'm trying to catch my breath.
7 I don't know if anybody has ever been hit in
8 the stomach or anywhere but, you know, it was
9 really hard breathing. I didn't know whether
10 I got hit over the head or -- immediately, I
11 didn't know what was what. I was just so in
12 a daze.

13 Then a fellow came out -- two fellows
14 came over to me and one of them said, 'Are
15 you alright?' The other guy said, 'Yeah,
16 he's alright.' They kinda dusted me off and
17 wanted to get out of there -- I sensed that
18 they wanted me to get out of there, but I had
19 a hard time getting up. I can feel the
20 sensation of blood.

21 Q. Did you have any expectations of
22 whether the lot would be say or not?

23 A. Sure.

24 MS. RUPARELIA: Leading, Your
25 Honor.

1 THE COURT: I sustain the
2 objection. Rephrase your question.

3 WITNESS: Do you want me to
4 answer that question?

5 MR. KHAN: No. There was an
6 objection. I'm going to ask you another
7 question.

8 DIRECT EXAMINATION CONTINUED

9 BY MR. KHAN:

10 Q. Did you have any expectations as to
11 the condition of the lot?

12 A. I assumed it was safe. I mean, my
13 whole purpose was to go to the game. 'What
14 has happened to me?'

15 Q. I am showing you Exhibit 2,
16 Plaintiff's Exhibit 2, can you show on this
17 photograph where you found yourself?

18 A. I found myself somewhere right
19 around in here.

20 Q. Okay. You mentioned two gentlemen
21 came to you. Did someone else come to you?

22 A. Maybe give or ten seconds later
23 there was a young man that came to me.

24 Q. Is he here today, in the courtroom?

25 A. He's back there in the corner.

1 Q. Had you ever met him before that
2 night?

3 A. Nope.

4 Q. What did you -- what were you
5 feeling at the moment that you hit the
6 ground?

7 A. By that time I was like trying to
8 gather myself. I felt blood pouring out of
9 my clothes. I felt swelling starting to come
10 out of the front part of my body. But I was
11 still pretty numb. But it was excruciating
12 pain.

13 THE COURT: Yes, ma'am.

14 MS. RUPARELIA: We object to the
15 perspective of damages.

16 THE COURT: Sustained. Move on.

17 DIRECT EXAMINATION CONTINUED

18 BY MR. KHAN:

19 Q. The young man that came to your aid,
20 where did he take you?

21 A. I asked him to get me to my car. If
22 he's going to be a witness, he can probably
23 tell you that he took me to the car. I asked
24 him -- my keys to the car were in the pocket.
25 He opened up the car and as soon as he opened

1 the car door the light inside the car came on
2 and I could see the blood all over me.

3 Q. Okay. Where was your daughter?

4 A. My daughter was in the building.

5 Q. How did she get to you?

6 A. Well, he got my cell phone and he
7 rang.

8 Q. Did Ashlyn come to you there?

9 A. She was coming. From what I
10 understand, she saw the EMT truck there --
11 which at most events of that sort they're
12 required to have emergency. She mentioned it
13 to them. Then she came over to see me.

14 Q. Did you go to the hospital?

15 A. Well, the EMT made that a clear
16 decision. They stopped us there in the
17 parking lot, had two flashlights on us. I
18 remember that.

19 THE COURT: Excuse me. Do you
20 have an objection?

21 MS. RUPARELIA: Your Honor, ---

22 THE COURT: I will allow that
23 question. That's going to be the last one.

24 WITNESS: And they said, 'We
25 gotta get this guy to the hospital.'

1 MR. KHAN: Thank you, Mr. Burke.

2 The other attorneys may have some questions.

3 THE COURT: Cross-examine?

4 MS. RUPARELIA: Yes, Your Honor.

5 CROSS EXAMINATION

6 BY MS. RUPARELIA:

7 Q. Good afternoon, Mr. Burke. You were
8 driving in from Wilson, North Carolina?

9 A. That's correct.

10 Q. That's a five to six-hour drive?

11 A. You can do it in four and a half.

12 Q. Okay. And you'd indicated earlier
13 that you had parked in the ---

14 A. Excuse me?

15 Q. I apologize. Am I not speaking loud
16 enough?

17 A. You're not speaking loud enough for
18 me.

19 Q. You indicated earlier that you had
20 been in that parking lot a couple of times
21 before.

22 A. During the daytime, (affirmative
23 nod).

24 Q. So you were familiar with where to
25 park your car once you enter the parking lot?

1 A. Well, Sunday you might -- if you hit
2 it on the right day, you've got your choice,
3 a hundred choices. Basketball game going on,
4 things happening there downtown, the lot was
5 pretty dog-gone full.

6 Q. I am going to show you a picture.
7 It is marked as Defendant's Exhibit 1. Does
8 that picture show one of the two parking
9 spaces where you parked?

10 A. Does it show one of the two parking
11 spaces where I parked?

12 Q. Yes, sir.

13 A. (Upon review), I think I parked more
14 over to the right.

15 Q. To the right?

16 A. (Affirmative nod).

17 Q. I am going to show you another
18 picture. It's got somebody else's car in it.

19 A. At the same time -- to the right.

20 MS. RUPARELIA: Let me show this
21 to the other counsel, (sidebar with Mr.
22 Khan).

23 THE COURT: Let's get it marked.

24 COURT REPORTER: Defendant's
25 Exhibit 3 for identification.

1 MS. RUPARELIA: For identification
2 purposes.

3 CROSS EXAMINATION CONTINUED

4 BY MS. RUPARELIA:

5 Q. Mr. Burke, I am going to show you
6 another picture and that's a photograph of
7 the right side of the parking spot; is that
8 correct?

9 A. (Upon review), I don't know. If
10 this is Joseph Bank -- is this building
11 Joseph Bank?

12 Q. Yes, sir.

13 A. I parked a little closer to Joseph
14 Bank. I don't know that I parked at --
15 Oops!, I didn't see that sign there.

16 Q. This is a ---

17 A. This is a pretty big sign.

18 Q. I am going to give you the one that
19 you looked at originally, which is
20 Defendant's Exhibit 1, which has already been
21 marked and admitted. This is the one that
22 you looked at earlier and you indicated that
23 you parked on the right side.

24 A. I parked on the right side? If
25 you're asking, I'm telling you that I'm

1 parking on the right side but I'd know if it
2 was in three or four.

3 Q. What you're pointing to is that you
4 parked on the right side of the picture, is
5 that what you're saying?

6 A. (No verbal response).

7 Q. Like if we look at the picture, you
8 parked on the right side; is that correct?

9 A. I parked to the right side of that
10 picture. That's what I felt.

11 Q. And you understand, Mr. Burke, that
12 that was a handicapped parking space?

13 A. I didn't see it.

14 Q. Did you understand ---

15 A. It was dark.

16 Q. Yes, sir, but you understand that it
17 was a handicap parking space.

18 A. You've got the Handicap sign there
19 but I didn't see it.

20 Q. Yes, sir.

21 A. It was very, very, very dark.

22 Q. I understand. You don't have a
23 handicapped sticker on your car?

24 A. No.

25 Q. And your headlights were on when you

1 pulled into the parking space; is that
2 correct?

3 A. Yes.

4 Q. And this picture shows a reflective
5 sign showing the Handicap sign ahead of you;
6 is that correct?

7 A. Repeat that question.

8 Q. This photograph shows the handi-
9 capped parking spaces with the light post
10 that contained the Handicap reflective sign;
11 is that correct?

12 A. I still don't understand your point.

13 Q. You pulled into the parking spot?

14 A. Right.

15 Q. Your headlights were on?

16 A. Right.

17 Q. You were oriented straight ahead,
18 correct?

19 A. Yeah, I'm looking.

20 Q. And when you're oriented straight
21 ahead, what you're looking at in that parking
22 spot is the reflective sign that says that it
23 is a Handicap spot; is that correct?

24 A. Well, I see the Handicap sign there
25 now. I did not see it.

1 Q. But your lights were on on your car?

2 A. I'm telling you that I didn't see
3 the -- I didn't see it.

4 Q. Yes, sir. The question was, the
5 lights were on in your car. Is that correct?

6 A. As I pulled up in the spot,
7 (affirmative nod).

8 Q. Thank you. Now, Mr. Burke, you have
9 a condition that causes you to have numbness
10 in your feet; is that correct?

11 A. I have some neuropathy.

12 MR. KHAN: Objection, Your Honor.

13 THE COURT: Yeah, how about
14 putting it insofar as time is concerned?
15 Otherwise that's a damages issue. Thank you.

16 MS. RUPARELIA: Yes, Your Honor.

17 THE COURT: I would sustain the
18 objection unless you want to reframe it to be
19 germane to the issue here.

20 CROSS EXAMINATION CONTINUED

21 BY MS. RUPARELIA:

22 Q. At the time that you drove into the
23 parking lot you were wearing what is called
24 Unna boots, is that correct?

25 MR. KHAN: Objection. Same.

1 THE COURT: I will allow that.

2 CROSS EXAMINATION CONTINUED

3 BY MS. RUPARELIA:

4 Q. Unna boots?

5 A. Unna boots?

6 Q. Yes, sir.

7 A. I was wearing a hundred fifty dollar
8 pair of shoes from Berlins.

9 Q. Yes, sir.

10 A. I don't consider that Unna boots.
11 I consider them to be stylish and I can go
12 anywhere I want with those things.

13 Q. Your doctor ---

14 A. That's an insult, whatever Unna
15 boots are.

16 THE COURT: No, sir. Mr. Burke,
17 just answer the questions, please. Refrain
18 from comments.

19 WITNESS: Yes, sir.

20 CROSS EXAMINATION CONTINUED

21 BY MS. RUPARELIA:

22 Q. You were wearing prescription
23 compression bandages on your feet, were you
24 not?

25 A. (No verbal response).

1 Q. At the time of your fall?

2 A. I had Unna boots on, yes, which were
3 prescription. But do you know what Unna
4 boots are?

5 Q. Yes, sir. And if I could continue
6 my questions.

7 THE COURT: No, sir, you don't ask
8 the questions.

9 CROSS EXAMINATION CONTINUED

10 BY MS. RUPARELIA:

11 Q. At the time, the day before your
12 fall, you had gone to see your doctor about
13 swelling in your legs; is that correct?

14 THE COURT: All right. I am going
15 to -- you've gone too far. Thank you very
16 much. That's reserved for a later proceeding
17 should that become necessary.

18 CROSS EXAMINATION CONTINUED

19 BY MS. RUPARELIA:

20 Q. Mr. Burke, it's my understanding
21 that you've had some eye problems; is that
22 correct?

23 A. I've had several, many years back.
24 Yeah.

25 Q. And you have something that impairs

1 A. Yes. Very dark.

2 Q. And do you recall the sidewalk that
3 takes you to George Street?

4 A. I never got to George Street. I
5 know where George Street is but I never got
6 there that night.

7 Q. Do you know where the sidewalk is
8 behind the Joseph Bank store, that takes you
9 to George Street?

10 A. The sidewalk?

11 Q. Yes, sir.

12 A. As far as I know the sidewalk
13 probably goes the whole block, but I couldn't
14 tell you for sure.

15 Q. That picture that we originally
16 marked, I am going to hand this back to you,
17 Defendant's Exhibit 1. You testified earlier
18 that you parked to the right side, that you
19 pulled into one of those parking spaces.
20 We've already talked about that. My question
21 was, Mr. Burke, do you see the sidewalk in
22 front of that parking spot?

23 A. You call that a sidewalk?

24 Q. It's not a sidewalk?

25 A. I wouldn't interpret it as a

1 sidewalk.

2 MS. RUPARELIA: Please mark this
3 for identification.

4 COURT REPORTER: Defendant's
5 Exhibit 4 for identification.

6 THE COURT: Okay.

7 CROSS EXAMINATION CONTINUED

8 BY MS. RUPARELIA:

9 Q. Mr. Burke, I am going to show you
10 another photograph that looks kinda of like
11 the one that you have in your hand. Do you
12 recognize that picture?

13 A. Yeah.

14 Q. Do you see the sidewalk right beside
15 that parking spot?

16 A. Yeah, that looks a little bit more
17 like a sidewalk.

18 Q. But you didn't walk on the sidewalk,
19 to get to George Street; is that correct?

20 A. When I opened my car, -- okay,
21 whatever was in front of me was blocked by
22 the car parked over. I knew the booth was
23 over there, and that's the direction that I
24 headed. I didn't know that there was a way
25 down, a way out. Nothing was marked that

1 said that.

2 Q. Do you recall telling the gentleman
3 that helped you that you slipped off the edge
4 of the sidewalk?

5 A. I don't think I told him that. No,
6 I know I didn't tell him that. I didn't slip
7 off the sidewalk. He might have mis-
8 interpreted my definition of the sidewalk or
9 whatever that block is and the sidewalk. But
10 I wasn't out in the street, I was still
11 basically just a couple of feet in front of
12 the booth.

13 Q. Yes, sir. Do you recall telling the
14 gentleman that helped you that you slipped
15 off, though?

16 MR. KHAN: Objection, asked and
17 answered.

18 THE COURT: I'll allow it.

19 CROSS EXAMINATION CONTINUED

20 BY MS. RUPARELIA:

21 Q. Go ahead, Mr. Burke.

22 A. The question again was?

23 Q. Do you recall telling the gentleman
24 that helped you that you slipped off -- that
25 you slipped off?

1 A. I have some prescription glasses.

2 There are not.

3 Q. For reading?

4 A. Yeah, newspapers and things like
5 that. I don't wear them to watch TV or
6 anything like that.

7 Q. The object that described striking
8 as you traversed the area that you described
9 in Exhibit 8, could you see it?

10 A. I see the opening between the two
11 cars.

12 Q. Could you see it when you tripped
13 over it that night?

14 A. No, I didn't see it. I didn't see
15 anything. I was just walking with my
16 intention to go to the game. I certainly
17 didn't want what happened to me to happen.

18 Q. Was the object there marked in any
19 way?

20 A. No.

21 Q. Was there any light on it?

22 A. (Negative gesture).

23 Q. Was there any light on it?

24 A. No.

25 Q. Were there any yellow markings on

1 it?

2 A. No.

3 MR. KHAN: That's all that I
4 have, Your Honor.

5 THE COURT: Okay. Recross?

6 MS. RUPARELIA: None, Your Honor.

7 THE COURT: You may come down.
8 You may assist him.

9 (WITNESS STEPS DOWN)

10 THE COURT: Call your next
11 witness.

12 MR. KHAN: Plaintiff calls Robert
13 Cammer.

14 (WITNESS TAKES STAND)

15 ROBERT CAMMER, having been sworn to
16 tell the truth, and nothing but the truth,
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MR. KHAN:

20 Q. Good afternoon, Mr. Cammer.

21 A. Good afternoon.

22 Q. Where do you live?

23 A. I live in Mount Pleasant.

24 Q. What is your occupation?

25 A. Currently a carhop at Sonic, skating

1 around food, and a fulltime student at the
2 College of Charleston.

3 Q. When do you graduate?

4 A. This Spring.

5 Q. Did you know Robert Burke prior to
6 January 2013?

7 A. No, sir.

8 Q. On the date of January 24th, 2013,
9 what were your plans?

10 A. I was meeting my girlfriend and our
11 roommate at the time at La Hacienda for
12 drinks, possibly dinner.

13 Q. I'm sorry?

14 A. And dinner.

15 Q. Okay. Where is La Hacienda?

16 A. It's on King Street.

17 Q. Where did you park your vehicle that
18 night?

19 A. I parked in the George Street
20 parking lot.

21 Q. Do you know approximately that time
22 you arrived?

23 A. I believe that it was around 8:00,
24 8:30.

25 Q. Are you familiar with what we're

1 the gatehouse, so to speak?

2 A. The entrance?

3 Q. Right.

4 A. Yes.

5 Q. Tell me and the jury what you saw,
6 what you found?

7 A. I heard some kind of commotion. I
8 wasn't really sure what it was, so I just
9 kinda kept walking. Once I got a little bit
10 further, I saw what turned out to be Mr.
11 Burke on the ground sort of, I'd say, halfway
12 up and there were a couple of guys helping
13 him up off the ground. I assumed that was
14 what the commotion was before.

15 Q. Did you hear anything or see
16 anything other than that?

17 A. I heard him groan.

18 Q. I'm handing you what has been marked
19 as Plaintiff's Exhibit 6, do you recognize
20 that document?

21 A. (Upon review), I do.

22 Q. Why do you recognize that document?

23 A. Because when I was being deposed
24 they -- I can't remember the gentleman's name
25 but they asked me to indicate where I found

1 Mr. Burke.

2 Q Is there something on that document
3 that indicates that?

4 A. A red marking. I believe it was a
5 pen. It's an "X" with a circle on it; around
6 it, rather.

7 Q. Did you stop to assist Mr. Burke?

8 A. Yes.

9 Q. Why did you do that?

10 A. These guys were helping him up off
11 the ground and I figured I'd check him out to
12 see, you know, -- I was curious. Once I got
13 a closer look, I realized how -- that he was
14 actually pretty badly hurt.

15 Q. Okay. Where did you take him from
16 there?

17 A. Put his arm around me. He was
18 having trouble walking, just trying to, I
19 guess, get his footing. But put his arm
20 around me and he said, you know, 'My car is
21 right over here.' From where we were
22 standing, I couldn't really see his car. He
23 said, you know, 'it's this kind of car.' I
24 can't remember specifically. But I started
25 looking for it and I couldn't see it, so I

1 said, 'All right, let's just move in that
2 direction.' We kind of shimmed through a
3 couple of cars and, you know, he said 'my
4 keys are in my pocket.' His hands were kind
5 of shaking a little bit. I said, 'I'll get
6 the keys, I'll get the keys.'

7 Q. Taking you back now to where you
8 parked your car. When you parked your car
9 and you were approaching Mr. Burke, could you
10 see?

11 A. In the lot, I could see silhouettes.

12 Q. Is the area that you traversed open?

13 A. Yes.

14 Q. Why is it open? What is there?

15 A. That where the cars drive instead of
16 park.

17 Q. Based on your observations that
18 night, how was the light compared to where
19 you walked and the area between where you
20 found Mr. Burke and his car?

21 A. Where I was walking was fairly well
22 lit. May not well lit, uh, but there was
23 nothing obstructing my view.

24 Q. And how was your observations of the
25 light from where you found Mr. Burke back to

1 his car?

2 A. It was really dark back there.

3 Q. Were you able to make contact with
4 Mr. Burke's daughter?

5 A. Yes.

6 Q. Did she at some point come to the
7 scene?

8 A. Yes.

9 Q. Now, you mentioned your familiarity
10 with the lot and you mentioned that you'd
11 parked there for a semester. Are you aware
12 of any methods of ingress/egress from the
13 lot?

14 A. There's a step of stairs also right
15 against the Joseph A. Bank building.

16 Q. To your knowledge, are those steps
17 marked in any fashion?

18 A. No.

19 Q. To your knowledge, is there any
20 indication on the walkway that those stairs
21 exist?

22 A. There's not.

23 Q. Do you know if there any signage
24 indicating to use those steps?

25 A. I don't. I don't believe there is.

1 Q. What else is in that area of stairs?

2 A. A couple of trees that are often low
3 hanging. People put trashcans over there.
4 I've found dog poop, the hard way, once or
5 twice.

6 Q. When you were assisting Mr. Burke
7 opening his door, do you recall if you had to
8 illuminate the car at all?

9 A. You mean when the light came on in
10 the car or beforehand?

11 Q. Do you recall if you had to use
12 anything to illuminate to see what you were
13 doing?

14 A. Chances are I used my flashlight on
15 my phone. I use that all the time.

16 Q. I just have one more question. I am
17 showing you what is marked as Exhibit 6, that
18 you've testified to that you'd previously
19 marked as to where you found Mr. Burke.

20 A. Yes.

21 Q. And showing you what has been marked
22 as Plaintiff's Exhibit 2, which Mr. Burke was
23 looking at a little while earlier, can you
24 see where he marked where he said he ended
25 up?

1 A. Yes.

2 Q. Where were you -- did you go ahead
3 and go into the game?

4 A. I did. I went ahead and went on in
5 to the game and told him that I'd meet him
6 inside. By the time I had gotten in
7 coliseum, I got the phone call.

8 Q. Where was the basketball game?

9 A. The basketball game was at the
10 College of Charleston Coliseum.

11 Q. This that right on Meeting and
12 George Street?

13 A. Yes.

14 Q. Now, tell me about -- did you
15 receive a phone call?

16 A. I did.

17 Q. All right. Tell the jury about that
18 call?

19 A. Well, my dad was on the phone. He
20 said, 'Ashlyn, I've had an accident.'

21 I said, 'Where are you?' I didn't
22 realize that he was in the parking lot until
23 the young man, Bob, had gotten on the phone
24 and explained to me where they were located
25 at the parking lot. So I knew that George

1 Street was right outside the coliseum, so I
2 just took off.

3 Q. And the guy that you spoke to, that
4 your dad handed the phone, was that Mr.
5 Cammer, the gentlemen that just left?

6 A. Yes.

7 Q. And prior to January 24th, 2013, had
8 you ever meet Mr. Cammer before?

9 A. No.

10 Q. So tell me -- when you got that
11 call, where were you?

12 A. I'd just actually entered the
13 coliseum five minutes before I got the phone
14 call.

15 Q. How far is the coliseum from where
16 you ultimately found your father?

17 A. Out the coliseum doors, take a
18 right, I'd say -- I don't know how many feet.

19 Q. A couple hundred yards?

20 A. Yeah, right around the corner.

21 Q. So what was your response on hearing
22 that your father had been injured? What did
23 you do?

24 A. Well, the first thing I did -- I
25 didn't realize that he has fallen. He just

1 said 'I've had an accident', and then that's
2 when Bob got on the phone and told me where
3 they were at. So I immediately got on the
4 phone and took off out of the coliseum, ran
5 out the front doors to the right, took
6 another right onto George Street and started
7 running down the right hand side of the
8 sidewalk. Then I crossed the street over
9 into the parking lot.

10 Q. So you were running down George
11 Street towards King Street?

12 A. (Affirmative nod), towards King
13 Street.

14 Q. And what had -- where had they told
15 you to go?

16 A. Bob mentioned that they were -- he
17 said, 'Do you know where the parking lot is?'
18 I said, 'Well, I will find it.' I knew that
19 there was a parking lot on George Street. He
20 said 'we're to the right.' So I knew the
21 direction that I was running, I had to go to
22 the right once I got towards the parking lot.

23 Q. All right. Was it your
24 understanding from looking at Plaintiff's
25 Exhibit 2, when he said right, right as of

1 looking at the booth, on the right-hand side?

2 A. Yes.

3 Q. And the booth is in the middle of
4 the George Street lot, correct?

5 A. Yes.

6 Q. Correct?

7 A. Yes.

8 Q. All right. So it was right, left,
9 and you knew that he was on the right?

10 A. Yes.

11 Q. So you charge up George Street.

12 A. (Affirmative nod).

13 Q. Tell me what you did as you were
14 entering this lot?

15 A. Well, there were people coming in
16 this direction and I was going the actual
17 opposite way because the game was about to
18 start. I crossed into the parking lot, I was
19 looking around and around. I saw Bob wave --
20 the other Bob -- and kind of a dim light,
21 which was the actual car light at that time.

22 Q. Now, your father's car -- and that
23 GIS map is hard to -- let me ask you this
24 way, are there four parking spaces -- and I'm
25 going to hand you Defendant's Exhibit 1, are

1 there four parking spaces bumped up against
2 that building?

3 A. In this actual picture?

4 Q. No, just from your recollection?

5 A. I couldn't tell you how many parking
6 spots were there, because it was dark and I
7 was ---

8 Q. How many are shown in that photo-
9 graph?

10 A. (Reviewing).

11 Q. Three?

12 A. Three, (affirmative nod).

13 Q. And do you recall that your father
14 was parked not on either end but in one of
15 the middle spots?

16 A. Yes, because there was -- there were
17 two cars on the side of him, I believe.

18 Q. Okay. So he wasn't parked -- I'll
19 show you Defendant's Exhibit 3, a photograph
20 of a car parked all the way at the end of the
21 lot, by the sidewalk. He was not in that
22 space?

23 A. No.

24 Q. Tell me -- you mentioned that the
25 car door was open.

1 A. Yes, on the driver's side.

2 Q. As a result of the car door being
3 open, was the car's light on?

4 A. Yes.

5 Q. What did you observe?

6 A. Well, as I was getting to my dad, my
7 dad was leaning against the driver's side
8 door. Bob was there and immediately -- at
9 that time my dad was cold. My dad had on a
10 black wool jacket. I went to him and was
11 trying to figure out what was going on, what
12 happened. When I grabbed his shoulder or his
13 elbow, there was blood all over my hand ---

14 MS. RUPARELIA: (Stands).

15 THE COURT: I will allow the
16 question.

17 WITNESS: --- and him. So I
18 asked Bob to run and get the EMT, because I
19 saw when I came out of the coliseum that the
20 ambulance was parked on the corner.

21 DIRECT EXAMINATION CONTINUED

22 BY MR. MCCULLOUGH:

23 Q. This is not a particularly good
24 example but if this is the car and this is
25 the front of the car, you've testified that

1 Bob and Bob were on the driver's side.

2 Correct?

3 A. Correct.

4 Q. So you're coming from this direction
5 from George Street?

6 A. Yes.

7 Q. Went to the right?

8 A. Yes.

9 Q. The car door was open?

10 A. Um-humm, (affirmative nod).

11 THE COURT: Is that a "yes"?

12 WITNESS: Yes. Sorry.

13 MR. MCCULLOUGH: Remember to speak.

14 She's (court reporter) has got the hardest
15 job.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. MCCULLOUGH:

18 Q. So as you come around, the car light
19 -- was it illuminated?

20 A. Yes.

21 Q. Does that help you observe Bob and
22 Bob, your father?

23 A. That was really the reason why I
24 found them leaning against the car, was
25 because of the car light.

1 Q. What did you do -- you sent Bob to
2 go find the EMT?

3 A. Yes.

4 Q. What did you do?

5 A. I -- my mom always keeps a roll of
6 paper towels in the car. I grabbed the paper
7 towels and I just started kinda like wrapping
8 it around my dad. I couldn't tell how blood
9 was there. So then I took him, I said,
10 'let's get you in the car, I'm going to take
11 you to the hospital.' I could not tell how
12 bad he was injured. He kept complaining
13 about his elbow, shoulder and his knee. I
14 got out my iPhone with the flashlight. I
15 opened the passenger side door and was trying
16 to get my dad to sit down in the passenger
17 side while I had my iPhone flashlight out.

18 Q. Why did you need your iPhone flash-
19 light?

20 A. Because you couldn't see anything.
21 It was dark. I mean, it was pitch black.

22 Q. What was your dad's -- I don't mean
23 his physical condition but what was his
24 emotional condition at that point?

25 A. He was just -- he was really shaken

1 up, startled, kind of like excited, jittery.

2 You know, just in shock pretty much.

3 Q. Did he tell you what had happened?

4 A. He said basically like, 'I tripped,
5 I tripped.' He kept saying, "It's so damn
6 dark that I can't see anything." That's his
7 exact words.

8 Q. Did you eventually, with the
9 flashlight and the door being open, get him
10 in the car?

11 A. I eventually got him in the
12 passenger seat. As I was putting him into --
13 moved his legs around into the passenger
14 seat, he kept complaining that his knee,
15 shoulder, elbow was stiffening up on him.

16 Q. What was your plan?

17 A. My plan was at that point to get him
18 to the hospital as quick as I could because I
19 didn't know what was going on. I just knew
20 that the car was covered in blood, I was, he
21 was. I didn't know what was going on, so I
22 wanted to get him to the emergency room as
23 quick as possible.

24 Q. And did you start that process by
25 backing your vehicle out?

1 A. Yes.

2 Q. All right. And did the EMS show up?

3 A. Yes.

4 Q. All right. Walk the jury through
5 that.

6 THE COURT: That is as far as I am
7 going to let you go with that.

8 MR. MCCULLOUGH: This is -- no,
9 sir, this -- may I approach?

10 THE COURT: Yes.

11 (OFF RECORD SIDEBAR)

12 THE COURT: I will allow that
13 area.

14 MR. MCCULLOUGH: Thank you, Your
15 Honor.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. MCCULLOUGH:

18 Q. As you were pulling out, the EMT
19 showed up?

20 A. Yes, the EMT showed up. When the
21 EMT showed up, I got out of the car, came
22 around. There were two EMT's. Both EMT's
23 -- one said, 'you've got to get a flash-
24 light...' ---

25 MS. RUPARELIA: Objection to

1 hearsay, Your Honor.

2 THE COURT: Sustained.

3 DIRECT EXAMINATION CONTINUED

4 BY MR. MCCULLOUGH:

5 Q. Don't tell the jury what they said.
6 What happened?

7 A. Basically they needed a flashlight.
8 One EMT held the flashlight while the other
9 EMT checked out my dad. We had the door car
10 open, so we had the light from the car and
11 the EMT also had the flashlight shining on my
12 dad.

13 Q. Were they using the flashlight so
14 that they could see your dad?

15 A. Yes, because they could not see
16 anything.

17 MR. MCCULLOUGH: Thank you, Your
18 Honor. That's all I've got.

19 THE COURT: Very well. Cross
20 examine?

21 MS. RUPARELIA: Yes, Your Honor.

22 CROSS EXAMINATION

23 BY MS. RUPARELIA:

24 Q. Miss Burke, Mr. Burke is your dad;
25 is that correct?

1 from the Summerville direction at 8:00
2 o'clock, you spent a little while on the
3 interstate, about an hour and twenty minutes
4 to get here, to drive thirty-seven miles.
5 Lots of fun, got to look at lots of people.
6 I hope that you have an uneventful evening.

7 We are ready to resume. Ms.
8 Bronklutz?

9 JUROR NUMBER 28: Yes, sir.

10 THE COURT: You are Juror Number
11 28?

12 JUROR NUMBER 28: Yes, sir.

13 THE COURT: You have been selected
14 as the presiding juror. That, of course,
15 will be your seat for the balance of the
16 trial. Thank you all. We stopped -- is
17 your next witness a deposition, publishing
18 the deposition?

19 MR. KHAN: Your Honor, we are
20 going to call Colleen Carducci.

21 (WITNESS TAKES STAND)

22 COLLEEN CARDUCCI, having been sworn
23 to tell the truth, and nothing but the truth,
24 testified as follows:

25 DIRECT EXAMINATION

1 BY MR. KHAN:

2 Q. Where do you work?

3 A. I work for the City of Charleston.

4 Q. How long have you been employed with
5 the City?

6 A. About eleven and a half years.

7 Q. Which year did you start?

8 A. 2003.

9 Q. What is your position at the City?

10 A. I am the Director of Real Estate
11 Management.

12 Q. Are you also responsible for
13 managing the City's parking contracts?

14 A. I am.

15 Q. In January of 2013, which company
16 was hired by the City to operate and manage
17 the City parking facilities?

18 A. In January of 2013 we hired ---
19 (pause).

20 Q. Who was the contractor at that time?

21 A. In January 2013, it was Republic
22 Parking.

23 Q. Was that to control and operate all
24 the parking facilities in the City?

25 A. Correct.

1 Q. Are you talking about parking lots?

2 A. Parking lots and garages.

3 Q. Okay. Were they also responsible in
4 any form for the meters?

5 A. They collected revenue from the
6 meters.

7 Q. Is the City of Charleston in the
8 parking management business?

9 A. We own the facilities and we
10 contract the management.

11 Q. When you came to work at City, was
12 Republic Parking managing and operating the
13 facilities?

14 A. Yes, they were.

15 Q. Okay. Was that for a period of
16 years prior to your arrival?

17 A. Correct.

18 Q. Do you know approximately how long?

19 A. It was in the -- I believe in the
20 1990's that the City contracted out the
21 parking management services.

22 Q. Until when did Republic generally
23 manage and operate these facilities?

24 A. Until we went through a new request
25 for proposals in mid 2013 and contracted with

1 a different company.

2 Q. And when we talk about the City --
3 you mentioned garages, correct?

4 A. Yes.

5 Q. And you mentioned lots?

6 A. Yes.

7 Q. And some form of meter collection as
8 well?

9 A. Correct.

10 Q. And did the City retain any
11 management over any of the facilities
12 regarding parking in the city?

13 A. No.

14 Q. In 2007, did the City request new
15 proposals from different contractors?

16 A. We did.

17 Q. And was that not just from Republic?

18 A. Correct. It was bid and advertised
19 for proposals from multiple companies.

20 Q. Did Republic respond to that request
21 for proposal?

22 A. Yes, they did.

23 Q. Were you involved in that process?

24 A. I was.

25 Q. Were you involved in reviewing

1 Republic's proposal in 2007?

2 A. Yes, I was.

3 MR. KHAN: (Tenders document to
4 be marked as exhibit).

5 COURT REPORTER: Plaintiff's
6 Exhibit 9 for identification.

7 DIRECT EXAMINATION CONTINUED

8 BY MR. KHAN:

9 Q. Ms. Carducci, I am presenting you
10 Plaintiff's Exhibit 9. Do you recognize that
11 document?

12 A. I do.

13 Q. What is that document?

14 A. It is the response from Republic
15 Parking to the solicitation for parking
16 services in 2007.

17 Q. Was that Republic's proposal to the
18 City to operating their facilities moving
19 forward at that time?

20 A. It was.

21 Q. Was that the document that the City
22 of Charleston reviewed in order to make its
23 decision?

24 A. Yes.

25 MR. KHAN: Your Honor, at this

1 time, I would like to move Exhibit 9 into
2 evidence.

3 THE COURT: Is there any
4 objection?

5 MS. RUPARELIA: No objection.

6 THE COURT: Without objection,
7 Plaintiff's 9 is admitted.

8 (SO ENTERED AS PLAINTIFF'S EXHIBIT 9)

9 DIRECT EXAMINATION CONTINUED

10 BY MR. KHAN:

11 Q. This is a pretty thick document,
12 correct?

13 A. Correct.

14 Q. Was Republic's intent to extend the
15 contract with the City?

16 A. Yes.

17 Q. Was this their offer as to what
18 services that they would provide?

19 A. Yes.

20 Q. Did the City agree to hire Republic
21 again?

22 A. We did.

23 Q. Was ultimately a new contract
24 entered?

25 A. Yes.

1 Q. Do you know approximately when?

2 A. Not exactly.

3 Q. Were you involved in the process of
4 entering into a new contract with Republic?

5 A. Yes, I was.

6 Q. I am going to show you what has
7 already been marked and entered into evidence
8 as Plaintiff's Exhibit 7, do you recognize
9 that document?

10 A. Yes, this was our document. So the
11 date was May of 2008.

12 Q. When you say that 'this was our
13 document', ---

14 A. The contract.

15 Q. Who signs that contract on behalf of
16 the City?

17 A. The mayor.

18 Q. We are here today about a specific
19 parking lot that we've been referring to the
20 George Street parking lot. Are you familiar
21 with that lot?

22 A. I am.

23 Q. Is that a public parking lot?

24 A. It is.

25 Q. Are all welcome to park there?

1 A. Yes.

2 Q. Do you have to pay to park there?

3 A. Yes.

4 Q. Now, does the City actually own the
5 George Street parking lot?

6 A. We do not. We lease the parking lot
7 from multiple property owners.

8 Q. Do those property owners retain any
9 form of control over that parking lot?

10 A. No, they do not.

11 Q. Does the City retain any form of
12 control over that parking lot?

13 A. We have our parking contract for the
14 management, so I guess that would be some
15 sort of control but -- yes. And we have the
16 lease rights.

17 Q. But you hired Republic to operate
18 and management that lot?

19 A. They do. That's correct.

20 Q. Once that Agreement that you are
21 holding was in place, who was responsible for
22 the facilities of the City's parking garages
23 and lots?

24 A. Republic Parking.

25 Q. That included the George Street

1 parking lot?

2 A. It did.

3 Q. Did the City rely on Republic to
4 manage and operate its parking facilities?

5 A. Yes, we did.

6 Q. Did the City turn over control to
7 Republic of these parking facilities?

8 A. Yes, we did.

9 Q. Do you know if Republic had
10 supervisors and managers here in Charleston?

11 A. Yes.

12 Q. Do you know if they hired and fired
13 employees to run these parking lots?

14 A. Yes.

15 Q. Do you know who controlled access to
16 and from those parking lots?

17 A. There was a gate attendant hired by
18 Republic Parking.

19 Q. Those were Republic's employees?

20 A. Yes.

21 Q. Did Republic have employees on site
22 at all these facilities during the hours of
23 operation?

24 A. Yes.

25 Q. Did the City have employees on site

1 during the hours and operation of these lots?

2 A. No.

3 Q. Does the City have parking
4 personnel?

5 A. No. We have meter repair personnel
6 for the parking meters but we do not have
7 operational parking people.

8 Q. Who took the money from patrons as
9 they parked in these facilities?

10 A. Republic Parking employees collected
11 the fees for parking.

12 Q. Do they then take custody of all
13 these fees?

14 A. They deposit it in an account for
15 the City.

16 Q. Who was in charge of maintenance for
17 the lots and facilities?

18 A. Republic Parking

19 Q. Did Republic manage the day to day
20 operations of the lots?

21 A. Yes.

22 Q. It has been contended that Republic
23 was merely ---

24 MS. RUPARELIA: Objection.

25 Leading, Your Honor.

1 THE COURT: I don't know the
2 question yet. Go ahead and finish stating
3 your question.

4 MR. KHAN: Sure.

5 DIRECT EXAMINATION CONTINUED

6 BY MR. KHAN:

7 Q. It has been contended that Republic
8 was merely toll collectors for the City. Is
9 that your understanding?

10 MS. RUPARELIA: Same objection.

11 THE COURT: I sustain the
12 objection.

13 DIRECT EXAMINATION CONTINUED

14 BY MR. KHAN:

15 Q. Does Republic -- do you know if
16 Republic does more than simply collect money?

17 A. It was our expectation according to
18 the contract that they did more than collect
19 money, yes.

20 Q. Did they actually do more than
21 collect money?

22 A. Yes, they did.

23 Q. Whose responsible for keeping the
24 lots free from hazardous conditions?

25 A. Republic Parking.

1 Q. I am going to refer you, Ms.
2 Carducci, to a few sections of Plaintiff's
3 Exhibit 7. The first section that I am
4 going to go to is Section 3.5. Just let me
5 know when you locate that.

6 A. I have.

7 Q. Section 3.5 is labeled Basic Terms.
8 Correct?

9 A. Yes.

10 Q. And it states, "Attached as Exhibit
11 B and incorporated herein by reference is the
12 scope of services of this Agreement, which is
13 hereby agreed to by the parties." Did I read
14 that correctly?

15 A. Yes.

16 Q. If you will look to the last page,
17 Exhibit B, Scope of Services.

18 A. Okay.

19 Q. (Reading): "Exhibit B, Scope of
20 Services. Republic Parking accepts the
21 appointment as Parking Facilities Operator to
22 operate, manage and maintain the City of
23 Charleston's parking facilities and collect
24 Parking Meter Revenue, where efficient,
25 economical, and professional delivery of

1 *services is a primary consideration. The*
2 *Parking Facilities shall be operated as a*
3 *first-class commercial public parking*
4 *facility with energy, fidelity, and*
5 *diligence, respectful of the culture it*
6 *serves, and in full compliance with all terms*
7 *and conditions contained in this Agreement."*
8 Did I read that correctly?

9 A. Yes.

10 Q. If I may direct you to Section 4.1

11 A. Okay.

12 Q. "Article IV, Maintenance and Repairs
13 *of the Parking Facility."* Are you following
14 me?

15 A. Yes.

16 Q. Section 4.1, Maintenance of the
17 *Parking Facility:*

18 (a) General Upkeep

19 (1) Republic shall, as part of the
20 *Operating Advance, perform the following:*

21 (a) Make regular and frequent
22 *inspections to determine whether maintenance,*
23 *repair and/or replacement of the Parking*
24 *Facilities is required.*

25 (b) Keep the Parking Facilities in

1 *a properly maintained state, free from*
2 *hazardous condition and deterioration, normal*
3 *wear and tear excepted.*

4 Did I read that correctly?

5 A. Yes.

6 Q. And on the next page, Ms. Carducci,
7 (reading):

8 "(b) The physical facilities provide
9 to Republic for the term of the Agreement
10 shall become the responsibility of Republic
11 and shall be returned the City upon the
12 termination of this Agreement..." -- did I read
13 that correctly?

14 A. Yes.

15 Q. Under that, (reading):

16 a) Be responsible for preventative
17 maintenance and repair of all the Parking
18 Facilities under this Agreement, which cost
19 shall be reimbursed by the City."

20 Did I read that correctly?

21 A. Yes.

22 Q. (Reading):

23 b) Promptly inform the City of the
24 need for major repairs, replacements,
25 elevator repair, painting and patching for

1 the Parking Facilities.

2 Did I read that correctly?

3 A. Yes.

4 Q. (Reading):

5 c) Negotiate and/or oversee
6 contracts using qualified or certified (if
7 required) personal for landscaping, repairs,
8 painting or patching for the Parking
9 Facilities, if requested by the City to do
10 so.

11 Did I read that correctly?

12 A. Yes.

13 Q. Then if you flip to Equipment,
14 (reading):

15 (2) Republic, as part of the
16 Operating Advance:

17 b) Shall be responsible for the
18 maintenance of all equipment required to
19 properly operate the Parking Facilities... --
20 did I read that correctly?

21 A. Yes.

22 Q. (Reading):

23 c) Shall maintain said equipment,
24 furnishings and pictures during the term of
25 this Agreement. Did I read that correctly?

1 A. Yes.

2 Q. And, (reading):

3 e) Shall replace all equipment,
4 materials and supplies worn out or expended
5 in the operations or maintenance of the
6 Parking Facilities.

7 Did I read that correctly?

8 A. Yes.

9 Q. Earlier you testified that as far as
10 the City was concerned -- I believe that you
11 said that they were more than a toll
12 collector. Correct?

13 A. Correct.

14 Q. The provisions of the agreement
15 which we read, does that support that
16 indication?

17 A. Yes.

18 Q. At times did the City assist
19 Republic Parking with specific repairs at
20 various facilities within the city?

21 A. Yes.

22 Q. And -- why?

23 A. If we had facility staff available
24 to do repairs or maintenance in the
25 garage(s), the City could do that work in

1 house instead of contracting it out; which
2 the City would pay for the contract services.

3 Q. Who would request those services
4 from the City?

5 A. Republic Parking.

6 Q. Was the City out there proactively
7 doing repairs?

8 A. No.

9 Q. As I understand, Republic Parking
10 made those requests to the City?

11 A. Yes.

12 Q. And why would the City do it in
13 house? If they didn't do it in house, would
14 it end up having to pay someone else to do
15 it?

16 A. Correct. That would be correct.

17 Q. Is the City of Charleston, to your
18 understanding, experts in parking?

19 A. No.

20 Q. Why does the City of Charleston hire
21 a national company like Republic Parking to
22 manage and control its parking facilities?

23 A. So that we can have the expertise
24 assisting the City with the management of the
25 parking facilities.

1 Q. To your knowledge, did Republic ever
2 notify the City of any deficiencies with
3 respect to lighting at the George Street
4 parking lot?

5 A. Not that I am aware of.

6 Q. Had they done so, would the City
7 have addressed it?

8 A. Yes.

9 Q. How would that have worked had that
10 happened?

11 A. The usual way for that type of issue
12 to be raised to the City would be in a work
13 order to our facilities staff. Then they
14 would either request that Republic have a
15 contractor, an electrician, go check the
16 lights or the City electrician would have the
17 option of going out there and doing a test
18 and inspection of the lot for the lighting,
19 to see if it was meeting code.

20 Q. Let's say something substantial
21 happened, the addition of lights or the
22 addition of some sort of equipment at a lot
23 or garage, would the City expect Republic to
24 pay for that?

25 A. No. The City would pay for the cost

1 of the repairs or replacements.

2 Q. Under the Agreement that we looked
3 at, is it your understanding that Republic
4 had to notify the City of insufficiencies?

5 A. Yes.

6 Q. What about hazardous conditions?

7 A. Yes.

8 Q. And if warranted the City and
9 Republic would address how to deal with it
10 and who would pay for it?

11 A. The City would pay for it.

12 Q. Okay. Now, did the City at times
13 through a City employee inspect, for whatever
14 reason, its various garages and parking lots?

15 A. Yes.

16 Q. Okay. In what type of situation?

17 A. Our procurement office has a
18 contracts person who would go out during
19 daytime hours to inspect the lot, or lots and
20 garages, on a perhaps monthly or bimonthly
21 basis to ensure that it is being kept clean
22 and free of perhaps any major issues. So it
23 was just a general inspection, they would
24 check the bathrooms and things to make sure
25 that they were keeping it clean and okay for

1 the people using the facility.

2 Q. I assume that generally those were
3 done during business hours?

4 A. That's correct.

5 Q. I am not going to walk through the
6 rest of the Agreement, but are you familiar
7 with the remainder of the Agreement in
8 general terms?

9 A. Yes.

10 Q. Does it provide for things staffing,
11 which Republic agreed to provide?

12 A. Yes.

13 Q. Does it provide for things like
14 uniforms and things of that nature?

15 A. Yes.

16 Q. Are you aware of any other
17 requirements on the City of Charleston in
18 that agreement?

19 A. Well, we are required to pay for the
20 quarterly advances and expenses relating to
21 the management of the lots and garages. We
22 pay for staff and such like that. We had the
23 right to do periodic inspections, that type
24 thing.

25 Q. Other than what we've talked about

1 and other than money, exchange of money,
2 other than what we've talked about, is there
3 anything else significant to your knowledge?

4 A. No.

5 MR. KHAN: Thank you, Your Honor,
6 that's all that I have. Ms. Carducci, the
7 other attorneys may have some additional
8 questions.

9 THE COURT: Cross examine?

10 MS. RUPARELIA: Thank you, Your
11 Honor. Beg the court's indulgence.

12 THE COURT: Sure. Take your time.

13 CROSS-EXAMINATION

14 BY MS. RUPARELIN:

15 Q. Ms. Carducci, good morning.

16 A. Good morning.

17 Q. Let me ask you a question. You
18 mentioned that the City leases the property
19 on which the parking lot sits from multiple
20 property owners?

21 A. Correct.

22 Q. And who is Indigo Realty?

23 A. They're one of the landlords or
24 property owners.

25 Q. Okay. And do you pay rent to, for

1 instance, Indigo Realty?

2 A. We do.

3 Q. Okay. And before Republic became
4 the manager of that parking lot, isn't it
5 true that the City of Charleston managed that
6 parking lot?

7 A. Correct.

8 Q. And the parking lot has, in fact,
9 been in existence since close to 1978, 1980,
10 something like that; in that time frame?

11 A. I believe so.

12 Q. Yes, ma'am. And from 1978 or '80 up
13 until 1997, '98, the City of Charleston
14 managed that parking lot?

15 A. That's my understanding.

16 Q. Now, we talked a little bit -- or
17 you talked a little bit earlier about the
18 bidding process. It's a beauty contest, is
19 it not, essentially for vendors to bid for
20 the City's park?

21 A. I don't understand the question.

22 Q. And that was a poorly worded
23 question. But if the City wants to contract
24 out parking management services, it puts out
25 a request for proposal; isn't that what it's

1 called?

2 A. Correct.

3 Q. And how many people, let's say, do
4 you get input from or proposals from once you
5 put out an RFP?

6 A. It varies.

7 Q. Okay. Do you have any idea how many
8 people competed the last time in 2013?

9 A. I don't remember exactly but I
10 believe there was three or four.

11 Q. Okay. And so you take submissions
12 from three or four vendors?

13 A. Yes.

14 Q. And you pick a winner?

15 A. We have a selection committee that
16 is appointed. And the committee reviews the
17 proposals and has the ability to have
18 presentations as well.

19 Q. Okay, interviews in person?

20 A. Correct.

21 Q. And at the end of that whole process
22 after everybody has turned in their proposals.

23 ---

24 A. Right.

25 Q. --- which I think you have one in

1 front of you?

2 A. I do. I have Republic's.

3 Q. And so you would have four of these
4 or five of these or however many people that
5 bid?

6 A. Correct.

7 Q. And you have an interview process?

8 A. Yes.

9 Q. And then at the end of that
10 interview process you pick -- in this
11 instance, in 2007, it was Republic?

12 A. Correct.

13 Q. And then you enter into a contract?

14 A. Yes.

15 Q. Which is that contract in front of
16 you?

17 A. That is correct.

18 Q. Plaintiff's Exhibit Number 7?

19 A. Correct.

20 Q. And isn't it true that not
21 everything that is in this proposal is then
22 incorporated into that contract?

23 A. I'm not exactly sure if it's in here
24 but typically our contracts attach the
25 proposal as an exhibit.

1 Q. Okay. But in terms of -- and I know
2 it's probably not a very good question either
3 -- but everything that Republic says that it
4 can do, because in this proposal it outlines
5 its capabilities; correct?

6 A. Yes.

7 Q. And then the City picks and chooses
8 what it wants Republic to do; correct?

9 A. They responded specifically to the
10 RFP, which required certain things.

11 Q. Okay.

12 A. The response and the contract were
13 based on those expectations.

14 Q. And when the contract is entered
15 into, at the end of the day, the contract
16 outlines who's supposed to do what?

17 A. Correct.

18 Q. Okay. And I'm just going to refer
19 you to some sections of that agreement. On
20 the very first page, under the Recitals?

21 A. Yes.

22 Q. Under the first WHEREAS clause?

23 A. Yes.

24 Q. It says, "WHEREAS, the City owns,
25 controls and regulates off-street parking

1 facilities owned by the City."

2 A. Yes.

3 Q. Isn't that correct?

4 A. Yes.

5 Q. And that would include all of those
6 light posts and lighting fixtures that are in
7 that parking lot; is that correct?

8 A. (No verbal response).

9 Q. Those light fixtures don't belong to
10 Republic?

11 A. Correct.

12 Q. And then if you will flip over to
13 the Article 4, Section 4.1 talks about
14 maintenance of the parking facility; is that
15 correct?

16 A. Correct.

17 Q. And it talks about for instances, in
18 (c) it says, (reading):

19 "Maintain the parking facilities in
20 a clean and neat fashion ensuring that all
21 trash, bottles and papers and other dirt and
22 debris are routinely removed and disposed
23 of...;" -- is that right?

24 A. Yes.

25 Q. For instance, (d) says -- or (e)

1 says, (reading):

2 "Furnish the supplies and
3 housekeeping equipment needed...?"

4 A. Yes.

5 Q. And then in (f) says, (reading):

6 "Perform minor repairs to the parking
7 facilities, including but not limited to
8 relamping...?"

9 A. Correct.

10 Q. Which what do you understand relamp-
11 ing to be?

12 A. Replacing light bulbs or ballasts in
13 the ---

14 Q. So it was Republic's job obviously
15 to replace -- it essentially does say
16 "...including, but not limited to, relamping...,"
17 meaning replacing. And then, "...minor
18 electrical repairs..." and then it says,
19 "...which its staff is capable of performing in
20 a safe and efficient manner?"

21 A. Correct.

22 Q. Does that tell you that the City
23 would do those tasks that the staff is not
24 capable of performing in a safe and efficient
25 manner?

1 A. Yes, I believe it says that they are
2 to notify us of those items that they cannot
3 handle.

4 Q. Yes, ma'am. And, for instance, if a
5 bucket truck is needed to change out a light
6 bulb that cannot be reached by a ladder, the
7 City would bring the bucket truck?

8 A. We could, yes.

9 Q. And they have in the past?

10 A. They have done that. Uh-huh.

11 Q. Yes, ma'am. And if you flip over to
12 the next page, under the sub-section that's
13 marked (b) under Facilities, under number
14 (1)?

15 A. Yes.

16 Q. It says, (reading): *"The physical*
17 *facilities provided to Republic for the term*
18 *of the Agreement, become the responsibility*
19 *of Republic and shall be returned to the City*
20 *upon termination of this Agreement in the*
21 *same condition in which they were provided to*
22 *Republic...;"* is that correct?

23 A. Correct.

24 Q. If you flip over to the next page
25 under the big paragraph (2). Part (b) says,

1 (reading):

2 "Republic shall be responsible for the
3 maintenance of all equipment required...;" is
4 that correct?

5 A. Correct.

6 Q. And then Part (c) says, "Republic
7 shall maintain said equipment furnishing and
8 fixtures during the terms of this agreement?"

9 A. Yes.

10 Q. And nowhere in there does it say
11 anything about adding lighting; is that
12 correct?

13 A. It doesn't say that.

14 Q. Yes, ma'am. Part (e) says, "...shall
15 replace all equipment, materials and supplies
16 worn out or expended in the operation or
17 maintenance of the parking facilities;" is
18 that correct?

19 A. Correct.

20 Q. And relamping or replacement of
21 light bulbs would be something that would
22 fall under that. The light bulbs are worn
23 out or they die out, and Republic would
24 replace the light bulbs?

25 A. Yes.

1 Q. Now, Ms. Carducci, you understand,
2 and I think you've testified earlier today,
3 that the City does, in fact, inspect this
4 parking lot as well as other parking
5 facilities; is that correct?

6 A. There is someone who does that.

7 Q. Yes, ma'am. And that gentleman is
8 Mr. Scott Maxie?

9 A. Yes, currently.

10 Q. He goes around and inspects these
11 parking lots?

12 A. Uh-huh.

13 Q. And he inspects, for instance, for
14 parking signage and posting; is that correct?

15 A. Yes.

16 Q. And he inspects the meters?

17 A. Inspects the meters; right.

18 Q. Yes, ma'am. Are you familiar with
19 the inspection checklists that are ---

20 A. I don't always review those.

21 Q. Okay. You don't review those?

22 A. Uh-uh.

23 Q. And those -- would it surprise you
24 that he inspects, for instance, the meters?

25 A. (No verbal response)

1 Q. And rates them as whether they're
2 acceptable or not?

3 A. Whether they're working or not?

4 Q. Yes, ma'am?

5 A. Uh-huh.

6 Q. Okay. And he inspects the parking
7 entrance?

8 A. Right.

9 Q. And you understand that he inspects
10 -- is it your understanding also that he
11 inspects the lighting?

12 A. He does these during daytime hours.
13 So in the garages, yes, if the lights are
14 out, he would report that.

15 Q. Okay. And, in fact, these
16 inspections are done every month; is that
17 correct?

18 A. Yes. It was a rating system.

19 Q. And you're right. It was
20 Acceptable, Needs Improvement, Concern,
21 Unacceptable?

22 A. Right.

23 Q. That's the rating scale?

24 A. Yes, rating Republic's, what they're
25 providing.

1 Q. And then these inspections are then
2 provided to, for instance, Republic, who
3 manages the parking lot?

4 A. Yes.

5 Q. And if there are concerns that are
6 noted in the inspection, Republic is provided
7 and told what to do; is that correct?

8 A. They're provided that list. I don't
9 know that it comes with they're told what to
10 do. But they're provided where there are
11 deficiencies.

12 Q. Okay. So, for instance, and I'm
13 going to show you what's marked ---

14 MS. RUPARELIN: We're just going
15 to mark it for identification purposes.

16 THE COURT: All right.

17 COURT REPORTER: Thank you.

18 Defendant's Exhibit Number 5 for identifi-
19 cation.

20 MS. RUPARELIN: Yes, ma'am. And I
21 apologize.

22 (SO MARKED AS DEFENDANT'S EXHIBIT 5)

23 CROSS-EXAMINATION CONTINUED

24 BY MS. RUPARELIN:

25 Q. Ms. Carducci, what is the caption or

1 the header on that particular piece of paper?

2 A. It's procurement division -- you
3 mean the caption?

4 Q. Yes, ma'am.

5 A. In the box?

6 Q. In the header, yes, ma'am?

7 A. George Society Street Parking Lot.

8 Q. Okay. And what is the date on that
9 document?

10 A. June of 2013.

11 Q. Okay. And then I have another one.

12 MS. RUPARELIN: Madam Court
13 Reporter if you can mark that as the next
14 one?

15 COURT REPORTER: Defendant's
16 Exhibit 6 for identification.

17 (SO MARKED AS DEFENDANT'S EXHIBIT 6)

18 CROSS-EXAMINATION CONTINUED

19 BY MS. RUPARELIN:

20 Q. Is this another similar document?

21 A. Yes, it is.

22 Q. And it's dated what?

23 A. January 4th, 2013.

24 Q. And that is a reflection of the
25 inspection that was done by Mr. Maxie on

1 January of 2013?

2 A. Correct.

3 Q. And it was for the George/Society
4 Parking Lot?

5 A. It was.

6 Q. Okay. And you will see where it
7 says at the bottom whether there were any
8 concerns for that particular lot? What does
9 it say?

10 A. It says, (reading): "Noted
11 improvements in the leaf and trash debris
12 from previous inspection and no discrepancies
13 found during inspections."

14 Q. Okay.

15 MS. RUPARELIN: Your Honor, I'm
16 going to move the -- introduce these exhibits
17 into evidence.

18 MR. KHAN: No objection.

19 THE COURT: Without objection,
20 Defendants 5 and 6 are admitted.

21 (SO ENTERED AS DEFENDANT'S EXHIBIT 5)

22 (SO ENTERED AS DEFENDANT'S EXHIBIT 6)

23 CROSS-EXAMINATION CONTINUED

24 BY MS. RUPARELIN:

25 Q. And Ms. Carducci, you didn't get

1 word of Mr. Burke's fall until there was a
2 lawsuit in this case; is that correct?

3 A. Correct.

4 Q. And after you received notice of Mr.
5 Burke's fall, did you initiate any action on
6 behalf of the City?

7 MR. KHAN: Objection, Your Honor.
8 May we approach?

9 (OFF RECORD BENCH CONFERENCE)

10 THE COURT: At this point, I'm
11 going to sustain the objection in this
12 portion of the proceeding, okay?

13 MS. RUPARELIN: Okay. All right.

14 THE COURT: You may revisit that
15 if necessary later.

16 MS. RUPARELIN: Yes, sir.

17 THE COURT: Thank you.

18 (BRIEF PAUSE)

19 THE COURT: Approach, please, one
20 other thing.

21 (OFF RECORD BENCH CONFERENCE)

22 BAILIFF WILLIAMS: Your Honor, can we
23 have a break at this time?

24 THE COURT: Sure, absolutely.

25 We'll take a recess at this point. Take

1 about ten or fifteen minutes. Thank you.

2 (JURY OUT @ 10:36 A.M.)

3 THE COURT: We'll be at ease.

4 MR. KHAN: Thank you, Your Honor.

5 THE COURT: You may -- Ms.

6 Carducci, you may step down. I'd ask you not
7 to have any conversation with any of the
8 attorneys, please.

9 THE WITNESS: Okay.

10 (BRIEF RECESS)

11 (JURY IN 10:48 A.M.)

12 CROSS-EXAMINATION CONTINUED

13 BY MS. RUPARELIN:

14 Q. Ms. Carducci, your primary point of
15 contact with Republic is Mr. Potter, Dwight
16 Potter?

17 A. Correct.

18 Q. And you'd worked with him before on
19 the management issues?

20 A. Yes.

21 Q. Okay. And in your opinion, Republic
22 Parking did a good job managing that George
23 Street parking lot?

24 A. I mean, they managed the facilities,
25 all of them.

1 Q. Yes, ma'am. And you were satisfied
2 with their performance; is that correct?

3 A. In some aspects, yes.

4 MS. RUPARELIN: Your Honor --
5 (tenders deposition to the bench).

6 THE COURT: Exhibit 3?

7 COURT REPORTER: Court's Exhibit 3.
8 Yes, sir.

9 (SO ENTERED AS COURT'S EXHIBIT 3)

10 THE COURT: Court's Exhibit 3 will
11 be the original transcript of the deposition
12 of Ms. Colleen Carducci, which was taken in
13 this matter on September the 23rd, 2014.
14 Portions will be published now pursuant to
15 our rules.

16 MS. RUPARELIN: Thank you.

17 CROSS-EXAMINATION CONTINUED

18 BY MS. RUPARELIN:

19 Q. Ms. Carducci, can you flip to Page
20 53 of your deposition, please?

21 A. Yes, I'm there.

22 Q. Okay. In Line 10 you were asked the
23 question, "*Did they do a good job in managing*
24 *the parking lot?*" What was your answer?

25 A. (Upon review) -- I said, "*I believe*

1 *they did."*

2 Q. And the question later on was -- at
3 (Line) 21, (reading): *"To your knowledge was*
4 *the City satisfied with what Republic did*
5 *regarding the maintenance and lighting in the*
6 *parking lot prior to Mr. Burke's fall?"* What
7 was your answer?

8 A. *"As far as I'm aware, they responded*
9 *if there were any issues."*

10 Q. And the question was, *"And so the*
11 *City was satisfied?"*

12 A. *"Yes."*

13 Q. Okay. And are you telling us
14 something different today?

15 A. In this case I wasn't aware of any
16 issues. And so generally in this context,
17 you're correct, that I was satisfied because
18 I wasn't aware of any other issues relating
19 to this. Yes.

20 Q. And when you say "this," you mean...

21 A. The operation of the lot, yes.

22 Q. That's what you were -- when you
23 said, "relating to this," I just wanted to be
24 ---

25 A. Yes. Yes.

1 Q. Okay. Okay. And before Mr. Burke's
2 fall, there had been no other reported
3 similar incidents or any in that George
4 Street parking lot; is that correct?

5 A. Not that I'm aware of.

6 Q. Yes, ma'am. And you were not aware
7 of any complaints that were ever made by the
8 City to Republic about the lighting prior to
9 Mr. Burke's fall?

10 A. Correct. Not that I'm aware of.

11 Q. And to your knowledge, the City was
12 satisfied with Republic's efforts to maintain
13 that lighting prior to Mr. Burke's fall; was
14 it not?

15 A. I'm not aware of anything, other
16 than that, yes.

17 Q. When you say "other than that" ---

18 A. I'm not aware that there were any
19 other reports of lighting issues.

20 Q. Okay. Other than the issue that has
21 since risen with Mr. Burke's fall?

22 A. Correct.

23 Q. Okay. And it's your understanding
24 that between the City and Republic if there
25 was any major work that needed to be done in

1 the George Street parking lot, that the City
2 was responsible for doing the work and would
3 coordinate with Republic?

4 A. Say that again?

5 MR. KHAN: Objection. Compound
6 and I think she needs to restate it.

7 THE COURT: All right. Restate
8 your question, please?

9 CROSS-EXAMINATION CONTINUED

10 BY MS. RUPARELIN:

11 Q. If there was any major work that
12 needed to be done to the parking lot beyond
13 what Republic could do, and if that was
14 indeed the case, then the City would be
15 responsible for doing that work and they
16 would work with Republic to get it done.

17 THE COURT: That's compound again.
18 Just break it down please. You can't handle
19 that question with one answer.

20 MS. RUPARELIN: Okay.

21 CROSS-EXAMINATION CONTINUED

22 BY MS. RUPARELIN:

23 Q. And essentially what I'm asking you,
24 Ms. Carducci, is if there's anything that
25 needed to be done, the City would do it?

1 A. Not always. And by that it depends,
2 it depended on the definition of "major."

3 Q. Okay.

4 A. And so if it was something that
5 could be contracted, the City would sometimes
6 ask Republic to facilitate contracts to
7 complete work. Sometimes the City would
8 choose to do it.

9 Q. Okay. And, in fact, if you look at
10 the management agreement -- if I could just
11 have you flip over to it real quick. And
12 flip over to the Facilities Section. I
13 believe that was Section 4.1, where it starts
14 talking about maintenance of the parking
15 facility.

16 A. Yes.

17 Q. And you flip over to the next page
18 on the bottom.

19 A. Yes.

20 Q. It says, (reading): *"The City may,*
21 *at its sole discretion, direct the City*
22 *Personnel to make necessary repairs or*
23 *provide the necessary replacements or*
24 *upgrades to the parking facilities at the*
25 *City's expense."* Is that correct?

1 A. Yes.

2 Q. You are not aware of any, when I say
3 "major," major improvements to that parking
4 lot since it was built back in the 1980s?

5 A. Since I've been with the City in
6 2003, I'm not aware of any.

7 Q. And to be clear, those lights in the
8 parking lot were not installed by Republic?

9 A. Correct.

10 Q. And they were not -- the lighting
11 scheme in that parking lot was not designed
12 by Republic?

13 A. Correct.

14 Q. And Republic was not involved in any
15 part of the construction of that parking lot?

16 A. Correct, as far as I'm aware.

17 Q. Yes, ma'am. Well, the parking lot
18 was constructed back in 1978 ---

19 A. Prior to them.

20 Q. --- during that time?

21 A. Yes, yes.

22 Q. And Republic didn't come on the
23 scene until 1997?

24 A. Correct.

25 Q. It was already a parking lot by

1 then?

2 A. Correct.

3 Q. With the lighting already in it?

4 A. Correct.

5 Q. Now, Republic did not take over the
6 job to upgrade the lighting as part of that
7 management contract; is that correct?

8 A. Say that again?

9 Q. They did not take on the
10 responsibilities under that contract to
11 upgrade the lighting; is that correct?

12 A. They did not.

13 Q. Yes, ma'am. Did Republic have any
14 control over the type of light fixtures that
15 get installed in that parking lot?

16 A. In that lot, no.

17 Q. Yes, ma'am. And isn't it true that
18 the City of Charleston has control over the
19 type of light fixtures that get put in that
20 parking lot?

21 A. I believe the answer is yes.

22 Q. Okay. Could Republic go put staging
23 lights in that parking lot?

24 A. No.

25 Q. Okay. And did Republic have any say

1 over the type of light bulbs that went into
2 the light fixtures?

3 A. I don't believe so.

4 Q. And prior to Mr. Burke's fall, was
5 your department aware of any lighting
6 problems with that particular parking lot?

7 A. I was not.

8 Q. And after Mr. Burke's fall, did the
9 City complain to Republic about, 'Hey, this
10 lighting was not good enough. Why didn't you
11 tell us?' Did you do that?

12 A. I don't believe there was specific,
13 in that manner.

14 Q. Yes, ma'am. You didn't ---

15 A. We had discussion but, yes. Okay.

16 Q. You didn't complain to Republic
17 yourself that, 'hey, guys, you should have
18 upgraded this parking lot'?

19 A. I did not. Correct.

20 MS. RUPARELIN: I beg the Court's
21 indulgence.

22 THE COURT: Certainly.

23 MS. RUPARELIN: I think that's all
24 the questions I have, Your Honor.

25 THE COURT: Okay. Redirect?

1 MR. KHAN: Thank you, Judge.

2 REDIRECT EXAMINATION

3 BY MR. KHAN:

4 Q. Ms. Carducci, you said that you were
5 not notified of any previous incidents at
6 this lot. Correct?

7 A. Correct.

8 Q. You also testified that you were not
9 aware of this incident until this lawsuit was
10 filed. Correct?

11 A. Correct.

12 Q. Would you have expected Republic,
13 the manager of your operations, to notify the
14 City of an incident like this?

15 A. Yes.

16 Q. I am going to hand you back Exhibit
17 5 and Exhibit 6 that was recently marked.
18 These were the City's inspections?

19 A. Correct.

20 Q. What time was the inspection done in
21 Exhibit 5?

22 A. Exhibit 5 was June 18, 2013 at 4:20
23 p.m.

24 Q. What time was the inspection done in
25 Exhibit 6?

1 A. January 4th, 2013 at 10:25 a.m.

2 Q. And in Exhibit 6, that report
3 actually tells Republic items related to leaf
4 removal and trash. Correct?

5 A. Yes.

6 Q. Earlier you testified or at least
7 you were asked a question as to this RFP,
8 Plaintiff's Exhibit 9. 'Well, this is just
9 -- this is just what we send them, this is
10 not what we send them.' Do you remember that
11 question?

12 A. Yes.

13 Q. I am going to point you to the
14 signature page of the contract with the City.

15 A. Correct.

16 Q. That is Exhibit 7. If you go the
17 signature page, Mayor Riley signed it?

18 A. Yes.

19 Q. 10.11, (reading): *Incorporation of*
20 *terms of Submittal. Anything contained*
21 *herein to the contrary notwithstanding,*
22 *Republic agrees that throughout the term of*
23 *this Agreement, it shall be bound by all*
24 *terms and conditions contained in the*
25 *Submittal dated December 17, 2007. Did I*

1 read that correctly?

2 A. Yes.

3 Q. What is the date of this RFP,
4 Plaintiff's Exhibit 9?

5 A. It is December 17, 2007.

6 MR. KHAN: That's all the
7 questions that I have. Thank you very much.

8 THE COURT: Recross?

9 MS. RUPARELIA: None, Your Honor.

10 THE COURT: Thank you, you may
11 come down.

12 (WITNESS STEPS DOWN)

13 THE COURT: Call your next
14 witness.

15 MR. KHAN: Your Honor, at this
16 time we are going to read Republic's 30(b)(6)
17 deposition.

18 THE COURT: Court's Exhibit 2,
19 ladies and gentlemen, is the original
20 transcript of the deposition of Jack Skelton.
21 The deposition was taken on May 21, 2014.

22 As I mentioned to you yesterday when I
23 discussed what a deposition involved, this is
24 a deposition taken pursuant to our Rules. As
25 I stated, sometimes witnesses may appear and

1 And it has a -- you can't see it. It's
2 got kind of a dome surface on it. So light
3 entering from any direction will be measured by
4 the sensor.

5 And then I can record and read it out on
6 the meter. So that's essentially all it is. So
7 when we take readings, we'll take readings either
8 horizontal orientation or vertical orientation
9 depending on the standard, and depending on the
10 location, depending on the application. So it's
11 very simple.

12 This meter will both measure and record
13 or I can do a continuous plot, you know, because I
14 walk through the area.

15 So it's very simple and doesn't take any
16 training, other than reading directions. Turn it
17 on, click to proper scale, and then we measure.

18 And the measurements that I took were on
19 the Lux Scale, which is what the industry standard
20 is that we're addressing.

21 Q. And what is a lux?

22 A. A lux is one-tenth of a foot candle.
23 Most people are probably familiar with the term
24 foot candle. And because a foot candle is fairly
25 bright ---

1 Q. Maybe in your world, but not in the real
2 world. What is a foot candle?

3 A. It's a standardized unit of measuring
4 light. I think that's the simplest explanation we
5 have for -- such as we have inch to feet, meters
6 for measuring distance, then lux, foot candle,
7 lumens, those are lighting measurements. And it's
8 just a standardized unit of measuring.

9 Q. And so today what unit of measurement are
10 you going to use when testifying?

11 A. We're going to be addressing the
12 illumination levels in lux. That's L-U-X, lux.

13 Q. Now, did you take light measurement
14 readings the first time you were on site?

15 A. I did. You called me and I told you I
16 would just take kind of an informal drive-by.

17 And I went out there, took our meter,
18 took some simple measurements and told you that at
19 that time that was not the complete survey that I
20 was going to do, but just those spot measurements
21 that I recorded, that it was below the industry
22 standard and probably would be a dangerous
23 condition.

24 Q. Okay. And how many times -- ultimately,
25 we'll get into the document. Ultimately, how many

1 the illumination measured level, and the lighting
2 intensity.

3 So for an area such as this, a parking
4 lot with a high classification, then the minimum
5 illumination level should be ten lux; medium would
6 be six and, then low would be two.

7 Q. And you offered the opinion a minute
8 ago that it's your expert opinion that this is a
9 high level of activity lot?

10 A. Yes, sir.

11 Q. Alan, in your expert opinion -- or
12 do you have an opinion to a reasonable degree of
13 engineering certainty, most probably, as to the
14 appropriate amount of light and lux measurements
15 that should be in that parking lot?

16 A. It should be ten.

17 Q. A minimum of ten?

18 A. Yes, sir.

19 Q. And you have something down there at
20 the bottom -- what is a -- two is the low
21 standard?

22 A. Two is the bare minimum. And by
23 comparison, two is the minimum level that a movie
24 theatre, when you lower the lights -- in movie
25 theatres when the movie is actually showing,

1 Greenville Cinemas or anything like that, any of
2 those movie theatres, the lowest minimum level
3 during that performance or during that movie is
4 two. So to give you the comparison, that's what a
5 illumination level of two lux is.

6 Q. Is it two or two-point-five?

7 A. Yeah, two-point-five. Yeah. So
8 that's kind of a comparison of the two.

9 Q. So it's your opinion that it should
10 be at least a ten lux in that parking lot at
11 night?

12 A. Yes, sir.

13 Q. All right. Next slide. All right,
14 what is IES RP20?

15 A. All right. So RP20 is the lighting
16 -- it's one of the publications from IES for
17 parking facilities. And within that standard it
18 talks about illumination levels for various
19 reasons, and they make specific reference to older
20 adults. And one of the references they make, they
21 said for older adults because obviously as we get
22 older and our vision degrades slightly, which is
23 why the older people get more often they have to
24 wear glasses, because they can't see as well.
25 And, also, their ability to see in dark

1 A. I did. So that it would be easier
2 to see. We basically just did a CAD sketch. And
3 the numbers, the same numbers that are on there,
4 have been applied to this.

5 Q. These were just the spot measure-
6 ments that you took?

7 A. That I took the night you and I were
8 out there. So the number that we're looking for
9 is some number in the range of ten. So these
10 values are also in lux.

11 So we've got here, where Mr. Burke fell,
12 somewhere along the edge of this elevated curb.
13 So out here are point four (.4), over here were
14 Point seven (.7), one point two (1.2) to one point
15 three (1.3) there.

16 Now, you see in the next slide I took
17 more detailed measurements. There are some values
18 out here, maybe, in the three range.

19 But in the area where Mr. Burke fell, all
20 are actually all less than one.

21 Q. Okay. And I want to make sure I
22 understand. This Exhibit that we marked 13, these
23 are your handwritten notes from that evening?

24 A. Correct. They are, yes, sir.

25 MR. MCCULLOUGH: And Your Honor, we

1 would request that this be admitted into evidence.

2 THE COURT: Is there any
3 objection?

4 MS. RUPARELIA: None, Your Honor.

5 THE COURT: Very well. Without
6 objection, Plaintiff's 13 is admitted.

7 (SO ENTERED AS PLAINTIFF'S EXHIBIT 13)

8 DIRECT EXAMINATION CONTINUED

9 BY MR. MCCULLOUGH:

10 Q. And this blowup is your
11 documentation of the information contained on 13?

12 A. It is. It's drawn obviously in a
13 lot cleaner form.

14 Q. Yes, sir. And Mr. Burke, it's your
15 understanding, parked somewhere over where you
16 have a one point two (1.2)?

17 A. Correct.

18 Q. Continued to walk where you've got
19 the one point seven (1.7)?

20 A. Right. Across this path over into,
21 along the edge of the elevated curb.

22 Q. And the areas where you took
23 measurements, it continued to be -- the highest
24 number on your report is a one point three (1.3)?

25 A. Correct.

1 A. To me that's not unreasonable at
2 all. I think that would be expected.

3 Q. In using this -- let's get away from
4 the light for a minute, okay?

5 A. Okay.

6 Q. What other options are available, if
7 that's an expected pedestrian path -- don't deal
8 with the lighting -- what are other options
9 available to make this either more highlighted,
10 safer, to point this curb out to a pedestrian
11 potential?

12 A. Well, you could either create a
13 pathway that would be permanently open, which is
14 usually done with stripping where you hatch a
15 space. Most people will rely on that if it's
16 hatched in the pavement. Most people aren't going
17 to park there. So you could do that to go that
18 route.

19 Or you could put a railing across there
20 to obstruct one from walking across that surface.
21 So, you know, either you direct them that way or
22 you obstruct them from going that way.

23 So there's two options.

24 Q. You could block them out; right?

25 A. Right.

1 Q. You could paint it; right?

2 A. You could paint it, make it more
3 visible.

4 MS RUPARELIA: Object to leading,
5 Your Honor.

6 THE COURT: I'll allow it.
7 Overruled.

8 WITNESS: If you painted it,
9 that works as long as there's adequate lighting to
10 see the thing.

11 DIRECT EXAMINATION CONTINUED

12 BY MR. MCCULLOUGH:

13 Q. And you mentioned creating some sort
14 of pathway.

15 A. Sure, an open path.

16 Q. I want to show you two photographs
17 that have been marked as Exhibits 3 and 5. Help
18 me out here. The security gate, bar goes right
19 here. Right

20 A. That's correct.

21 Q. So as you drive in around this,
22 where do these stripes come from Exhibit 3 to
23 Exhibit 5? Does that make sense? Can you see
24 them on Exhibit 5?

25 A. I don't see them.

1 Q. Well, is that the point of the curb
2 right there? Next to the Mercedes?

3 A. That would be on this side, wouldn't
4 it?

5 Q. Mr. Burke was parking here, walking
6 in this direction?

7 A. Oh, I got it. Yeah. I'm looking
8 the other way. Yes.

9 Q. So behind this Mercedes is what?

10 A. Yeah. You can barely see the
11 stripes coming out diagonally there.

12 Q. All right.

13 A. So there is stripping there, but
14 there's a space right in front of it.

15 Q. But my point is, as you turn around
16 the point of this curb, there is stripping half-
17 way; correct?

18 A. There is.

19 Q. But they jammed a parking space in
20 there beside it?

21 A. Yeah. I think the stripping would
22 be to prevent one from turning past.

23 Q. So they'd have to lose a parking
24 space but you could continue that striping around
25 the curb and through this space right here; right?

1 A. That would create an unobstructed
2 open pathway.

3 Q. And is that an expensive process,
4 coloring stripes on a piece of pavement?

5 A. The cost of labor and materials to
6 paint it, which is not much.

7 Q. All right. Now, if you remove this
8 car, if you remove the Mercedes ---

9 A. Right.

10 Q. --- and so Mr. Burke is leaving his
11 vehicle ---

12 A. Correct.

13 Q. --- and you have a stripped pathway
14 all the way, wrapping around this curb by the
15 security gate, and there's no vehicle here, what
16 does that do with your expectation of where a
17 pedestrian would walk?

18 A. I think if you've got a narrow space
19 between a vehicle and an eight-foot-wide space
20 where there's no car, you're likely, especially if
21 you're walking with somebody, you're going to take
22 the open pathway.

23 Q. Please go to the next slide. What
24 is this International Maintenance Code?

25 A. This is an International Property

1 Maintenance Code. It's just one of the codes that
2 comes under the International Building Code and
3 addresses operation and maintenance of facilities.

4 Q. And this indicates what?

5 A. Well, specifically, if you go to the
6 next slide, it addresses lighting and maintenance
7 of that lighting.

8 Q. Whose obligation in this instance
9 would you opine is responsible to maintain the
10 appropriate safe level of lighting?

11 A. It would go back to the owner and
12 operator.

13 Q. Okay. And whose responsibility is
14 it according to this document?

15 A. The first line there 401.2,
16 (reading): *Responsibility: The owner of the*
17 *structure shall provide and maintain light,*
18 *ventilation, space condition... -- etcetera,*
19 *etcetera, etcetera. Their responsibility is the*
20 *lighting.*

21 In 402.3, (reading): *Other Spaces:*
22 *All other spaces shall be provided with natural or*
23 *artificial light to create a safe occupancy of the*
24 *space.*

25 Q. Okay. Next slide. What are the

1 operator responsibilities, in this case Republic,
2 in your opinion based on your research and your
3 investigation?

4 A. Well, based on -- and based on prior
5 testimony, and contract language and my
6 interpretation, which obviously is just my own
7 interpretation, but the -- as the owner and
8 operator they've got to maintain a safe
9 environment, maintain the asphalt and the parking
10 spaces, maintain the lighting, properly service
11 that equipment. And if they identify deficient
12 conditions and unsafe conditions, bring that to
13 the attention of the City.

14 Q. Next slide. What does this say?
15 Are these a summary of your opinions?

16 A. Summary bullet points. They failed
17 to determine if the lot met industry standards.

18 No measurements were taken with any type
19 of meter or instrumentation. I mean, I think we
20 heard several times they essentially performed an
21 eyeball test. We all know that our eyes can be
22 deceiving. Everybody has different levels of
23 visual acuity or visual abilities. You know, half
24 the jurors may be 20/20. The other half may be
25 20/15 or 20/100 or 20/200. There's no standard

1 when you're using the eyeball test, which is why
2 you need to use some type of instrumentation to
3 reach that industry standard and measure for
4 proper illumination levels.

5 Q. Well, using the eyeball test and
6 looking at Plaintiff's Exhibit Number 8, and based
7 on your three visits, what would the eyeball test
8 tell you?

9 A. My eyeball test would tell me that
10 it was very dark, that that did not even remotely
11 meet the industry standard. I think that should
12 be obvious on that one.

13 Q. And that was before you whipped out
14 your meter?

15 A. Yes, sir.

16 Q. You can retake the stand, Mr.
17 Campbell.

18 A. (Complies).

19 Q. Based on your investigation,
20 research and on-site analysis, in your expert
21 opinion to an engineering certainty, most
22 probably, was the lighting condition and the
23 overall condition of the George Street Lot at the
24 time Mr. Burke fell, fall below the applicable
25 industry standards?

1 A. It did. It did not meet those
2 industry standards.. It was well below and it was
3 a dangerous condition.

4 Q. And based on what you heard -- you
5 were in here for Republic's 30(b)(6) testimony,
6 that they were in charge of this lot from 1997 to
7 2013?

8 A. Yes, sir.

9 Q. What does a competent, qualified
10 parking contractor who's coming on site, what are
11 their responsibilities to do to investigate and
12 make sure that the customers are safe?

13 A. They should survey the parking lot
14 for safe operation, safe operational levels.
15 Determine any dangerous conditions, write up those
16 deficiencies, report them to the city or whoever
17 they're contracting with, and then ensure that
18 those conditions are corrected.

19 Q. And short of tearing up the entire
20 parking lot to rewire it for additional lighting,
21 are there other cheaper alternatives, such as
22 striping and taking out parking space, putting in
23 the railings, and other available options that
24 Republic had?

25 A. Sure. There are fairly -- there are

1 economical solutions without reworking the entire
2 parking lot, even putting brighter bulbs out there
3 if necessary or trimming the trees back if they
4 create an obstruction to an existing light
5 fixture.

6 Q. So this would have been obvious to a
7 competent contractor?

8 A. A simple survey with a light meter
9 that we have here would have identified those
10 conditions. Yes, sir.

11 Q. Thank you.

12 MR. MCCULLOUGH: Your Honor, we do
13 not have a smaller copy of this, so I am -- but I
14 would move Exhibit -- the large copy of Exhibit 15
15 into the record or at least allow us to get a
16 smaller copy and supplement at some point.

17 MS. RUPARELIA: That's fine.

18 THE COURT: It will be admitted.
19 And if necessary you can supplement it.

20 MR. MCCULLOUGH: Thank you, Your
21 Honor.

22 THE COURT: Exhibit 13 (sic) is
23 admitted without objection.

24 COURT REPORTER: Fifteen.

25 MR. MCCULLOUGH: Fifteen,

1 MS. RUPARELIA: None, Your Honor.

2 THE COURT: All right. You may
3 come down, Mr. Campbell.

4 (WITNESS STEPS DOWN)

5 MR. MCCULLOUGH: Your Honor, that
6 concludes the Plaintiff's case on liability.

7 THE COURT: Okay. Thank you.
8 Now, ladies and gentlemen, there's some matters of
9 law now that I must take up out of your presence.
10 I'm going to let you go to your jury room, but do
11 not begin your deliberations. Don't discuss the
12 case among yourself. We'll be with you as quickly
13 as we can. Thank you.

14 (JURY OUT @ 3:35 P.M.)

15 THE COURT: All right. Any
16 Motions from the plaintiff at this point?

17 MR. MCCULLOUGH: Your Honor, at
18 this point, we would move for a directed verdict
19 as to liability.

20 THE COURT: Okay. With all due
21 respect, I think there's certainly an abundance of
22 evidence that would support a verdict for the
23 defendant, so I will deny that. Thank you.

24 MR. MCCULLOUGH: Thank you.

25 MS. SPRUILL: Your Honor, I've got a

1 written Motion, just to expedite things. I'm
2 going to hand it to ---

3 THE COURT: And your written
4 Motion is incorporated fully in the record.

5 MS. SPRUILL: Thank you, Your
6 Honor.

7 THE COURT: You bet.

8 MS. SPRUILL: Many of these
9 arguments I raised prior to trial on duty issues.
10 We would remind the Court that Republic is not an
11 owner. It's not an occupier. It's simply there
12 pursuant to its contractual agreement.

13 THE COURT: If that's the case,
14 we've got a bunch of businesses doing business in
15 this world that are not occupiers.

16 MS. SPRUILL: Well, they are simply
17 there pursuant -- I'm just -- my point is they're
18 there pursuant to ---

19 THE COURT: If the Court wants to
20 change what that means, they will. But I deny it
21 on that basis and continue to deny it, but ---

22 MS. SPRUILL: Okay. Well, my first
23 ground is that there's not a duty in this case.
24 It's a question of law for you.

25 THE COURT: Thank you.

1 MS. SPRUILL: The danger was open
2 and obvious, despite darkness, it is apparent to
3 everybody ---

4 THE COURT: No, I beg your pardon.
5 It was not open and obvious and you know as well
6 as I do -- you're arguing that with a straight
7 face?

8 MS. SPRUILL: Your Honor, I'm
9 preserving my record.

10 THE COURT: You're preserving your
11 record. I've already done that. So you don't
12 need to argue.

13 MS. SPRUILL: I understand. I
14 just want to run through them quickly.

15 THE COURT: Well, you don't need
16 to. That's why you printed it. Thank you.

17 MS. SPRUILL: Well, can I get to
18 something other than duty issues because I have
19 some others?

20 THE COURT: Ms. Spruill, first of
21 all, your argument now is contained in this
22 document that has been provided to me, that is now
23 protected for the purposes of review, fully.

24 Now, if you want to elaborate on
25 something that you haven't stated in that, please

1 feel free to do so. Otherwise, it's incorporated
2 fully. That's what I just did.

3 MS. SPRUILL: Your Honor, could I
4 ask you on a couple of other questions?

5 Are y'all still pursuing a
6 negligence, *per se*? I haven't heard anything
7 about a statute at all.

8 MR. MCCULLOUGH: We have a claim
9 based on the violation of industry standard. And
10 probably it will be for the Court to determine.

11 THE COURT: Yeah. I'll have to
12 rule on that. But at this juncture, -- I'll let
13 you know. I've got that down. In fact, I wrote a
14 note to myself that I've got to search some law on
15 that because there are cases where I've seen it
16 charged, cases where it's not been charged

17 MS. SPRUILL: Industry standards,
18 generally the way that works is it allows -- an
19 industry standard can be evidence of negligence,
20 but what I'm saying is there's not negligence *per*
21 *se*? There's no violation of statute. That rule
22 is if you violate a statute, you've got
23 negligence. So we don't have -- I don't believe
24 we have that. You haven't indicated ---

25 THE COURT: I haven't heard that

1 argument yet. But, again, again, we aren't there
2 yet. I'm not granting you a directed verdict on
3 negligence *per se*. I'll either charge it or I
4 won't charge it.

5 MS. SPRUILL: Thank you, Your
6 Honor.

7 THE COURT: I'm sorry. I'm not --
8 at this juncture, I'm not going to tell you I'm
9 not going to charge negligence *per se* if the case
10 law, if what you say, and I think you're correct
11 on that. It has to be a statute -- it has to be a
12 violation of the statute.

13 MS. SPRUILL: Okay.

14 THE COURT: And that's what
15 typically the charge says. Standards, no
16 question, it's evidence of negligence. I don't
17 think they've ever used that term to link the two
18 from a standard of any industry. But we're not
19 there. That's not -- I'm not going to give you a
20 directed verdict on that issue.

21 MS. SPRUILL: Well, they've raised
22 it as a separate claim. I just don't think that
23 the statute -- but, that's fine.

24 THE COURT: Just for your
25 edification what the verdict's going to be is:

1 "We find that the Defendant was
2 negligent -- yes or no.'

3 'We find that the Defendant was
4 reckless -- yes or no.'

5 And it's going to be based on 'the
6 standard that I'm going to charge. So, I mean,
7 it doesn't matter how and why they find it.

8 MS. SPRUILL: Well, subject to we
9 want a comparative negligence.

10 THE COURT: I understand that.

11 MS. SPRUILL: I understand, Your
12 Honor. And we've also ---

13 THE COURT: Now, I refuse to
14 charge that because you've raised it. And I will
15 never charge something that's an affirmative
16 defense, which I've already told them about. Ms.
17 Spruill, come on. You know that I'm going to
18 include that. I told the jury that in my opening
19 statement.

20 MS. SPRUILL: Your Honor, I
21 apologize. I apparently have come across as
22 combative and I do not mean to.

23 THE COURT: Well, all I'm saying
24 to you, you don't need to say the obvious. Of
25 course, I'm going to charge comparative

1 negligence.

2 MS. SPRUILL: Yes, Your Honor.

3 And the only other thing I wanted to raise it's in
4 here, but I just wanted to mention, I don't think
5 we've seen any evidence of willful, reckless or
6 wanton conduct. I don't think we have evidence to
7 go on punitives.

8 THE COURT: Well, I appreciate it.
9 I can tell you something that -- right off the
10 bat, you've got a responsibility to ensure, and
11 you're the expert. You're hired as the expert.
12 And you don't take a reading in your entire time?
13 Somebody can perceive that to be reckless. So,
14 thank you. I think that's evidence of
15 recklessness, so I deny your Motion on that.

16 MS. SPRUILL: And, Your Honor, we
17 go back to all the duties contained in this
18 Agreement. But thank you, we appreciate it.
19 Thank you.

20 THE COURT: Ms. Spruill, let's
21 talk about that one, because I -- you know, I've
22 listened really closely because I -- obviously,
23 the negligence *per se* is critical to jumping to
24 the hurdle of getting some recklessness. And
25 typically we have a statutory violation, which

1 bootstraps it into the reckless area. I really
2 did -- but the key to me, and it's by your
3 Agreement. You keep referencing that. You and I,
4 we're both lawyers and we're going to read that,
5 and that's the beauty of what we do. And I love
6 it. As I told the jury, most of the law is great.
7 Thank god, because we'd be out of business if it
8 wasn't.

9 But the bottom line is you and I can read
10 that Agreement and we can differ as to what it
11 says. And I can respect you implicitly. You
12 certainly are a very competent lawyer and you
13 argue your position and you even supported it with
14 your memorandum.

15 But clearly, when I'm listening to
16 something, I'm listening for any evidence, as I
17 understand my standard, to say what is reckless
18 here. I agree with you. Just simply having
19 curbing, that's not reckless, *per se*. But when
20 you take it in the light of what you were hired to
21 do, what your responsibility under, as I construe
22 that Agreement, you and I can differ. But under
23 that Agreement, as I construe it, you had a duty
24 to not just sit there and assume everything's okay
25 because that's not what it says.

1 I agree that certain people, that there's
2 no question, and I stopped Ms. Ruparelia from
3 going into something that if we go there -- I'm
4 sure we're going to hear about that and I would
5 expect that, because there's no question, there
6 really is an issue here -- if you end up being a
7 joint tort feisor. I don't know that you are.
8 But if you do end up being a joint tort feisor,
9 there's no question about now we're getting into
10 some area of who has the greater responsibility
11 here? No quarrel about that. But is it reckless
12 for you to be hired and not do something that
13 somebody could assume and presume that you're
14 doing and that's why they hired you in the first
15 place, then that's one inference to be drawn from
16 this Agreement. I know you don't agree with me,
17 but it is in my opinion. I'm stating that for
18 purposes of review so that they can say, well, I
19 didn't just arbitrarily deny your motion, because
20 I really have thought about. I think to have this
21 area and be involved as long as you have and
22 nobody has ever taken a reading.

23 Another area, quite frankly is -- you all
24 made the argument in your opening statement that
25 nobody's ever reported it. Well, I think it's

1 germane and pertinent that this wasn't even
2 reported until the lawsuit. That's pretty
3 reckless in my opinion. Because how can they come
4 in and make a change if they're not aware that
5 something's happened?

6 So there are several that -- I didn't
7 create the term. I asked my friend and former
8 colleague, Judge Few, to please define scintilla
9 for us, because I think the bar would like it.
10 I know the bench would love it. But I've been
11 informed by some lawyers that practiced in Alabama
12 who said that Alabama's had it for years and they
13 still don't know what it is. I don't know how you
14 define it, but if I've got to apply that scintilla
15 I'm afraid I'd be doing a disservice.

16 MS. SPRUILL: And certainly, Your
17 Honor. I was referring back to the threshold
18 question of duties to you.

19 THE COURT: And I appreciate that,
20 and it goes all the way back. If I'm wrong on the
21 first, this shouldn't have happened. Correct? I
22 mean, we wouldn't have even had a trial.

23 MS. SPRUILL: But that was -- that
24 was my only point.

25 THE COURT: And I understand that.

1 And I appreciate your position. And you made it
2 clear, your position there, and I thought it made
3 it clear my position. I'm comfortable with my
4 decision.

5 MS. SPRUILL: Thank you, Your Honor.

6 THE COURT: All right. Thank you
7 very much. And you are totally protected and I
8 want the record to so reflect. If you find
9 something else between now and when we start
10 towards the end and you need to supplement it,
11 please feel free to do it.

12 And, no, you're not antagonizing me. And
13 no, you're not -- one of my many, many faults is I
14 tend to get back about my passionate self as a
15 lawyer sometimes and it has nothing to do with me
16 being angry. It just -- I feel just as strongly
17 as you do. And when we've got two strong-willed
18 people going head-to-head, it looks like we're
19 fighting each other and we're not, and I'm not.
20 And I don't think you are with me. So I assure
21 you of that. I respect you totally.

22 MS. SPRUILL: Well, I apologize.
23 I'm an impatient person and I do not want to test
24 your patience.

25 THE COURT: Don't you worry about

1 it. You feel. That's one thing that I often
2 said, since I've been on this bench -- we're off
3 the record now.

4 (OFF RECORD DISCUSSION)

5 (BRIEF RECESS)

6 THE COURT: Plaintiff ready?

7 MR. MCCULLOUGH: Yes, sir.

8 THE COURT: Ms. Ruparelia, are you
9 ready?

10 MS. RUPARELIA: Yes, Your Honor.

11 THE COURT: Bring in our jury, please.

12 (JURY IN @ 4:10 P.M.)

13 THE COURT: Thank you, ladies and
14 gentlemen. We are now ready to continue. You may
15 call your first witness.

16 MS. RUPARELIA: Your Honor, the
17 defense would call Mr. Julius "Buddy" Denny to the
18 stand.

19 (WITNESS TAKES STAND)

20 JULIUS "BUDDY" DENNY, having been duly
21 sworn to tell the truth, and nothing but the
22 truth, testified as follows:

23 DIRECT EXAMINATION

24 BY MS. RUPARELIA:

25 Q. Good afternoon, Mr. Denny.

1 A. Good afternoon.

2 Q. You go by "Buddy"?

3 A. Yes, sir.

4 Q. Mr. Denny, how old are you?

5 A. I'm sixty-eight (68).

6 Q. Where do you live?

7 A. Goose Creek.

8 Q. That's Charleston County?

9 A. Yes -- Berkeley County.

10 Q. How long have you lived in Berkeley
11 County?

12 A. I've been in South Carolina for
13 fifteen years.

14 Q. And who do you work for?

15 A. I work for ABM Parking Services at
16 the present time.

17 Q. Who did you work for before ABM?

18 A. Republic Parking Services.

19 Q. That was here in Charleston?

20 A. Correct.

21 Q. How long did you work for Republic?

22 A. I started in '98, then the contract
23 was up and they changed hands, I think it was
24 in '13.

25 Q. I am going to have to ask you to

1 speak a little louder, please.

2 A. No problem.

3 Q. You were telling us that your
4 company changed hands, that Republic switched
5 over to ABM?

6 A. Correct.

7 Q. And that was in what year?

8 A. July 1st of 2013.

9 Q. And for a total of -- from 1997 to
10 currently, you've been in the parking
11 industry?

12 A. Yes. Maintenance, park-and-drives,
13 whatever needs to be done. Maintenance
14 supervisor.

15 Q. Does that include the George Street
16 parking lot?

17 A. Yes, it does.

18 Q. And you said that you are a
19 maintenance supervisor?

20 A. Correct.

21 Q. What all is involved in being a
22 maintenance supervisor?

23 A. In the case of the George Street
24 parking lot it was the payments on the
25 computer, lighting, bringing anything to

1 people's attention if something needed to be
2 done.

3 Q. When you say people's attention, who
4 do you mean?

5 A. To the City's or park services.

6 Q. Help us understand the things that
7 you were able to do yourself and the things
8 that you might have a problem with.

9 A. Things that I could do myself were
10 like light bulbs, changing light bulbs or if
11 a ballast needed changing. I could change a
12 bulb or ballasts or rewire.

13 Some lights, regardless of the
14 situation, the City was called regardless
15 because the equipment needed a bucket truck
16 or whatever. For the most part, I could take
17 care of everything.

18 That's what it entailed.
19 Maintaining equipment, lights, maintaining
20 gates. Lights.

21 Q. What sort of equipment? Was it
22 lighting mostly?

23 A. The cash register, gate arms, ticket
24 spitters, bringing to people's attention
25 about different concerns and issues --

1 striping on the lot, holes, or things of that
2 nature.

3 Q. Who do you have to call in to come
4 assist you with that?

5 A. I'd always discuss it with my boss,
6 Mr. Potter. Then for the most part I'd call
7 and notify the City. They had, you know, a
8 work order hotline you could call and make
9 any requests that you needed. I mostly had a
10 relationship with City Parks people, I'd call
11 them directly, tell them I had some issue and
12 they'd say yes or no and or they'd get back
13 with you whether they could fix it or if they
14 were going to sub it out. For the most part,
15 I tried to deal with them first. Most of the
16 time you didn't get a very positive answer.

17 Q. You were talking about light bulbs,
18 changing light bulbs and such. Is that
19 correct?

20 A. That's correct.

21 Q. You were saying something about that
22 there were times when you could not replace a
23 light bulb and I didn't quite understand
24 that. Were there times when you could not
25 replace a light bulb?

1 A. There are four edgings, four edges
2 in the parking lot and sometimes you couldn't
3 get in there, in those areas, without a
4 bucket truck. If we had to bring in a bucket
5 truck in to change a ballast or bulb,
6 whatnot, I'd always call the City.

7 Q. And they would come out?

8 A. Yeah, they'd come out and do it.
9 Sometimes it'd take two or three days.

10 Q. You would not be the one to go find
11 a bucket truck to get up there?

12 A. No.

13 Q. You are aware, Mr. Denny, that Mr.
14 Burke fell in the George Street parking lot?

15 A. I am aware due to conversation, yes.
16 I understand he fell on a four or five-foot
17 wide curbing.

18 Q. I'd like to show you Defendant's
19 Exhibit 3. Is that the curb in question?

20 A. (Upon review), yeah.

21 Q. How long has that curb been out
22 there?

23 A. It's been there as long as I've been
24 there. Since '97, '98.

25 Q. Between 1997 and 2013 when Mr. Burke

1 fell, had you had anybody else fall over that
2 curb?

3 A. Not to my knowledge.

4 Q. Had anybody told you that there were
5 issues with that curb?

6 A. No.

7 Q. Can you tell the jury what all
8 lighting is there at that curb?

9 A. What lighting there is?

10 Q. Yes.

11 A. There's a light by Joseph Bank, in
12 the far corner, there's illumination from the
13 parking booth. On the exit side of that
14 entrance curb there's two or three lights on
15 the sidewalk along the street.

16 Q. You said that the attendant's booth
17 is lit up?

18 A. Yes.

19 Q. When you're outside the booth, can
20 you see the light from the booth?

21 A. Well, there are blinds there, so it
22 is restricted some. It's not like somebody
23 can't see.

24 Q. Had anyone ever complained about the
25 lights in the parking lot?

1 A. Not to my knowledge.

2 Q. Did you ever go by the George Street
3 parking lot at night?

4 A. Yes. It was one of the places that
5 I visited first thing in the morning, about
6 6:00 to 7:15, and one of the last places that
7 I visited at night.

8 Q. You'd been out there when the sun
9 had gone down?

10 A. Yes.

11 Q. Did you have any trouble seeing?

12 A. No.

13 Q. Are you wearing glasses today?

14 A. I've worn glasses since the first
15 grade, (affirmative nod).

16 Q. There are attendants that work in
17 this parking booth, is that correct?

18 A. Yes.

19 Q. Was there anybody who worked there
20 who, at any time, told you there was not
21 enough light in the parking lot to see?

22 A. They never had no problems.

23 Q. Let me ask you, Mr. Denny, do you
24 own a light meter?

25 A. I do not.

1 Q. Do any Republic employees own a
2 light meter?

3 A. Not to my knowledge.

4 Q. Do you know how to operate a light
5 meter?

6 A. I've never operated one.

7 Q. Do you believe that it was part of
8 your responsibility to take light meter
9 readings of the various areas of the parking
10 lot?

11 A. No, I was never told to do that. I
12 understand the problem and we took it serious
13 but ---

14 Q. Let me ask you this, do you know of
15 anyone who worked with the City of Charleston
16 who owned a light meter?

17 A. I don't know of anybody.

18 Q. To be clear, you're the supervisor?
19 The maintenance supervisor?

20 A. Right.

21 Q. That means that there are people
22 underneath you, who report to you?

23 A. Yes.

24 Q. What did those people do?

25 A. I interacted with the cleaning

1 people within the facility to maintain the
2 cleanliness of the garage and lots.

3 Q. They pick up trash?

4 A. Pick up trash, (affirmative nod).
5 There is a superintendent/supervisor in each
6 -- in all of the parking garages 10:00 at
7 night until 6:00 in the morning.

8 Q. And there were other people?

9 A. Yeah.

10 Q. What did some of these other people
11 do?

12 A. Painting, painting curbs/stripes.
13 I'd use them from time to time to do various
14 things like change lights and ballast. In
15 interacted pretty much with everybody in the
16 parking facilities.

17 Q. You were the supervisor of everyone
18 who working in the parking facilities?

19 A. Pretty much the maintenance people.
20 The other people, I worked with the companies
21 that -- I worked mainly with the clean up
22 people in the garages, managers and stuff.

23 Q. Did you change -- can Republic, on
24 its own, change the number of number spaces
25 within a parking lot?

1 A. No.

2 Q. Why not?

3 A. That's controlled by the City.

4 Anything of that magnitude would have to be
5 approved by the City. We might could do a
6 layout, make suggestions but they were the
7 ones that made the final call.

8 Q. You couldn't unilaterally change the
9 number of parking spaces?

10 A. No.

11 Q. Could you go out there on your own
12 and change the number of light fixtures?

13 A. No.

14 Q. Could you -- well, let me ask you
15 this. Who provided the light bulbs for the
16 fixtures in the parking lots?

17 A. I would purchase those through an
18 electrical supply and, in turn, bill them
19 back to the City.

20 Q. How did you know what kind of light
21 bulbs to buy?

22 A. Get on a ladder, take it out and
23 look at it.

24 Q. So you maintained the lights bulbs
25 as they were in that facility?

1 A. Right, they were there, we took care
2 of it for a long period of time, established
3 ground rules. The lighting was there. We
4 were told to maintain what was there.

5 Q. So what you've saying is that when
6 Republic took over in 1997, they took over
7 what was there by the City of Charleston?

8 A. Yes. I took over in '97.

9 Q. It was being operated by the City of
10 Charleston when you took over?

11 A. Yes.

12 Q. The parking lots that were there
13 were owned by the City of Charleston?

14 A. I couldn't say if they were the
15 owners. I believe that the parking lot was
16 managed by the City of Charleston and we, in
17 turn, managed it for them.

18 Q. So it was privately owned, leased to
19 the City and you managed it for the City?

20 A. Correct.

21 Q. If you had wanted to, could you have
22 put some stadium lights out there?

23 A. No.

24 Q. Why not?

25 A. Among other things, the cost. We'd

1 have to get a price on that and the City
2 would have to bless it, approve it. In turn,
3 they would have to probably discuss the
4 situation with their contractors or whatever,
5 with the owners because it was coming out of
6 their pocket.

7 Q. So you could do any upgrade to the
8 lighting system as it was when you took over?

9 A. No. We could make suggestions but
10 the final word was the City's.

11 Q. Did Republic decide where lighting
12 goes in the parking lot?

13 A. No, it was there.

14 Q. That was the lighting that was there
15 when you got there?

16 A. Right.

17 Q. And that was essentially the same
18 lighting when you left?

19 A. Yes.

20 Q. Republic maintained it?

21 A. That's correct.

22 Q. Did anybody ever tell -- from the
23 City's standpoint, did anybody ever tell you
24 that there was insufficient lighting in the
25 George Street parking lot?

1 A. No.

2 Q. Did you have a pretty good working
3 relationship with the City of Charleston?

4 A. I think I do.

5 Q. Are you aware if the City has any
6 inspector that inspects the parking lots?

7 A. Yes.

8 Q. Do you recall the name of the
9 gentlemen?

10 A. Scott Maxey.

11 Q. Are you familiar with Mr. Maxey?

12 A. Yes.

13 Q. If you were to see him, you'd
14 recognize him?

15 A. Yes.

16 Q. You saw him come out to the parking
17 lot and make inspections?

18 A. (Affirmative nod), from time to
19 time.

20 Q. Did you see him -- what did you see
21 him do?

22 A. Service poles, lighting, -- he
23 checks everything.

24 Q. If he finds something wrong with the
25 way that you are managing the parking lot,

1 would he tell you?

2 A. Yes. I rarely heard any complaints
3 from him. We -- our lot manager -- if he
4 reported anything to our lot manager, she's
5 report it to me and I'd repair it or replace
6 it.

7 Q. Are you referring to the inspection
8 reports he'd complete after his inspection?

9 A. Yes. He'd go through, do an
10 inspection and he'd write on there anything
11 that he saw: lights out, trash, whatever, he
12 would make a note of it.

13 Q. If you did get such a report from
14 them to clean up trash or debris, did you
15 take that as an instruction to do something?

16 A. Yes, it was an instruction from them
17 and we would do it.

18 Q. So you would take directions from
19 the City of Charleston?

20 MR. MCCULLOUGH: Objection to
21 leading.

22 THE COURT: Sustained.

23 DIRECT EXAMINATION CONTINUED

24 BY MS. RUPARELIA:

25 Q. So you'd ---

1 A. I'd take their suggestion.

2 Q. You would take their suggestion to
3 'go pick up these leaves' or something?

4 A. (Affirmative nod).

5 Q. You would not ignore that?

6 A. No.

7 Q. Certainly if you heard anything
8 about the light bulbs needing to be replaced,
9 you would replace them?

10 A. Certainly. I'd replace them or make
11 arrangements for them to be replaced.

12 Q. Make arrangements, because sometimes
13 you'd have to wait for specialize equipment,
14 such as a bucket truck, to be able to replace
15 the bulbs?

16 A. Right.

17 Q. Did you have the ability to -- did
18 Republic own a bucket truck?

19 A. (Coughing).

20 Q. Are you okay?

21 A. Yeah.

22 Q. Did Republic Parking own a bucket
23 truck?

24 A. No, we did not.

25 Q. If the City doesn't come out to

1 change that bulb that required a bucket
2 truck, you'd have to find some other way to
3 make arrangements for it to be replaced?

4 A. Yeah, I'd have to go to a rental
5 place or something of that nature.

6 Q. In that particular parking lot, the
7 George Street parking lot, can you tell the
8 jury what the lighting is along the sidewalk
9 that faces the parking lot?

10 A. Are you talking about the lighting
11 on George Street itself?

12 A. Yes.

13 Q. There is one near the entrance,
14 exit, and -- there are three right there, and
15 I think two or three on the sidewalk, light
16 bulbs that are maintained by the City.

17 Q. Do you have an understanding of
18 where Mr. Burke parked on the night of the
19 fall?

20 A. I understand -- from what I heard,
21 he'd parked over to the side in the Handicap
22 area, cutting around the curb to get towards
23 the gymnasium to watch the basketball game.

24 Q. By the ---

25 A. Probably the third one down in the

1 lot, near the street.

2 Q. That was the next thing I was going
3 to ask you.

4 A. I don't know exactly.

5 Q. Mr. Denny, do you feel like you fell
6 down on the job by not using a light meter to
7 measure the light in the George Street
8 parking lot?

9 A. No, I did not.

10 Q. Did the City ever come to you after
11 the fall and say, 'Hey, Mr. Supervisor, what
12 happened? Was the lighting sufficient?'

13 A. No.

14 MR. MCCULLOUGH: Objection,
15 hearsay.

16 THE COURT: Sustained.

17 MS. RUPARELIA: That's all that I
18 have, Your Honor.

19 THE COURT: Cross-examine?

20 CROSS EXAMINATION

21 BY MR. MCCULLOUGH:

22 Q. The City didn't know that Mr. Burke
23 had fallen, did they?

24 A. (No verbal response).

25 Q. Republic didn't tell the City, did

1 they?

2 A. We didn't know until a year later.

3 Q. You didn't know?

4 A. No. My understanding is that there
5 wasn't an incident report, the police weren't
6 called. I don't know how that was handled,
7 so I can't speak to that.

8 Q. This was your lot, right?

9 A. No, I was the maintenance
10 supervisor.

11 Q. You just described a team that works
12 under you to maintain and supervise this lot?

13 A. Yeah, I said that there was a person
14 there, a clean up person, that worked with
15 the manager.

16 Q. From 1997 until today, you were
17 there on that lot first thing in the morning
18 and the last thing at night, or late in the
19 afternoon?

20 A. Yes.

21 Q. Right. So you knew that lot better
22 than anybody else?

23 A. (No verbal response).

24 Q. It was your lot?

25 A. It was the City's lot.

1 Q. You worked from 1998 until 2013 and
2 you were in charge as the maintenance
3 supervisor, boots on the ground, for Republic
4 Parking Services. Right?

5 A. Correct. I ---

6 Q. And you held that position until
7 2013. Right?

8 THE COURT: Hold on just a second,
9 Mr. McCullough. The witness had not finished
10 his answer. You may complete your answer,
11 Mr. Denny.

12 WITNESS: Yes, I was the maintenance
13 supervisor of the lot but I was controlled by
14 the guidelines set by the City.

15 CROSS EXAMINATION CONTINUED

16 BY MR. MCCULLOUGH:

17 Q. Yes, sir. Let's talk about that.
18 You were aware -- let me ask this, you
19 weren't involved in the RFP that we marked as
20 Exhibit 9, submitted to the City of
21 Charleston, were you?

22 A. I was involved in none of that.

23 Q. And you weren't involved in the
24 negotiation and drafting and signing of the
25 parking agreement between Republic and the

1 City, right?

2 A. Right.

3 Q. So Exhibit 8 (sic) entered into on
4 May 1st, 2008, you don't know what they agreed
5 to do, do you?

6 A. It didn't involve me.

7 Q. It went to your boss, Mr. Potter,
8 down to your staff but you have no idea what
9 was the agreement except what you were told?

10 A. I was told to maintain that lot.
11 I wasn't -- I was not told to make any
12 changes without the City's approval.

13 Q. That's right. If there was
14 something that needed to be done on that lot,
15 you would have gone to the City?

16 A. (No verbal response).

17 Q. If you felt that you could take out
18 spaces, add lines/stripes, whatever, if you
19 felt that it was important, you would have
20 gone to the City. Right?

21 A. If there were any changes to be
22 done. There were occasions when that would
23 be approved and there were occasion when it
24 was not. They controlled it.

25 Q. That's right, they controlled it.

1 A. (Affirmative nod). I've got people
2 that control me, to a certain extent, and the
3 City has people that control them.

4 Q. And the folks that control you are
5 the folks that entered into that contract?

6 A. (No verbal response).

7 Q. Made promises, right?

8 A. (No verbal response).

9 Q. Made promises with the City of
10 Charleston?

11 A. I don't know about promises. I
12 wasn't there.

13 Q. Right. And they never told you what
14 they said that they were going to do, did
15 they?

16 A. No, other than verbally I was told
17 that any improvements, upgrades or whatever
18 we did on the lots and locations had to go
19 through the City.

20 Q. I understand that. Did you know
21 that you were supposed to look for dangerous
22 conditions, to notify folks of dangerous
23 conditions?

24 A. We do.

25 Q. Okay. Did you know your boss, the

1 person that they sent down here to the
2 30(b)(6) deposition testified that improper
3 light was a dangerous condition?

4 A. That improper lighting is a
5 dangerous condition?

6 Q. Yes, sir.

7 A. I did know that.

8 Q. Were you here when Mr. Campbell was
9 testifying a few minutes ago?

10 A. Yes, sir.

11 Q. Did you hear that the light out
12 there was less than twenty percent, fifteen
13 percent of the standard? Were you aware of
14 that?

15 A. I heard that.

16 Q. You and everybody else did the
17 "eyeball test", you'd just go out there and
18 see what the light was. Right?

19 A. That's what I do.

20 Q. You know that's what your boss in
21 Nashville does, right?

22 A. (No verbal response).

23 Q. Nobody, from you to your boss in
24 Nashville, to your boss in the back of the
25 courtroom, to your staff, owns a light meter

1 reader?

2 A. Nobody ever told me that I needed
3 one.

4 Q. That's exactly right. Nobody ever
5 told you that as the manager of maintenance
6 running that lot that you should use a light
7 meter to make sure that that lot was
8 appropriately lit. Did they?

9 A. No.

10 Q. You didn't know that Republic had
11 promised the City of Charleston that was what
12 they were going to do, did you?

13 A. I didn't know until this happened
14 that anybody had ever had a problem.

15 Q. In fact, you didn't even know that
16 they had filed a lawsuit, did you?

17 A. (No verbal response).

18 Q. You just testified to that.

19 A. I knew that it happened several days
20 afterwards because I was told to go check the
21 pole at the entrance, because somebody
22 thought that it was a light pole when in
23 essence it is a sign post.

24 Q. And you did that on January 25th?

25 A. I couldn't designate what day that I

1 was asked to do that.

2 Q. On January 25th, 2013, when you
3 arrived back at your job, as managing
4 maintenance supervisor for all the public
5 lots, to include the George Street parking
6 lot, you as the head man were not even told
7 that this (indicating Mr. Burke) had fallen
8 as a result of falling on your curb. Is that
9 right?

10 A. It's not my curb. It's the City's
11 curb.

12 Q. You didn't want to know?

13 A. No, I didn't.

14 Q. Do you know Mr. Lee?

15 A. I have no idea who Mr. Lee is.

16 Q. You don't know Kenneth Lee?

17 A. Kenneth Lee, I do. There are plenty
18 of Lees.

19 Q. Republic is a big company, right?

20 A. That's what I have been told.

21 Q. They've got policies, protocols,
22 safety guidelines; right?

23 A. Sure.

24 Q. So when something really bad
25 happens, like when a man is sitting in ICU at

1 the Medical University of South Carolina,
2 there are safety protocols -- you've got to
3 bring the team together. Right?

4 A. Like I said, I didn't know. I
5 didn't know that he had fallen until I was
6 asked to go check on a pole when I'd hear
7 that someone had fallen. I didn't know what
8 procedure he went through. I don't know if
9 he notified Kenneth Lee, if he called the
10 police. They did tell me that he called EMS
11 but that was all that I knew that he had
12 done.

13 Q. Well, let me ask you this, if
14 Kenneth Lee said in a statement, undated,
15 that he provided, *"It was dark and it was*
16 *during a college game, the lot was full. A*
17 *lady came up to the booth and said that her*
18 *husband or father had fallen and the*
19 *ambulance was coming to get him. So the*
20 *ambulance came, took him out from inside the*
21 *car, put him in the ambulance and they all*
22 *left."* Did I read that right?

23 A. I've seen it, (affirmative nod).

24 Q. You've seen it?

25 A. (Affirmative nod).

1 Q. This big national company didn't
2 bother doing anything that night or the next
3 day but at some point after a lawsuit was
4 filed, this is what we end up having; is that
5 right?

6 A. I don't know.

7 Q. Let me ask you another question, as
8 the maintenance supervisor you are not in
9 charge of the person that sit in that box
10 collecting tools, are you? That's somebody
11 else's job?

12 A. (Affirmative nod) -- no, sir.

13 Q. But that individual had on a shirt
14 that said "Republic Parking Services", right?

15 A. I don't know.

16 Q. Have you been on your website,
17 Republic Parking's website?

18 A. (No verbal response).

19 Q. Have you seen those?

20 A. Honestly -- I've seen them but I
21 don't recall them to be sure.

22 Q. All right. "Service with a smile."
23 Right?

24 A. Yes.

25 Q. That of that guy's responsibility is

1 to be looking and letting folks know about
2 dangerous conditions. Right?

3 A. He's supposed to tell folks about
4 dangerous conditions?

5 Q. Yes.

6 A. No.

7 Q. Isn't ever Republic Parking employee
8 responsible for the safety of their
9 customers?

10 A. Yes, they are.

11 Q. Isn't that what those videos say?

12 A. Yes, sir. It's also a customer's
13 responsibility on their own.

14 Q. So it's his fault!?

15 A. I am not saying that it's his fault.
16 I'm just saying that any person who is using
17 a Republic Parking facility has a certain
18 amount of responsibility for themselves.

19 Q. So it is his fault?

20 A. I didn't say that.

21 Q. Mr. Kenneth Lee, a gentleman who is
22 not in court, was the gentleman in that box
23 that night, wasn't he?

24 A. I am not sure.

25 Q. We've heard testimony from two

1 witnesses that Mr. Lee was with another
2 gentleman at the time that Mr. Burke fell.

3 A. I couldn't answer that. I mean
4 there could been ten cars in a line waiting
5 to get in. I have no idea what he was doing.

6 Q. Mr. Lee was supposed to be doing his
7 job, not hanging out with friends on their
8 way to a basketball game; right?

9 A. I don't know what was the situation.

10 Q. You never talked to Mr. Lee to find
11 out what the situation was?

12 A. (No verbal response).

13 Q. To find out where Mr. Burke fell or
14 to check on Mr. Burke's condition. You never
15 followed up with Mr. Lee, did you?

16 A. I didn't follow up with him because
17 he didn't work for me. You stated that
18 yourself a while ago, that he worked for
19 somebody else.

20 Q. He worked for Republic Parking,
21 didn't he? Isn't that right?

22 A. He worked for Republic but under
23 another manager, somebody else, not me.

24 Q. So it was not your problem?

25 A. It was still my problem. All

1 company are made up of people working as a
2 team.

3 Q. And you've got to communicate -- to
4 notice folks when notice that something is a
5 problem? You said that Mr. Lee said that his
6 wife came up to the booth and said that he
7 was sitting in the car. You stated that?

8 A. Are you referring to Mr. Lee's
9 statement where he said that he left and the
10 ambulance came?

11 Q. That his wife came to the window and
12 notified Mr. Lee and that Mr. Lee, in turn,
13 when he wrote the report said that his wife
14 or sister or daughter, whoever it was, said
15 that he was sitting in the vehicle waiting
16 for the ambulance.

17 A. I don't know if he was sitting in
18 the car or laying on the ground.

19 Q. If he was sitting in his car, he
20 still could have been very badly hurt?

21 A. Yes. If I had been there, I would
22 have been glad to help but I wasn't there.

23 Q. Mr. Denny, let's make something very
24 clear. You weren't told that he got hurt,
25 were you?

1 A. Not until the next morning, no.

2 Q. And nobody at the corporate officer
3 ever told you that you or Republic that the
4 lighting out there was insufficient?

5 A. My responsibility that was given to
6 me was to maintain the lights and ballasts
7 that made the lights function.

8 MR. MCCULLOUGH: No further
9 questions.

10 THE COURT: Redirect?

11 MS. RUPARELIA: Yes, Your Honor.

12 REDIRECT EXAMINATION

13 BY MS. RUPARELIA:

14 Q. Just to be clear, you were not the lot
15 manager?

16 A. No, I thought that I made that clear.

17 Q. You were facilities manager?

18 A. Maintained the facilities. And in that
19 capacity, I'm controlled by what I can do and
20 can't do.

21 Q. Yes, sir.

22 A. By the City or my boss.

23 Q. Okay. And when you're a maintenance
24 supervisor, do you sit in one particular lot for
25 eight hours a day?

1 A. No, I do not.

2 Q. Okay. So you go around?

3 A. I may be -- I may hit twenty, twenty-
4 five, thirty different lots. I mean, we ain't got
5 that many lots, but I may go from twenty -- I
6 could work from five different problems to thirty
7 different problems a day at different locations.

8 Q. And just so the jury is clear, how did
9 you first hear about Mr. Burke's fall?

10 A. I was asked to go check the pole on the
11 right-hand side entrance, to the entrance.
12 Somebody wanted to know if there was a light pole.
13 And if so, why wasn't there a light on it. I went
14 and checked that pole and it's a sign pole. As a
15 matter of fact, the two sign brackets are still on
16 that pole.

17 Q. And the sign pole and light pole, the
18 sign pole would not have any electrical wiring?

19 A. No, it would not.

20 Q. It was not a light pole without a light
21 on it?

22 A. No, it was not. It was a sign pole.

23 Q. Okay. When you say sign pole, what do
24 you mean?

25 A. You could put a sign up the size of these

1 pictures that they have or a billboard that would
2 say George Street Parking Lot. Maybe a sign and
3 have George Street Lot on it.

4 Q. And so what I'm hearing you say is that
5 you went to check the sign pole after somebody
6 told you that Mr. Burke had fallen?

7 A. That was one of the things I was asked to
8 go look at.

9 Q. Were you aware of any insufficient
10 lighting in that particular parking lot.

11 A. I had never heard a complaint of any
12 insufficient lighting on the lot.

13 Q. Do you believe that there was a hazardous
14 or a dangerous condition on the parking lot?

15 A. No, because nobody had ever made mention
16 of it.

17 Q. Did the City ever tell you that you had
18 to use light meters to evaluate the levels of the
19 lighting in the parking lot?

20 MR. MCCULLOUGH: Objection.

21 WITNESS: No.

22 THE COURT: I'm going to sustain
23 the objection. Can y'all approach, please?

24 (OFF RECORD BENCH CONFERENCE)

25 REDIRECT EXAMINATION CONTINUED

1 BY MS. RUPARELIA:

2 Q. Mr. Denny, if you had been in that
3 parking lot at night when Mr. Burke fall, would
4 you have assisted him?

5 A. Most definitely.

6 Q. And you would have called the ambulance?

7 A. I would have done anything possible to
8 help him. I've assisted many people many times
9 over the years.

10 Q. Thank you, Mr. Denny.

11 THE COURT: Recross.

12 MR. MCCULLOUGH: No, sir.

13 THE COURT: Thank you. You may
14 come down, Mr. Denny.

15 WITNESS: Thank you.

16 (WITNESS STEPS DOWN)

17 THE COURT: Call your next
18 witness.

19 MS. RUPARELIA: Yes, sir. I call
20 Mr. Anderson, Your Honor.

21 THE COURT: Okay. Mr. Anderson.

22 (WITNESS TAKES STAND)

23 EDWARD ANDERSON, having been duly sworn
24 to tell the truth, and nothing but the truth,
25 testified as follows:

DIRECT EXAMINATION

BY MS. RUPARELIA:

Q. Mr. Anderson, Good afternoon. Where are you employed?

A. The City of Charleston.

Q. And how long have you worked for the City of Charleston?

A. Twenty-four years.

Q. Okay. And if you will just briefly tell the jury what you've done in your tenure at the City of Charleston?

A. I originally started as an electrician and graduated up to operations coordinator, then to electrical superintendent, then to mechanical electrical superintendent, and I am currently the assistant director of building operations.

Q. And how long have you been the assistant director building operations?

A. Since 2002.

Q. And what all does the job of an assistant director of building operations entail?

A. I'm responsible for all maintenance in all city facilities.

Q. And all city facilities would include all city lighting?

1 A. Including street lighting.

2 Q. Street lighting?

3 A. On city facilities. Not so much private
4 property, but the street lights are a little bit
5 different.

6 Q. And just so we're all clear, the George
7 Street parking lot was a City parking lot?

8 A. It's a private parking lot, managed by
9 the City; which, in turn, is managed by Republic.

10 Q. The private owners didn't tell you how
11 the parking lot would get to be run or tell
12 Republic how the parking needed to be run -- told
13 Republic how the parking lot needed to be run?

14 A. I don't control that person, no. I'm
15 strictly maintenance.

16 Q. But I'm talking about the City of
17 Charleston?

18 A. The City of Charleston would have
19 directed them, but it would not have been me.

20 Q. And I didn't mean to say you personally.
21 I meant the City of Charleston. Do you hold any
22 licenses, Mr. Anderson?

23 A. Yes, I do.

24 Q. And can you tell the jury what sorts of
25 licenses you hold?

1 A. I have a State electrical license.

2 Q. Any other certifications that you have?

3 A. FEMA courses that I've taken for
4 emergency preparedness.

5 Q. You've talked about -- you talk about
6 you're responsible for all the street lighting and
7 facilities. Can you tell us what all is involved
8 in that?

9 A. Can you be a little more specific?

10 Q. You mentioned that you're the guy
11 responsible for all the parking facilities, the
12 street lighting facilities?

13 A. Well, I mean, all the facilities would be
14 from the roof to the floor, that would be the
15 aspect of the whole building.

16 Q. Okay. That would include the lighting?

17 A. That would include the lighting.

18 Q. And Mr. Anderson when were you first made
19 aware of Mr. Burke's fall in this particular case?

20 A. I want to say it was September/October.

21 Q. The same year?

22 A. The same year that it happened, yes.

23 Q. Okay. And what did you do after you
24 learned about Mr. Burke's fall?

25 MR. MCCULLOUGH: Your Honor, may we

1 approach?

2 THE COURT: Sure.

3 (OFF RECORD BENCH CONFERENCE)

4 DIRECT EXAMINATION

5 BY MS. RUPARELIA:

6 Q. Mr. Anderson, during the time that
7 Republic managed the parking lot in question,
8 did you have any interactions with them?

9 A. With Republic?

10 Q. With Republic?

11 A. Yes.

12 Q. And what sorts of things did you engage
13 with Republic on?

14 A. If it was a maintenance item that was
15 beyond his scale or capability, we would typically
16 try to intercede. The City did have some sense of
17 urgency to have things repaired in a timely
18 manner.

19 Q. And he gave the example when it's time to
20 replace a light bulb, if he can't get to it?

21 A. Yeah.

22 Q. Are you familiar with that particular
23 situation?

24 A. Yes, I am.

25 Q. Okay. And can you tell me what happens

1 when that situation arises?

2 A. Depending, you know, who called the work
3 order in or whenever I could get it on the
4 schedule and go out and repair it. We have a
5 bucket truck. We can get in over the top of the
6 shrubbery where some of these lights are located
7 that he doesn't really have access to.

8 Q. Okay. Do you -- and you agree that
9 that's okay for him to come to the City and ask
10 for assistance on?

11 A. It's ultimately Republic's responsibility
12 to maintain the facilities; however, if there is a
13 need that arises and a light needs to be fixed,
14 certainly the City's going to assist. We're
15 paying for it regardless ---

16 Q. Right.

17 A. --- of whether it comes out of the money
18 that's generated.

19 Q. Right.

20 A. So that doesn't really matter.

21 Q. The City of Charleston provided or
22 dictated what kind of light bulbs were used in
23 those light fixtures?

24 A. The lights originally that were installed
25 in that lot were 175 watt mercury vapor. In 2006

1 the federal government said that we would no
2 longer be allowed to use mercury vapor. There was
3 a transition period. You could still get them up
4 until about 2009, I believe.

5 Q. Yeah.

6 A. And then they gradually have been phased
7 out.

8 Q. And, again, it was the City's decision to
9 decide which kind of light bulbs went into those
10 light fixtures?

11 A. We put 175 watt metal halide light.

12 Q. Yes, sir. The mercury vapor lights, were
13 there any mercury vapor lights on that particular
14 parking lot in 2013?

15 A. It may have been, but it probably would
16 have been one or two, maybe three. It's hard to
17 say. I can't really be for sure, but there could
18 have been.

19 Q. Do you have an idea of how many light
20 posts there are in that parking lot that have this
21 kind of light bulb, not just mercury vapor, metal
22 halide?

23 A. The total amount of light bulbs in the
24 lot?

25 Q. Yeah. Do you recall how many there are?

1 A. I believe there's ten to twelve, some-
2 where in that neighborhood.

3 Q. Are you familiar with the layout of where
4 they are?

5 A. I'm familiar.

6 Q. Would you be able to tell us where those
7 light posts are, sitting here?

8 A. I mean, not every single one but I could
9 come close.

10 Q. Where are the light posts, the best you
11 can recall?

12 A. The medians, the grassy areas, the
13 shrubbery, the planted areas, the isles. They're
14 not in the parking lot itself. They're in those
15 planter beds.

16 Q. Okay. If Republic wanted to upgrade the
17 lighting facilities, would it do that on its own?

18 A. It would have to go through BAR ---

19 Q. Which is?

20 A. Which is Board of Architectural Review
21 because that lot is in the historic district. The
22 BAR originally approved those light fixtures back
23 in 1978 from my understanding.

24 Q. The light posts that are there currently?

25 A. Yes.

1 Q. Okay. And so if Republic wanted to
2 upgrade those light fixtures to something else,
3 brighter lights, what would that process be?

4 A. They would have to go through the whole
5 due process, which would be BAR, BRC, all the
6 typical things that new projects would have to go
7 through currently.

8 Q. Okay. And the Board of Architectural
9 Review is with the City of Charleston?

10 A. Yes.

11 Q. Okay. So would have to go to the City of
12 Charleston?

13 A. Right.

14 Q. Could Republic put stadium lighting in
15 that particular parking lot?

16 A. I'm sure the BAR would not allow that.

17 Q. The mayor?

18 A. The BAR would not allow that.

19 Q. And why is that?

20 A. It's not a stadium. It's a parking lot.

21 Q. Does the City have any concern about
22 lighting pollution in the city?

23 A. We're gradually progressing in that
24 direction.

25 Q. Okay. Eliminating extra lighting?

1 A. Dark sky compliant, yes.

2 Q. When you walk around the city at night, I
3 find the city is very dark. Do you find the city
4 to be a generally dark city?

5 A. No, I do not.

6 Q. Okay. It's not Las Vegas; is it?

7 A. No, it's not.

8 Q. Not the city of Baltimore; is it?

9 A. No, it's not.

10 Q. It's not New York City; is it?

11 A. No, it's not.

12 Q. It's a historical city; isn't it?

13 A. That's correct.

14 MS. RUPARELIA: Thank you, Your
15 Honor. Those are all the questions I have.

16 THE COURT: All right. Cross-
17 examine.

18 CROSS EXAMINATION

19 BY MR. MCCULLOUGH:

20 Q. Mr. Anderson, who was the City relying on
21 to maintain the George Street parking lot?

22 A. Can I expand on that a little bit?

23 THE COURT: You can answer the question
24 and then you explain your answer any way you wish.
25 Yes, sir.

1 WITNESS: Can you ask that question
2 again?

3 CROSS EXAMINATION CONTINUED

4 BY MR. MCCULLOUGH:

5 Q. Sure. Were you looking to Republic, was
6 the City looking to Republic to manage and
7 maintain that parking lot?

8 A. Yes.

9 Q. And the fact that you had a bucket truck
10 they could use so they wouldn't have to go to a
11 huge rental company and rent one and then charge
12 it back to you, does that change the fact that you
13 were relying on Republic to maintain that lot?

14 A. It does not. We tried to work hand in
15 hand with Republic to try to make accommodations;
16 you know, just trying to help out where we could.

17 Q. Sure. And if they came to you, came to
18 the City and said, 'Look, we're worried about
19 something. Let's come up with some ideas to make
20 it safe', you'd have listened?

21 A. (Affirmative nod), and I would have
22 passed that up the chain.

23 MR. MCCULLOUGH: Thank you, Your
24 Honor. No further questions.

25 THE COURT: Redirect?

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Case No. 13-CP-10-1400
Jury Trial of December 15-19, 2014
Before The Honorable R. Markley Dennis

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1 MS. RUPARELIA: No further
2 questions, Judge.

3 THE COURT: Thank you. You may
4 come down Mr. Anderson.

5 WITNESS: Thank you.

6 (WITNESS STEPS DOWN)

7 MS. RUPARELIA: Your Honor, our
8 next witness is about five minutes away.

9 THE COURT: Okay. Do you want us
10 to wait or you want to call ---

11 MS. RUPARELIA: We may actually go
12 past 5:30.

13 THE COURT: Well, let's go ahead
14 and do this. He'll be available tomorrow without
15 any imposition?

16 MS. RUPARELIA: Yes, sir.

17 THE COURT: Okay. Thank you.
18 Then we'll use this point to take our recess for
19 the evening.

20 Thank you ladies and gentlemen. I
21 appreciate your attention throughout the day. I'm
22 going to excuse you. Of course, please return --
23 they have scheduled things in addition to what
24 we're doing here and I appreciate your patience
25 with that, we're trying to get those things done.

1

2

DECEMBER 17, 2014

9:45 A.M.

3

4

5

6

THE COURT: Okay. Is the
Plaintiff ready? Is the Plaintiff ready, Mr.
McCullough?

7

MR. MCCULLOUGH: Yes, sir.

8

THE COURT: Is the Defense ready?

9

MS. RUPARELIA: Yes, Your Honor.

10

THE COURT: Bring them in.

11

(JURY IN @ 9:56 A.M.)

12

BAILIFF: Jurors are all present,

13

Your Honor.

14

THE COURT: Thank you very much.

15

Good morning, ladies and gentlemen. We're getting

16

ready to continue. Does everyone that had a

17

notebook have your notebooks now? Okay. Good.

18

Hope you had a good evening.

19

When we stopped yesterday you had

20

another witness you want to call?

21

MS. RUPARELIA: Yes, Your Honor.

22

Mr. Dwight Potter, please?

23

(WITNESS TAKES STAND)

24

KENNETH DWIGHT POTTER, having been

25

duly sworn to tell the truth, and nothing but

1 the truth, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. RUPARELIA:

4 Q. Thank you, Mr. Potter. How old are you?

5 A. Fifty-nine (59).

6 Q. And where do you live?

7 A. Charleston.

8 Q. How long have you lived here?

9 A. Altogether, since '98.

10 Q. And have you worked for Republic Parking
11 at any time?

12 A. Yes, I have.

13 Q. Tell us your history with Republic
14 Parking from the beginning?

15 A. I believe I started with them in August
16 of 1997 in Sioux Falls, or Sioux City, Iowa. I
17 was there for about fourteen months or so.

18 They transferred me here in Charleston. I
19 got here in November of '98. I came in as a
20 senior Ops manager for the first year and a half,
21 and then I was a general manager from that point
22 on.

23 Q. And when you say a senior Ops manager,
24 senior Ops manager of what?

25 A. Of the basic operations. The staffing,

1 daily operations of the parking operation.

2 Q. When you got transferred from Iowa, what
3 was your understanding of what kind of job you
4 were taking on in Charleston?

5 A. Well, when I came down here, the idea was
6 I'd come as a senior Ops and be promoted to a
7 general manager. The fellow here ahead of me was
8 about to be transferred out.

9 Q. Okay. And then you became general
10 manager about a year and a half later?

11 A. Yes, ma'am.

12 Q. Okay. And we heard from Mr. Buddy Denny
13 yesterday. How are your job responsibilities
14 different for Republic Parking than Mr. Denny's
15 responsibilities?

16 A. Well, as the general manager I was
17 responsible for overseeing the parking operation.
18 I had corporate oversight of course.

19 Q. How many -- when you say parking
20 operation, what all is the parking operation?

21 A. We had twelve garages and five surface
22 lots. And we also collected the coins out of
23 approximately seventeen hundred and fifty meters
24 for the City.

25 Q. On the street?

1 A. Yes, ma'am.

2 Q. Okay. Was the George Street parking lot
3 one of your five surface parking lots?

4 A. Yes, ma'am.

5 Q. And you said how many garages?

6 A. Twelve.

7 Q. And those were all managed by Republic?

8 A. Yes, ma'am.

9 Q. And when you took over the parking lot
10 that is now what we're talking about today, the
11 George Street parking lot, who was managing that
12 parking lot before you took over it?

13 A. Before Republic took over?

14 Q. Yes.

15 A. The City of Charleston.

16 Q. Did you recall how long they had been in
17 that role?

18 A. My understanding was around twenty years
19 or so. I'm not real sure.

20 Q. And when you took over the parking lot
21 from the City of Charleston, were you supposed to
22 do anything that was in addition to what the City
23 was already doing in that parking lot?

24 A. Well, not really. We were -- took over
25 the whole thing under their direction. They, you

1 know, pretty much set the parameters on what they
2 wanted done, how they wanted to do it. Any major
3 problems came up, we were to report to them. They
4 would direct us on, you know, how they wanted to
5 go about it.

6 Q. And you said they set the parameters.
7 And can you just tell us a little bit more about
8 what sorts of parameters the City of Charleston
9 set?

10 A. Well, this was a typical management
11 contract for Republic. In the management account,
12 all of the expenses are passed through.

13 Q. What does that mean?

14 A. That's means all the expenses are paid by
15 the city. They have to approve them. They set
16 the -- for instance, the rates that we're going to
17 charge in the facilities. They decide what hours
18 of operation. They decide how much we're going to
19 pay our employees. And we submit a budget and
20 they'll either approve it or amended it or change
21 it or do whatever they want. And then we go from
22 there.

23 Q. And how does Republic get paid then?

24 A. Basically a management fee.

25 Q. On the George Street parking lot, did

1 Republic conduct its own inspections of that
2 parking lot?

3 A. Yes, we did, quarterly.

4 Q. Okay. Is that something the City made
5 you do?

6 A. This was for internal purposes.

7 Q. Okay. And explain a little bit more
8 about what that means.

9 A. Okay. Our insurance carrier asks, you
10 know, every quarter that we do a field inspection.
11 And typically the manager that was over that
12 particular location would walk through, check off
13 the list, sign it and send it in.

14 Q. And do you recall what all was contained
15 in the inspections?

16 A. It's pretty generic. You know, covered
17 lighting, hazards, obstructions anything that
18 needed to be done basically.

19 Q. Okay. And who would be the person at
20 Republic that would actually do these inspections
21 of the parking lots?

22 A. The manager of that particular location.

23 Q. Okay. So for the George Street parking
24 lot it would have been the manager of that
25 location?

1 A. Correct. And typically they'd have, you
2 know, maybe one or two other locations they were
3 responsible for.

4 Q. Okay, Mr. Potter. And what happened to
5 those inspections once they were done? Did they
6 go to corporate or where did they ---

7 A. Yes, they did.

8 Q. Okay. Did the City do its own
9 inspections?

10 A. Yes, they did.

11 Q. And what did they do with those
12 inspections?

13 A. They did there's once -- well, right at
14 once a month. And they would send them to me.

15 Q. And what were you supposed to do them?

16 A. If there was an issue that needed
17 attention, I was to correct it. Or if it was
18 beyond our expertise level, take it back to them.
19 They'd either decide to do it in-house or sub it
20 out.

21 Q. Okay. Now, I'm going to show you what's
22 been marked as Defendant's Exhibit Number 6. Can
23 you tell the jury what that document is?

24 A. Okay. This looks like a City inspection
25 report for the George Society Street parking lot.

1 It was held on January the 4th, 2013 at 10:25 a.m.
2 and Scott Maxie is the fellow with the city that
3 apparently performed it.

4 Q. Do you know Mr. Maxie?

5 A. Yes, I do.

6 Q. Okay. How familiar are you with what all
7 he does?

8 A. As far as what he does in relation to
9 parking, very familiar.

10 Q. Okay. What all does he do?

11 A. He does monthly inspections of all our
12 locations. He'll walk through, look at them, note
13 if there's anything that he feels needs to be
14 addressed. If there's graffiti on the wall, or
15 whatever the case may be.

16 Q. And then they give the inspection to you?

17 A. Yes. He sends these to me. Yes.

18 Q. And if the City notices a problem or
19 thinks there's a deficiency somewhere, would they
20 note it on that inspection report?

21 A. Yes, they would.

22 Q. And then what would you do about it?

23 A. I would address it. I would either -- if
24 we could do it in-house, we would take care of it.
25 If we couldn't, I'd come back to them and say,

1 'gee, we don't have the expertise, equipment,
2 supplies', whatever.

3 Q. Okay. Okay. In those inspections, did
4 the City ever tell you that the lighting in the
5 George Street parking lot was not good enough?

6 MR. MCCULLOUGH: Objection.
7 Hearsay.

8 THE COURT: Sustained.

9 MS. RUPARELIA: Sorry, Your Honor.

10 DIRECT EXAMINATION CONTINUED

11 BY MS. RUPARELIA:

12 Q. Did you ever get any idea from the City
13 that ---

14 MR. MCCULLOUGH: Objection.

15 THE COURT: Sustained.

16 MS. RUPARELIA: All right. Sorry.

17 THE COURT: Can't do it that way
18 either.

19 DIRECT EXAMINATION CONTINUED

20 BY MS. RUPARELIA:

21 Q. Well, did Republic put the lighting in
22 the lighting in the parking lot?

23 A. No, ma'am.

24 Q. Okay. Who did?

25 A. The City of Charleston.

1 Q. Did Republic ever take on the job to
2 upgrade the lighting in that parking lot?

3 A. No, ma'am.

4 Q. Okay. And does Republic have the people
5 -- do you have the people to upgrade the lighting?
6 Do you have the expertise to do that?

7 A. No, we do not.

8 Q. Who does?

9 A. Well, obviously, the City would.

10 Q. Okay. Were you -- are you familiar with
11 any instances where the City has taken on projects
12 to upgrade lighting?

13 A. Yes, ma'am.

14 Q. Okay. Can you tell us about that?

15 A. Probably five years ago ---

16 MR. MCCULLOUGH: Your Honor, I
17 would object under relevance.

18 THE COURT: Sustained.

19 DIRECT EXAMINATION CONTINUED

20 BY MS. RUPARELIA:

21 Q. Could Republic put stadium lights in the
22 parking lot?

23 A. No, ma'am.

24 Q. Okay. Why not?

25 A. Number one, we don't have the expertise.

1 And we don't have the supplies.

2 Q. Did you take on the role to put in
3 anything other than replacing the light bulbs
4 in that particular parking lot?

5 A. No, ma'am.

6 Q. Okay. And did Republic have any say over
7 the type of bulbs that went into those light
8 fixtures?

9 A. Absolutely not.

10 Q. Okay. Did you guys design the layout of
11 the lighting?

12 A. No, we did not.

13 Q. Were you aware of any problems with the
14 lighting?

15 A. No, ma'am.

16 Q. Okay. Did you receive any complaints
17 about the problems or any issues with the
18 lighting?

19 A. Not that I recall.

20 Q. Thank you, Mr. Potter.

21 A. Yes, ma'am.

22 MR. MCCULLOUGH: Your Honor, may we
23 approach?

24 THE COURT: Yes, sir.

25 (OFF RECORD BENCH CONFERENCE)

1 THE COURT: Ladies and gentlemen,
2 there's a matter of law that I have to take up out
3 of your presence. When you go to your jury room,
4 do not begin any deliberation, do not discuss the
5 case.

6 (JURY OUT @ 10:05 A.M.)

7 THE COURT: All right. We've had
8 a bench conference. Mr. McCullough, I'll be happy
9 to hear from you now in regard to the bench
10 conference.

11 MR. MCCULLOUGH: Thank you, Your
12 Honor. I don't want to create an appellate issue.
13 This has been a clean trial up until this point.
14 We're not going to make an issue of her bringing
15 up insurance, in all candor. I just wanted to
16 button this up now, to make sure that they weren't
17 going to talk about it. And that they were going
18 to clearly not talk to the ---

19 THE COURT: Well, I'm not worried
20 about the use of it. I worried about whether I
21 talk about it here. And if you don't want to go
22 there, that's up to you. But just for purposes of
23 the record, I told and advised and I think I'm
24 correct on this, you've injected a reason that you
25 have liability. You wouldn't have coverage if you

1 didn't have. So ---

2 MS. SPRUILL: (Stands)

3 THE COURT: Ms. Spruill, I don't
4 need you to pontificate at this point.

5 MS. SPRUILL: I'm not going to
6 pontificate.

7 THE COURT: Well, you've got --
8 you're holding the rule book. What you going to
9 say?

10 MS. SPRUILL: I know. That's just
11 my security blanket. I'm listening to you, Your
12 Honor.

13 THE COURT: What is it that you
14 want to say?

15 MS. SPRUILL: I'm just listening to
16 you. If they're not going to talk about it
17 anymore, then I'm not going to talk about.

18 THE COURT: No, but what were you
19 going to say?

20 MS. SPRUILL: Just that reference --
21 he didn't say what kind of insurance. He didn't
22 say why they had it. At this point, I don't think
23 we have a problem unless somebody wants to talk
24 about it.

25 THE COURT: Well, I appreciate

1 that. And that's not what I'm talking about. I'm
2 not worried about the word "insurance" coming in.
3 Frankly, I think this State needs to wake up and
4 move into the 21st Century. But I'm not willing to
5 create the issue for everybody else.

6 Everybody in the world knows that we have
7 insurance. This isn't a car case, but if you
8 drive your car without insurance, you get a
9 ticket. So people know that.

10 But we play this silly game of keeping it
11 under wraps. Surely -- I don't know of any other
12 insurance it could possibly be, except liability
13 insurance, because there's sure no fire issue.
14 But be that as it may, if he's not going there, we
15 don't have a problem.

16 MS. SPRUILL: Yeah. We understand
17 insurance existed and we're okay.

18 THE COURT: Yeah. Okay. And I'm
19 fine with the word being dropped. It's not the
20 first time, it won't be the last time. People do
21 it every day. So it's not a problem.

22 MR. MCCULLOUGH: Thank you, Your
23 Honor.

24 THE COURT: In fact, quite
25 frankly, there's a charge that's been circulating

1 for several years about when the jury asks the
2 question -- and several of us are contemplating
3 giving that charge initially. I give it if they
4 ask the question, 'What portion of this has been
5 paid by insurance?' And that's a typical
6 question. And the reason for that, and I kept --
7 it lead me to what I just said just a minute ago.
8 You tell the jury they're to decide this case
9 based on the record, based on the evidence. The
10 first question comes out in about five minutes,
11 'How much has been paid in insurance?' How in the
12 world did they get to that point, because there's
13 no testimony about insurance? And it finally
14 dawned on me. Because we all tell them to use
15 their commonsense, their knowledge, their sense of
16 logic and reason. Everybody there knows about
17 insurance. Or a lot of them, most of them do for
18 sure. And they know that insurance pays for
19 medical. They know insurance pays all those
20 things. So it tops the charge, and really this
21 charge is really the essence of what this action
22 is. And I think it would protect the insurance
23 industry, protects the plaintiff. The question's
24 not what insurance is there. That's not an issue.
25 That's a business decision.

1 MS. SPRUILL: We're here to make
2 Plaintiff whole?

3 THE COURT: No. They're there to
4 -- correct in one sense. They're to set a figure
5 that they believe it represents the damage that
6 plaintiff has sustained. How it's paid, whether
7 it's paid, that's not a concern of theirs.

8 And, frankly, it would eliminate all of
9 this -- I have defense lawyers -- I know y'all
10 won't do this -- but 'this poor person he can't
11 possibly do -- this poor little individual.' And
12 I want to say -- that's when I want to say, wait a
13 minute. This poor little individual has two
14 hundred and fifty thousand dollars insurance
15 coverage. Don't sit there and use that term.
16 That's unfair. So it eliminates all of that.
17 It's just totally wrong.

18 But anyway, that's fine. As I said, it's
19 a strategic decision and I don't blame you for
20 that. I think that's probably the proper move for
21 your client. So thank you very much.

22 MR. MCCULLOUGH: Thank you, sir.

23 THE COURT: I appreciate your
24 position as well. Thank you.

25 All right. Let's bring in our jury.

(JURY IN @ 10:18 A.M.)

BAILIFF: All jurors are present, Your Honor.

THE COURT: Thank you very much. Thank you, ladies and gentlemen. We're ready to continue.

MR. MCCULLOUGH: May it please the Court?

THE COURT: You may begin your cross examination.

MR. MCCULLOUGH: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. MCCULLOUGH:

Q. Good morning.

A. Good morning.

Q. All right. I've got just a couple of questions. You testified that the lot manager filled out the quarterly inspection reports; is that correct?

A. Yes, sir.

Q. And that would be Exhibit Number 11; is that right? Is that a Republic checklist?

A. Excuse me. (Upon review), yes, sir. It is.

1 Q. Okay. And Republic has a standardized
2 way of doing business, to include standardized
3 checklist; right?

4 A. Yes, sir.

5 Q. And the lot manager is the guy that
6 actually fills out these checklists on a quarterly
7 basis?

8 A. Correct.

9 Q. And that lot manager might have the
10 George Street lot and another couple of lots?

11 A. Yes, sir.

12 Q. And you're not the lot manager for George
13 Street?

14 A. No, sir.

15 Q. Who is -- Republic, at the time in
16 January of 2013, who was Republic's lot manager
17 for the George Street lot?

18 A. I believe Tamara Brown at that time. I'm
19 not positive, but I believe so.

20 Q. All right. And they're not here today?
21 That person's not here today; right?

22 A. No, sir.

23 Q. You're here today?

24 A. Yes, sir.

25 Q. All right. So Mr. Denny, the gentleman

1 that testified yesterday, he's a maintenance
2 supervisor; is that right?

3 A. Yes, sir.

4 Q. And so with regards to maintaining the
5 lots, you've got your lot manager.

6 A. (Affirmative nod).

7 Q. And Mr. Denny would be responsible for
8 the maintenance issues city wide; is that right?

9 A. Yes, sir.

10 Q. Now, you testified a minute ago, that
11 Republic's responsibility basically, 'we only
12 replace light bulbs', is what you said. In fact,
13 Republic's responsibilities are a good bit more
14 than that, aren't they?

15 A. Yeah. I mean it's quite a bit. We do
16 replace light bulbs, though.

17 Q. Okay. Did you -- Republic brought you
18 down to work in Charleston after it had already
19 entered into the original Agreement with the City
20 of Charleston; right?

21 A. Yes, sir.

22 Q. And the folks in Nashville responded and
23 put forth the information contained in the RFP;
24 right?

25 A. Chattanooga.

1 Q. Chattanooga. I'm sorry.

2 A. Yes, sir.

3 Q. I've been using the wrong state [sic].

4 So this Exhibit 9 that is the management of the
5 City of Charleston parking garages and lots, dated
6 December 17th, 2007, the information contained in
7 this originated at the corporate headquarters;
8 right?

9 A. For the most part, yes, sir.

10 Q. And so what they promised they would do
11 when they were looking to enter into the agreement
12 that was outside of your responsibilities; right?

13 A. What year did you say that was?

14 Q. 2007?

15 A. Okay. I would have been here at that
16 time, yes.

17 Q. Yes, sir. But as far as what the folks
18 at the national office were telling the City that
19 they were going to do for them, that's not stuff
20 that Dwight Potter said. That's stuff that the
21 national folks were saying, right?

22 A. For the most part, yes, sir.

23 Q. And in that contract that's been signed
24 by Mayor Riley on May 1st of 2008, and admitted as
25 Exhibit Number 7, and all of the contractual

1 obligations and promises made in this agreement,
2 these were made by the national Republic folks
3 with the City; right?

4 A. Yes, sir.

5 Q. This isn't Dwight Potter. This is
6 Republic Parking Services; right?

7 A. Yes, sir.

8 Q. Now, despite what was said on behalf of
9 Republic Parking Services, you were given specific
10 instructions by your boss as to what you were
11 supposed to do; right?

12 A. Yes, sir.

13 Q. And they told you that you were supposed
14 to change light bulbs, make sure the parking lots
15 were clean, the trash was emptied and that things
16 looked generally straight. Right?

17 A. Yes, sir.

18 Q. You were never told that you had an
19 affirmative obligation to seek out dangerous
20 conditions, were you?

21 A. That goes with the job.

22 Q. You were never told that every Republic
23 employee, including Ken Lee, the guy who's sitting
24 in the box, was obligated to note safety hazards,
25 including lighting issues; were you? You didn't

1 know that, did you?

2 A. No, sir, I didn't know that.

3 Q. You didn't know that you had a duty to
4 evaluate dangerous conditions including any trip
5 hazards? You didn't know that, did you?

6 A. Yes.

7 THE COURT: What's the objection?

8 MS. RUPARELIA: Never mind.

9 THE COURT: Oh, okay.

10 CROSS-EXAMINATION CONTINUED

11 BY MR. MCCULLOUGH:

12 A. Yes, sir, I did.

13 Q. So you undertook an evaluation of the
14 lighting conditions at the George Street lot?

15 A. Undertook it to the scope, you know, the
16 way I understood my position and Republic's
17 position, as I was told by the City, was we were
18 to replace the bulbs at all the facilities,
19 whatever the existing light bulb was, the ballast
20 was. If it had a dome, a globe on it, a pole,
21 whatever, we were to replace as-is.

22 Q. And that's your understanding of what you
23 were supposed to do?

24 A. Yes, sir.

25 Q. Do you know that that Agreement actually

1 specifies that if there's a situation where
2 Republic is worried, that they have the authority
3 to go in and fix things in an emergency situation.
4 Did you know that?

5 MS. RUPARELIA: Your Honor, can he
6 show Mr. Potter the document he's referring to?

7 MR. MCCULLOUGH: Yes, sir.

8 THE COURT: Show him.

9 MR. MCCULLOUGH: Exhibit 7.

10 THE COURT: Absolutely.

11 CROSS-EXAMINATION CONTINUED

12 BY MR. MCCULLOUGH:

13 Q. I'll read to you because it's long.

14 THE COURT: May want to tell him what
15 page.

16 MR. MCCULLOUGH: It's paragraph 5.9,
17 Your Honor.

18 THE COURT: Okay.

19 CROSS EXAMINATION CONTINUED

20 BY MR. MCCULLOUGH:

21 Q. And I'll read it, 5.9(b). It doesn't
22 have page numbers, but it's about halfway in.

23 A. Okay. Yes, sir.

24 Q. Let me read this and I want you to tell
25 me if I read it right. It's titled, Limitations

1 on Alteration of Parking Facilities. Paragraph,
2 (reading):

3 (b) Nothing set forth above shall
4 preclude Republic from making repairs or
5 alterations of an emergency nature, or in order to
6 protect from or prevent an immediate threat to
7 safety or property provided that prompt notice is
8 given to the City of the nature of such repairs
9 and alterations. Do you see that?

10 A. Yes, sir.

11 Q. Did I read that right?

12 A. Yes, you did.

13 Q. So if Ken Lee or the lot manager or
14 yourself went out there and deemed it to be
15 problematic, you could have gone out there and
16 stuck a cone out, make sure folks didn't park;
17 right? You could have done that?

18 A. Yes, sir.

19 Q. You could have asked the City -- for some
20 reason she keeps asking people about the stadium
21 lighting. You could have asked the City just to
22 add another light or two, couldn't you?

23 A. Yes, sir.

24 Q. You or somebody at Republic could have
25 gone in and continued that striping around that

1 curb or moved that one car so folks that park in
2 that area had a clear path out of that parking.
3 And you could have done that, right?

4 A. If I would have deemed that an emergency,
5 yes, sir.

6 Q. Well, aside from that, don't you also --
7 I thought we agreed you understood you have an
8 obligation to seek out dangerous conditions and
9 eradicate those dangerous conditions for the
10 safety of your customers. Isn't that true?

11 A. That is true.

12 Q. And you know that that's your job, isn't
13 it?

14 A. Yes, it is.

15 Q. Your job's not just changing light bulbs.
16 It's making sure that you were creating a safe
17 environment for the customers that you're on site
18 to service; right?

19 A. Yes, sir.

20 Q. Isn't that what those videos on your
21 website talked about, customer service and safety?

22 A. Yes, it is.

23 Q. And you know safety is a paramount
24 important, not only to the City but to Republic
25 Parking Services; right?

1 A. Yes, it is.

2 Q So if you see a dangerous condition,
3 you're supposed to do something about it, right?

4 A. Yes, sir.

5 Q. Finally, Mr. Potter, Republic has both an
6 RFP and the Agreement and I'm sure through your
7 training, it's told you that there's a process in
8 place wherein the employee is supposed to document
9 and investigate accidents that occur; right?

10 A. Yes, sir.

11 Q. And part of that is to include photo-
12 graphing, witness statements, notification to
13 authorities and notification to management that
14 an accident has occurred; correct?

15 A. Correct.

16 Q. And you do that for a couple of reasons.
17 The primary reason is to make sure nobody else
18 gets hurt. Right?

19 A. Yes, sir.

20 Q. You want to make sure that if you've got
21 a dangerous condition that you fix that dangerous
22 condition. Right?

23 A. Correct.

24 Q. In this instance the only statement that
25 was provided by anybody was by Mr. Ken Lee.

1 Right?

2 A. (No verbal response).

3 Q. Have you even seen this?

4 A. Yes, I have.

5 Q. And this was done well after Mr. Burke
6 fell; right?

7 A. Yes, it was.

8 Q. And nobody did some investigation.

9 Nobody took any pictures.

10 Nobody did any witness statements.

11 Nobody sent this up the line so there could
12 be some investigation of a dangerous condition.

13 Did they?

14 A. In this instance, no, sir, they didn't.

15 COURT REPORTER: And "this" was
16 Exhibit 12?

17 MR. MCCULLOUGH: I'm sorry. Yes,
18 ma'am.

19 COURT REPORTER: Thank you.

20 MR. MCCULLOUGH: Well, I believe
21 it's 11. No, that's not right. 12. You're
22 right. That's all I've got. Thank you, Your
23 Honor.

24 THE COURT: Redirect?

25 MS. RUPARELIA: One moment, Your

1 Honor.

2 THE COURT: Sure. Take your time.

3 MS. RUPARELIA: Nothing, Your

4 Honor.

5 THE COURT: Thank you. You may
6 come down, sir.

7 (WITNESS STEPS DOWN)

8 THE COURT: Call your next
9 witness.

10 MS. RUPARELIA: Yes, Your Honor.
11 We call Mr. Jack Skelton.

12 (WITNESS TAKES STAND)

13 JACK SKELTON, having been duly sworn to
14 tell the truth, and nothing but the truth,
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MS. RUPARELIA:

18 Q. And Mr. Skelton, what is it that you do?

19 A. I'm a vice president with Republic
20 Parking System.

21 Q. And how long have you been in that
22 position?

23 A. About eight years.

24 Q. Okay. And give the jury a little bit
25 about your history with Republic Parking?

1 THE COURT: That's fine. He's
2 here. Overrule the objection. You may continue.

3 MS. RUPARELIA: Thank you, Your
4 Honor.

5 DIRECT EXAMINATION CONTINUED

6 BY MS. RUPARELIA:

7 Q. On the first page in the definitions,
8 1.1(b), there's a definition of city expenses.
9 What does it say?

10 A. It reads, "City expenses shall all be
11 capital expenses as may be necessary at the sole
12 determination of the City. All capital
13 improvements and replacements to the parking
14 facilities and related equipment, striping,
15 restriping of parking spaces, boundaries, all
16 signs and the following operating costs."

17 Q. Okay. And then it lays out the operating
18 costs that the City pays?

19 A. Yes. In this case, the City pays all the
20 expenses, but ---

21 Q. Okay. And then on page two -- page three
22 -- excuse me -- small letter (i), up top?

23 A. Yes, ma'am.

24 Q. It says a Management Fee. Can you
25 explain to the jury what a management fee is?

1 parking lot?

2 A. No, ma'am.

3 Q. Okay. Well, did you have any input in
4 the type of light fixtures?

5 A. No, that wasn't our role with the City.

6 Q. Okay. Mr. Denny, yesterday, talked about
7 the quarterly inspections. Those are done four
8 times a year?

9 A. Yes, ma'am.

10 Q. Okay. And somebody in-house does them?

11 A. Well, the field operations are requested
12 by the insurance department. They're sent up.

13 Q. The field operations. We'll move on.

14 A. Okay.

15 Q. This particular incident, Mr. Potter was
16 asked about whether there was an incident report
17 or not. And what is your understanding of that
18 situation?

19 A. The only thing I've seen is the note, the
20 statement from the attendant that was there on the
21 site.

22 Q. Should there have been an incident
23 report?

24 A. Yes. That would have been the normal
25 protocol.

1 Q. Okay. So that was just a break in
2 protocol at that time?

3 A. Yes. And I'm assuming the attendant
4 didn't notify his supervisor that something had
5 happened that night.

6 Q. Just one second.

7 MS. RUPARELIA: One moment, Your
8 Honor.

9 THE COURT: Sure.

10 MS. RUPARELIA: All right. Thank
11 you, Your Honor.

12 MR. MCCULLOUGH: May it please the
13 Court?

14 THE COURT: Yes, sir.

15 CROSS EXAMINATION

16 BY MR. MCCULLOUGH:

17 Q. The only response Republic ever made to
18 Mr. Burke's fall was Mr. Lee's statement, which
19 was done after the lawsuit was filed; correct?

20 A. That's my understanding, yes.

21 Q. And you didn't find out about this
22 accident until well after a year; right?

23 A. Me, personally?

24 Q. Yes, sir?

25 A. Yes.

1 Q. And just so I'm clear, you are the legal
2 representative that Republic has designated that
3 knows the most and is in charge of handling Mr.
4 Burke's claim; correct?

5 A. Yes.

6 MS. RUPARELIA: Objection. Your
7 Honor, that's a misstatement.

8 THE COURT: Overruled. You can
9 ask a follow-up question if you wish on redirect.
10 Thank you.

11 CROSS-EXAMINATION CONTINUED

12 BY MR. MCCULLOUGH:

13 Q. All right. So you're supposed to know
14 the most, and yet you didn't find out about it
15 until a year after it happened, over a year after
16 it happened; right?

17 A. Yes.

18 Q. And you just walked in here today. You
19 weren't here Monday or Tuesday. Right?

20 A. I arrived on Sunday.

21 Q. You've been in Charleston the whole time?

22 A. Yes, sir, since Sunday.

23 Q. You were here and you had other important
24 things to do and you didn't bother coming to this
25 trial Monday and Tuesday?

1 Q. And you testified you wouldn't know how
2 to use a light meter.

3 A. (Affirmative nod).

4 Q. Do you deem that to be a complicated
5 process?

6 A. I couldn't tell you.

7 Q. Republic has thousands of employees;
8 doesn't it?

9 A. I believe the number is around twenty-
10 eight hundred.

11 Q. Twenty-eight hundred. And of those
12 twenty-eight hundred people, do you imagine that
13 somebody probably knows how to use a light meter?

14 A. I couldn't say for sure, sir.

15 Q. Would you anticipate that somebody in
16 Charleston, South Carolina probably could meet you
17 on site and do a light measurement test for you?

18 A. That was the role the City had taken on
19 here.

20 Q. That's what the City's got to do. That's
21 not anything you bothered to do when you came to
22 submit this RFP. That's what you're telling this
23 jury. Right?

24 A. I don't understand the question.

25 Q. You didn't bother to test anything

1 "improper" is.

2 Q. If it says -- what about fifteen percent
3 of the standard, would you consider fifteen
4 percent of the applicable standard improper?

5 A. It would -- I'd need more, a better
6 example than that.

7 Q. All right. Well, it's too bad you
8 weren't here yesterday because you might have
9 gotten it.

10 THE COURT: Refrain from that,
11 please.

12 MR. MCCULLOUGH: Yes, sir.

13 CROSS EXAMINATION CONTINUED

14 BY MR. MCCULLOUGH:

15 Q. We've got your deposition. We can pull
16 it out if needed be. I'm going to ask you if you
17 agree with these statements.

18 Do you agree that, "every Republic
19 employee is obligated to know safety hazards,
20 including lighting issues"?

21 A. Every employee is expected to perform
22 inspections of the parking facilities, yes, for
23 any dangerous conditions.

24 Q. "If lighting is poor, Republic is
25 obligated to notify the City." That's what you

1 said, right?

2 A. If we felt there was a hazardous
3 condition related to lighting, we would have a
4 duty to inform the city, yes.

5 Q. You have an obligation to notify the city
6 if lighting was insufficient. And you think it is
7 a duty that was undertaken by Republic, right?

8 A. Yes.

9 Q. And further, you, Republic, have a duty
10 to evaluate dangerous conditions to include
11 surface conditions, tripping hazards, lighting and
12 signage; right?

13 A. Yes.

14 Q. And that's not only you, Dwight Potter,
15 Buddy Denny, Ken Lee, that's every employee for
16 Republic?

17 A. Yes. We work as a team.

18 Q. Bu the only way every employee from
19 Republic can know that it has an obligation, that
20 it has these duties, is if the folks that agree
21 and sign these Agreements and enter the RFP is if
22 they tell them they've got that obligation and
23 that duty; right?

24 A. They've been told.

25 Q. So it's your understanding Buddy Denny

1 knows that he's supposed to -- that he has an
2 obligation to seek out dangerous conditions?

3 A. Yes.

4 Q. Ken Lee knows that he's supposed to let
5 the City know if there's insufficient lighting?

6 A. If he felt there was a hazardous
7 condition; yes.

8 Q. You mentioned -- I wrote it down --
9 "we're not experts." You remember testifying
10 a minute ago that "we're not experts"?

11 A. In what context was that, sir?

12 Q. That Republic was not -- didn't have
13 experts ---

14 A. My wife will say I'm an expert in a lot
15 of things or that I think I am.

16 Q. My wife often tells me, "often wrong,
17 never in doubt." So we probably share that.

18 In fact, you believe that your customers have
19 a right to rely on Republic Parking Services and
20 their expertise. And I believe you even said,
21 "It's even in our name." Do you remember that?

22 A. I don't -- it doesn't sound familiar to
23 me.

24 Q. You believe that your customers have a
25 right to rely on Republic Parking Services'

1 expertise; right?

2 A. Republic Parking System.

3 Q. System, excuse me. They have right to
4 rely on you as the expert, right?

5 A. Sure. We offer up a service of parking
6 and -- yes.

7 Q. And you're not just toll collectors. You
8 do a lot more than that, don't you?

9 A. It depends on what the client asks us to
10 do. Each contract's different.

11 Q. Well, that Agreement spells out a whole
12 lot of stuff in addition to just collecting money,
13 doesn't it?

14 A. Well, you have an agreement, but you also
15 have an operating practice, which defines the
16 agreement over time. And in all my time here in
17 the City of Charleston, we were never allowed to
18 make any esthetic changes to any of the parking
19 operations. That will all fell back to the city.

20 Q. And we don't have any evidence that
21 anybody at Republic ever made a suggestion as to
22 things that it needed to do with regards to the
23 improper lighting in that parking lot or fixing
24 this curb shown in Exhibit Number 3; do you?

25 A. What do you mean by fixing, sir?

1 Q. If this is a tripping hazard, if this is
2 a dangerous condition, there is nothing that
3 Republic has here today or any day that they can
4 show this jury when they asked the City, 'Hey,
5 we're worried about this. We need to fix this.'

6 A. Are you suggesting we take the curb out?

7 Q. I'm suggesting -- I won't do it.

8 I'm suggesting putting a cone on this parking
9 lot space right here.

10 I'm suggesting finishing this striping so
11 that pedestrians can know where they're going.

12 I'm suggesting putting a potted plant on this
13 thing so people see it's a curb.

14 I'm suggesting painting this yellow.

15 I'm suggesting anything to let pedestrians
16 know that this is lurking out there between cars.

17 Did Republic do anything?

18 A. The City wouldn't allow us to paint the
19 curbs.

20 Q. How do we know? You never asked, did
21 you?

22 A. Actually we did.

23 Q. This right here?

24 A. That specific curb, no. In general, the
25 City wouldn't let us paint any of the curbs.

1 Q. Okay.

2 A. In fact, they told us to stop.

3 Q. The only employee and representative from
4 anybody that was there the night Bob Burke fell
5 was a Republic employee; right?

6 A. That's my understanding, yes.

7 Q. And Mr. Lee was ten or fifteen feet from
8 Mr. Burke when he fell; right?

9 A. I couldn't say the distance for sure.

10 Q. And you've got managers, maintenance
11 supervisors, you've got a whole team here in
12 Charleston to manage, at the time, the City's
13 parking facilities; right?

14 A. Yes.

15 Q. And the whole team reported to another
16 team at corporate headquarters; correct?

17 A. Yes.

18 Q. And their operational structures and
19 guidelines and safety mechanisms and everything in
20 place, and that was part of the undertaking that
21 Republic agreed to do when it entered into that
22 management agreement; right?

23 A. That's how we represent our company, yes.

24 MR. MCCULLOUGH: That's all I've
25 got. Thank you, sir.

1 MS. RUPARELIA: Nothing further,
2 Your Honor.

3 THE COURT: No redirect?

4 MS. RUPARELIA: No, Your Honor.

5 THE COURT: Okay. You may come
6 down.

7 WITNESS: Okay. Thank you.

8 (WITNESS STEPS DOWN)

9 THE COURT: Any additional
10 witnesses?

11 MS. RUPARELIA: None, Your Honor.
12 Sorry. We rest.

13 THE COURT: That's all right. Any
14 reply testimony?

15 MR. MCCULLOUGH: No, sir.

16 THE COURT: All right. Ladies and
17 gentlemen, I need for you to go to your jury room.
18 Do not begin your deliberations. We'll be with
19 you as quickly as we can. There are some matters
20 of law now that I must take up out of your
21 presence. Thank you.

22 (JURY OUT @ 11:07 A.M.)

23 THE COURT: Any Motions from the
24 plaintiff at this point?

25 MR. MCCULLOUGH: Your Honor, I

1 just renew our Motion for directed verdict on
2 liability.

3 THE COURT: Okay. Well, given the
4 testimony now that we have, clearly there's -- it
5 certainly confirms what I've heard. In the light
6 most favorable to the defendant, that there's
7 certainly could be construed to be just a duty to
8 basically just run the parking lot, that there's
9 no other obligation or responsibilities, other
10 than those that are open and obvious and plain.
11 The question is whether or not, and that's where
12 the issue of fact comes in, is to whether or not
13 it's an open and obvious problem. But there can
14 be -- certainly, the jury could conclude that any
15 duty to make it the safest place in the world
16 still rests in the hands of the City. So, for
17 that reason, I would respectfully deny your
18 motion. For those reasons I would deny your
19 Motion for those reasons.

20 Ms. Spruill?

21 MS. SPRUILL: We would also renew
22 for all the reasons that our Motion stated
23 earlier.

24 THE COURT: And I appreciate again
25 your putting it in very clear terms. And clearly,

1 there's an issue -- it's a threshold issue and
2 we've talked about it and you've briefed it very
3 well. That is whether this duty can be created
4 through this, by this Agreement. And in my
5 opinion, I've just looked at just the general
6 cases dealing with the duty and creation of duty
7 and clearly our law recognized that it can be.

8 And taking it from the standpoint of
9 whether or not they've breached that duty, that's
10 the issue in fact. And I think if the jury
11 determines what, to me, the -- that's why it
12 becomes a jury issue.

13 I think there's no question there was a
14 duty. The extent of that duty, however, I think
15 is what the jury has to determine so far as this
16 action is concerned.

17 So -- and therein we get to the proximate
18 cause issue, which is not going to go before the
19 jury in this stage, but will go to the jury in the
20 second stage. Before they can award damages they
21 have to be proximately caused by negligence. For
22 instance, I can assume this but assuming testimony
23 that there was the Handicap sign you talked about.
24 It would be negligent for a person to park under a
25 handicapped sign, sure. But that negligence --

1 parking in that space didn't cause the damage and
2 that would be ---

3 MS. SPRUILL: Of course, if he
4 hadn't parked in that space --

5 THE COURT: Well, yeah. And if
6 the curb hadn't been there, if the curb had been
7 marked, if the light wasn't dim. There are all
8 sorts of "ifs." I'm just simply saying parking
9 in that didn't cause the problem, so I appreciate
10 that.

11 Thank you very much and you can
12 argue that if you want to. Go ahead and argue
13 that if you want to argue that to the jury,
14 that'll be fine. Maybe they'll react just like
15 you did or maybe they'll react like I did. But
16 you do what you want to on that issue.

17 MS. SPRUILL: Thank you, Your Honor.
18 Are going to discuss charges now?

19 THE COURT: Yeah. We are.

20 MS. SPRUILL: Okay. We'd be
21 interested to hear what Your Honor has in mind for
22 us.

23 THE COURT: All right.

24 MS. SPRUILL: Do you have ---

25 THE COURT: Your charges are not

1 numbered?

2 MR. MCCULLOUGH: Yes, sir.

3 THE COURT: So I'm going to number
4 them in the order they were handed to me.

5 MR. MCCULLOUGH: Okay.

6 THE COURT: I don't know whether
7 yours are -- (reviewing charges submitted by
8 counsel).

9 Okay. I'll do yours first. The
10 first one is covered in the general charge. It's
11 pretty much verbatim. I have a charge that I've
12 been using for years as to an invitee. This
13 addresses that; as to what is an invitee, and I
14 define that.

15 MS. SPRUILL: Your Honor, I would
16 note one. Throughout this trial, we are not an
17 owner. We are not an occupier. So the premises
18 charges ---

19 THE COURT: I appreciate it. You
20 can object to that again.

21 MS. SPRUILL: Thank you, Your Honor.

22 THE COURT: You are an occupier.
23 You have stepped into the shoes of the City. Even
24 everybody has said we just took over from the
25 City. That's just putting you in the same

1 position. You are the occupier. The City's an
2 occupier.

3 MS. SPRUILL: We would take the
4 position we're an independent contractor subject
5 to those terms.

6 THE COURT: I appreciate it.
7 You're an independent contractor. And, therefore,
8 you don't have any obligation to anybody that
9 comes on the premise, notwithstanding that every-
10 body says you did.

11 MS. SPRUILL: We have those
12 obligations set forth in the agreement.

13 THE COURT: Precisely. And you're
14 an occupier. And that's why it's an invitee.

15 MS. SPRUILL: Your Honor, just to
16 preserve the record. That's all. Thank you.

17 THE COURT: I appreciate that.
18 You don't think you're -- what are you? How would
19 you define it? You don't think premises liability
20 applies to you?

21 MS. SPRUILL: I think we're an
22 independent contractor.

23 THE COURT: So you don't have any
24 obligation to ---

25 MS. SPRUILL: No, no, no. I

1 didn't say that.

2 THE COURT: Well, then how would
3 you choose to define yourself? You're not the
4 owner, I agree. How else are you? What else are
5 you?

6 MS. SPRUILL: We are an
7 independent operator. We take the position we
8 didn't have control over how this was laid out,
9 how it was done.

10 THE COURT: I didn't ask you what
11 -- you've jumped -- I'm asking you who are you for
12 the purpose of a premises liability case?

13 MS. SPRUILL: We're an independent
14 operator there pursuant to the terms of our
15 management agreement.

16 THE COURT: Thank you very much.
17 Your position is clarified. It's very clear.
18 I'll be using the term "occupier", that I use
19 throughout my charges, as taken from a number of
20 other charges.

21 But we've created another issue.
22 We're going to find out whether there's another
23 separate class for premises liability. I don't
24 know whether there is or isn't. I'm always
25 educated.

1 The request to charge number three,
2 we don't need to get into that because I'm already
3 -- I'm referring to them as an occupier. So
4 there's ---

5 MR. MCCULLOUGH: That's fine, Your
6 Honor. I'm just putting in the ---

7 THE COURT: I understand. If you
8 want me to say you're an independent contractor

9 MR. MCCULLOUGH: No, sir, we just
10 put in there, making sure. We're comfortable with
11 that.

12 THE COURT: All right. Do you
13 have any objection to the restatement charge?
14 I'll use that instead?

15 MS. SPRUILL: No, I do not like
16 the restatement charge.

17 THE COURT: I didn't think so. I
18 don't either so ---

19 MS. SPRUILL: And I think it's
20 clear we don't have a entire charge. Whatever --
21 I think everybody agrees with that.

22 THE COURT: Well, I understand
23 that. What about your charge number four, any
24 objection?

25 MS. SPRUILL: We take position we

1 didn't have control so that's not a proper charge
2 in this case.

3 THE COURT: If the jury finds you
4 did, it is a proper charge. Do you agree with
5 that?

6 MR. MCCULLOUGH: Yes, sir. This is
7 a case they've cited.

8 THE COURT: Well, I understand
9 that. But, no, I'm familiar with Miller. That's
10 where he voluntarily undertook the responsibility.
11 I think it was a dam and the water broke or
12 whatever it was. But I understand, but that's me
13 concluding that you don't have authority ---

14 MS. SPRUILL: No, I ---

15 THE COURT: I appreciate that.

16 MS. SPRUILL: I understand. To the
17 extent you give it, I would ask you give the whole
18 thing. The second sentence is as important as the
19 first in this case, in these charges.

20 THE COURT: Let me have an
21 understand, Ms. Spruill. When I say four, I'm
22 talking about -- unless I specifically say I'm
23 only going to charge X, you can assume that I'm
24 talking about the entire charge.

25 MS. SPRUILL: Thank you, Your

1 Honor.

2 THE COURT: So we don't have to
3 talk about both sentences.

4 MS. SPRUILL: Thank you, Your
5 Honor.

6 THE COURT: Okay. Number five,
7 that's in my general charge. Not necessarily in
8 those words, but it's pretty close.

9 MS. SPRUILL: Can I just have a
10 standing objection on premises business and I
11 won't object -- I won't say anything else if
12 that's standing.

13 THE COURT: When you hear my
14 charge, you will have an opportunity to state it.
15 I understand you oppose it because you say you're
16 not an occupier. So the plaintiff, to you, is not
17 an invitee. Is not your invitee?

18 MS. SPRUILL: We just take the
19 position that charges ---

20 THE COURT: I'm asking you a
21 question, Ms. Spruill. You've got to be at some
22 point. And I mean, it's like we talked about this
23 at lunch. The rule against perpetuity has to vest
24 in somebody. What are you? If you're not an
25 occupier and you're just an independent contractor

1 on the premise, then he's not your invitee, right?

2 MS. SPRUILL: I think that's true,
3 Your Honor.

4 THE COURT: All right. And so
5 that's your position. And that's what you're
6 arguing throughout to support any of that.

7 MS. SPRUILL: I understand that.

8 THE COURT: And that's fine so
9 that I'm comfortable in my ruling because you are.
10 He is your invitee. You've said that over and
11 over throughout the testimony, in my opinion. You
12 can differ. But I understand that that's a
13 standing objection and you can make it at the
14 conclusion of my charge to further reinforce your
15 preservation of that issue.

16 MS. SPRUILL: Thank you, Your
17 Honor.

18 THE COURT: Uh-huh. I talk about
19 the warning of unsafe conditions known. That's
20 covered in my general charge as well. I define
21 "latent defects" as well, number seven.

22 MS. SPRUILL: Do we have evidence
23 of a latent defect?

24 THE COURT: Well, it's latent in
25 the sense that if it's not known to everybody,

1 but it should be known to you.

2 MS. SPRUILL: Okay.

3 THE COURT: I think that's what
4 latent defect is, that you would know but they may
5 not.

6 Again, what I have to charge for my
7 purposes -- I appreciate that. I'd love to take
8 positions that does apply. When I've done that
9 before, back when we were talking about that this
10 week, my law clerk was reading something about a
11 case that I tried in Horry County. It's a death
12 penalty case. And I refused to charge voluntary
13 manslaughter because I didn't think shooting --
14 taking a pistol out and shooting a police officer
15 in the face because he said, 'I want to talk to
16 you' was sufficient provocation to warrant
17 voluntary manslaughter. I thought that was a
18 pretty reasonable conclusion. But the Supreme
19 Court said I should have charged that and,
20 therefore, reversed the case.

21 MS. SPRUILL: Thank you, Your
22 Honor.

23 THE COURT: So that's why I do
24 that. If there's any evidence of it, I think it
25 has to be charged. I go through the duty on -- I

1 think this is pretty much covered. It's certainly
2 dictated by the circumstance in all those things
3 that are there in the general charge.

4 Number nine is in my general charge.

5 I don't know that I say affirmative.
6 I state it in -- not those words. It has a duty to
7 take some action of things to which he's aware of.
8 And to warn of any dangers than an owner should be
9 -- any question? Any objection?

10 Foreseeability really talks about --
11 but you have a foreseeability in yours as well.
12 And that's really primarily tied to proximate
13 cause, but there is a foreseeability part where
14 is it foreseeable that somebody may be injured.
15 And so I think mine included that ---

16 MS. SPRUILL: Notice issue.

17 THE COURT: So do you have any
18 objection to number 11? I know yours. I'm going
19 to incorporate and make sure they're both cover
20 the same thing. Yours looks similar.

21 MS. SPRUILL: I think they're
22 pretty similar.

23 THE COURT: Similar. So I'll give
24 that charge. All right.

25 The next one that you want, circum-

1 stantial. I use circumstantial and direct
2 evidence and I will define those terms for you.

3 And I've got that known and obvious
4 dangers. That part is part of my general charge.

5 And the duty to inspect, make a
6 reasonable inspection to make sure that they are
7 aware ---

8 MR. MCCULLOUGH: The only portion
9 of this, Your Honor, that is slightly different
10 and that's why we asked if this was a Republic
11 Parking facility and things of that nature, is
12 that the second prong that says the facilities are
13 open to the public, indicating that harm should be
14 anticipated.

15 MS. SPRUILL: Any harm?

16 THE COURT: Is that a quote? Is
17 that directly stated in the *Hancock* case?

18 MR KHAN: That is not, Your
19 Honor. It's in what I'm going to hand up.

20 THE COURT: And I'm not inclined
21 to enlarge the state, but -- we can do it in this
22 state but I'm not going to do it. I think, first
23 of all, first of all, if you think about what we
24 just talked about foreseeability and that creating
25 the duty. That they have a duty to look at it and

1 to be aware of the use of it, and to make certain
2 actions, take certain actions, that they would be
3 on notice of it. That's really what that's saying
4 in a nutshell.

5 MR KHAN: Yes, sir. Just a quick
6 question. Does your charge in number one have the
7 second half, "unless the possessor should
8 anticipate the harm despite such" -- or
9 obviousness. I'm sorry. Charge number thirteen,
10 number one.

11 THE COURT: As I said, it's
12 covered in the general ---

13 MR KHAN: Okay. That's fine.

14 THE COURT: I'll look at it again
15 during -- that concept is contained.

16 MR KHAN: Understood.

17 THE COURT: But I'll check.

18 MR. KHAN: Thank you.

19 THE COURT: Thank you. Number
20 14, any objection? That's a correct statement of
21 the law. It does not create negligence but it can
22 be considered in determining conduct breached the
23 duty.

24 MS. SPRUILL: I agree. That's a
25 correct statement.

1 THE COURT: I will charge that.
2 All right number fifteen, I've read that and I
3 don't fault you for doing this, it's probably --
4 but it really talks about a principal is deemed to
5 have constructive knowledge of things that his
6 agent does, or vice versa. So -- I just don't --
7 I'll charge it as it's given in that case. That's
8 the mortgage foreclosure case as well and a fraud
9 action. Any objection to that, number fifteen?

10 MS. SPRUILL: To just ask that
11 Your Honor charge it as it's written.

12 THE COURT: I charge it as -- I
13 quote from the case as it applies.

14 MS. SPRUILL: Thank you.

15 THE COURT: Failure to call a
16 witness. What's your position on that?

17 MS. SPRUILL: We would oppose the
18 giving of that charge. We're entitled to put up
19 our case. It's not an adverse inference case.
20 It's not a criminal case. We called the folks we
21 thought could give testimony the jury needed to
22 hear. They could have called them. They're
23 local.

24 THE COURT: Yeah. Therein lies
25 the crux of it. And, frankly, there's some been

1 some exchange on our list-serve about this
2 recently, the last couple of months. I'll have to
3 look again, but there's some law that basically
4 I've read and I pretty much have taken -- taken
5 the position -- and I believe nobody's stated
6 that. And, again, it'll be up to each individual
7 judge. As you know, one of the things and it's a
8 problem we have with charges being submitted from
9 the federal jurisdiction. I'd love to be able to
10 give federal charges. But as you know, the
11 federal court can charge on the facts. We've got
12 a Constitutional provision that prohibits us from
13 charging on the facts.

14 I think two things. Number one,
15 they don't have a duty to disprove your allega-
16 tions. You have a duty to prove your allegations.
17 The fact that they don't call a witness that's
18 available to you, that's fine.

19 MR. MCCULLOUGH: I do believe they
20 have an obligation to show comparative negligence.

21 THE COURT: Well, they do. But
22 that doesn't ---

23 MS. SPRUILL: This doesn't cover
24 that.

25 THE COURT: --- but that doesn't

1 have anything -- his negligence hasn't got a thing
2 to do with their negligence.

3 MR. MCCULLOUGH: Yes, sir. But Ken
4 Lee, the gentleman who was there at the time, that
5 is our ---

6 THE COURT: Well, I appreciate it.
7 The other problem that you get into is it's
8 getting close to charging on the facts. And
9 there's some law that says we shouldn't give that
10 charge. We shouldn't, but you can argue it.

11 MR. MCCULLOUGH: Well, as long as I
12 can argue it, that'll be fine.

13 THE COURT: Oh, you can argue it
14 all day long. I just don't charge it. All right.

15 MR. MCCULLOUGH: That's fine.

16 THE COURT: The eggshell. I
17 understand that. All right. Now, I've haven't
18 printed yours. Let me go through yours. I have
19 them before me, though.

20 MS. SPRUILL: Thank you, Your Honor.

21 THE COURT: Okay. Number one, the
22 sympathy. That's always -- that's the last part
23 of my jury charge. When you hear that, when you
24 hear me start talking about that's what we're
25 called upon to be, then I'm starting setting it

1 down. And you're going to hear sympathy. That's
2 fine.

3 MS. SPRUILL: Okay. Judge. I got
4 confused.

5 THE COURT: I'm sorry. I beg
6 your pardon. I could sense that. I saw that on
7 your face.

8 The accident, that's part. Just
9 because there is an accident, just because someone
10 sustains damage is not evidence of negligence. I
11 include that in my general charge.

12 MS. SPRUILL: Thank you.

13 THE COURT: Two, the preponder-
14 ance. I'm going to charge that and I don't have
15 any problem -- well, I'm not going to charge
16 causation at this point. I'm not going to charge
17 proximate cause at this point. It's got --
18 they've got to prove negligence. And you've got
19 to prove that they were negligent. They have to
20 prove that you're negligent in some fashion.

21 Now, we talked about something and I
22 thought about that and read some cases. I will
23 charge injury or damage can result from a number
24 of negligent actions. But that they have to prove
25 that you were careless in some fashion. So the

1 conjecture -- that part is very germane when it
2 comes to my -- if we get to that point, the
3 damages. Because there will be a lot of areas
4 where that becomes the case, such as, alleged
5 aggravation of conditions. It has to be more.
6 This is more germane to that, so I'm declining to
7 give it on this charge. I note that it's there.
8 You can make an issue on request if you think it's
9 necessary after hearing my charge.

10 MS. SPRUILL: All right. Thank you,
11 Your Honor.

12 THE COURT: Number three, sympathy
13 passion, yeah, I've covered that in my charge, I'm
14 sure.

15 Foreseeability, we all agree and I'm to
16 incorporate language in my charge. All right.

17 What's your position on number five?

18 MR. MCCULLOUGH: Just they under-
19 took a responsibility and that this is kind of
20 out-of-left-field injury where there's a guy
21 walking, and tripping and falling in the parking
22 lot had no bearing on the mere possibility. I
23 think this is a little outside the scope of the
24 case.

25 MS. SPRUILL: Well, it's just a

1 clarification on foreseeability. If you can
2 foresee, you know, in a lay person's under-
3 standing, you can foresee almost anything.
4 This just is a little clarification on that.

5 MR. MCCULLOUGH: Your Honor, my
6 understanding is you took out the affirmative
7 obligation. You took out some of our punches that
8 point to the other directions. Frankly, what I'm
9 gathering is you're doing a down-the-middle-of-
10 the-road foreseeability charge and this is ---

11 THE COURT: Well, I'll look at it.
12 I want to read the case myself and see it in the
13 context in which it's given. I'll look at that
14 when we have a break. I

15 MS. RUPARELIA: Thank you, Your
16 Honor.

17 THE COURT: Okay? And let you
18 know. Are you going to argue -- you going to plan
19 to argue that to the jury?

20 MS. RUPARELIA: I was planning to.

21 THE COURT: Well, frankly, I don't
22 have any problem with you arguing it anyway.

23 MS. RUPARELIA: Sure.

24 THE COURT: I mean, there's no
25 question about that. It just has to be more than

1 possibility.

2 MS. RUPARELIA: Yes, sir.

3 THE COURT: Number 6, that's
4 covered in my general charge on unsafe conditions.
5 And that's basically what's in their other one.
6 And I do have -- "not ensure the safety of persons
7 using the premises." That's in my charge.

8 MS. SPRUILL: Thank you, Your Honor.

9 THE COURT: And duty for them to
10 keep -- they may have to use due care for
11 themselves for their own protection.

12 MS. SPRUILL: Your Honor, we would
13 ask -- we haven't seen your charge but
14 specifically that last sentence of that ---

15 THE COURT: That's what I just
16 said.

17 MS. SPRUILL: Thank you, Your Honor.

18 THE COURT: That the duty of
19 ordinary care in keeping -- of being aware of
20 what's there.

21 MS. SPRUILL: That's right. That
22 you've got to use all of your sense to a
23 reasonable ---

24 THE COURT: I don't use the term
25 "all your senses." I said he has to use due care

1 for his own safety, which is basically -- and
2 that's in the first sentence in the next charge,
3 which is precisely what I've stated. Or I say the
4 invitee has a duty of care that a reasonable
5 person would use under the same circumstances.

6 MS. SPRUILL: Okay.

7 THE COURT: Okay?

8 MS. SPRUILL: Yes, sir.

9 THE COURT: No duty to warn them
10 of natural or open and obvious condition. That's
11 in my general charge.

12 MS. SPRUILL: Thank you, Your Honor.

13 THE COURT: Proximate cause, I'm
14 not going to -- as I've stated, I'm not going to
15 give it at this point.

16 Everything that you have in that
17 charge is in my general charge, but for the
18 damages aspect.

19 And the burden of proof of that is
20 also -- I'm going to define that.

21 Comparative negligence, I appreciate
22 yours. I have a comparative negligence charge. I
23 list basically the factors that you've listed.
24 You have them all. I use all of them.

25 MS. SPRUILL: I think that's just

1 copied out of the Judge's desk book.

2 THE COURT: Yeah. It is. And
3 over the years I've stopped doing that. I sort of
4 thought about what it is. And then I talk about
5 evaluating, assessing it, and that's when we get
6 into the factors.

7 MS. SPRUILL: And we just wanted
8 it charged.

9 THE COURT: Sure, I'll be happy to
10 do that.

11 MS. SPRUILL: We're not wedded
12 to that language.

13 THE COURT: Okay. Expert witness,
14 do you want that? We don't really -- I've almost
15 stopped, but if you want me to charge it, I will.
16 Because it's really the same charge now that it
17 was always, because one of the paragraphs of an
18 expert witness is 'just because his testimony is
19 uncontradicted, you don't have to accept it.' And
20 I say that about all witnesses. You can believe
21 all the witness, none of the witness, parts of the
22 witness. But if you want me to charge it, I'll be
23 happy to charge it.

24 MS. SPRUILL: We'd like that, Your
25 Honor.

1 THE COURT: That's fine. I'll
2 charge it. I'm not going to go into Ralph King's
3 version, but I'll charge it.

4 MS. SPRUILL: Understood, Your
5 Honor.

6 THE COURT: You know, I'll use my
7 clear and convincing definition and I define what
8 reprehensible conduct is. It's a conscious
9 failure to use due care.

10 I'm not going to talk about punitive
11 damages at this point. I'm not going to mention
12 that.

13 I'm just going to talk about the
14 burden. What it is and the burden of proof of
15 that is clear and convincing evidence.

16 MS. SPRUILL: And we'd ask that
17 you define what the terms they're to consider are:
18 willful, wanton, reckless.

19 THE COURT: I thought that I said
20 that.

21 MS. SPRUILL: I apologize, Your
22 Honor.

23 THE COURT: I will define it for
24 you.

25 MS. SPRUILL: Thank you. Can we

1 go back to request number 8?

2 THE COURT: Sure.

3 MS. SPRUILL: We talked about this
4 some yesterday in chambers.

5 THE COURT: Uh-huh.

6 MS. SPRUILL: This is our sole
7 negligence of others proposed charge. I wanted to
8 know how you were going to handle -- from what
9 I've seen we've got that included and we've
10 requested it. We're entitled to some kind of
11 charge on sole negligence. Of you don't want to
12 give this one because you believe it is a
13 proximate cause, rather than something else
14 charge. But we want a charge that says the
15 plaintiffs have the burden of showing -- that
16 we've said that the negligence of a third party
17 caused this. That we don't have the burden
18 affirmatively of showing that, but they've got to
19 show it was us.

20 THE COURT: Okay. I tell you
21 what. At the end of my charge, if I haven't
22 adequately addressed that, you let me know and
23 I'll be happy to.

24 MS. SPRUILL: Thank you, Your
25 Honor.

1 THE COURT: But I addressed that
2 when we started. I said the plaintiff has the
3 burden and the plaintiff alone has the burden.
4 The defendant doesn't have any burden to disprove
5 or show anything. The plaintiff has to prove that
6 your negligence -- but in that regard, I will add,
7 as I stated, a negligent -- an injury can result
8 from the combination of many persons. But they
9 have to prove that at least the defendant was
10 negligent in some fashion. That's why we you talk
11 about getting into the sole -- do you object to
12 me doing that? Because I just think that creates,
13 puts you -- puts them in the same boat with
14 Charleston. And they want -- if Charleston's
15 negligent, they're negligent. I mean, if that's
16 what you want me to say. Because you've said that
17 "we're in Charleston." That's what your
18 testimony's been.

19 MS. SPRUILL: Well, and, of course,
20 we disagree with that. We say it was Charleston
21 and we were just there ---

22 THE COURT: I appreciate that you
23 disagree, but your witnesses have said.

24 MS. SPRUILL: Your pleasure, Your
25 Honor.