STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF GEORGETOWN	)	**THE FIFTEENTH JUDICIAL CIRCUIT**
Thomas Pope	)	**Civil Action No.: 2015-CP-22-00175**
Plaintiff,	)	
v.	)	**ORDER DENYING PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND FOR NEW TRIAL**
Four Star Plumbing & Air Conditioning Services, Inc.	)	
Defendant.	)	

This matter comes before the Court, pursuant to SCRCP Rule 50(b), on Plaintiff's Motion for Judgment as a Matter of Law on Defendant's negligence (question 1 on the verdict form) and for a new trial because the jury did not address the remaining issues in the case/ on the verdict form. The parties filed opposing memoranda and the Court heard arguments on September 15, 2017. For the reasons set forth below, the Court affirms the jury verdict and thereby denies Plaintiff's Motion.

STANDARD OF REVIEW

"[A] motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) (citing *Glover v. N.C. Mut. Life Ins. Co.*, 295 S.C. 251, 256, 368 S.E.2d 68, 72 (Ct.App.1988)). As such, "[a] motion for judgment notwithstanding the verdict is limited to the grounds stated in the motion for directed verdict." *Marsh v. S.C. Dep't of Highways & Pub. Transp.*, 298 S.C. 420, 423, 380 S.E.2d 867, 869 (Ct. App. 1989). "The same is true as to an alternative motion for new trial that simply mirrors . . . a motion for judgment notwithstanding the verdict." *Id.*

"In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them." *Burns v. Universal Health Servs., Inc.*, 361 S.C. 221, 231–32, 603 S.E.2d 605, 611 (Ct. App. 2004) (citing *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993)). "In making this determination, the judge must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party." *Id.* (citing *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004)). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998). Further, if more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination. *Id.* at 568, 503 S.E.2d at 713. The verdict must be upheld if there is any evidence to support the factual findings necessary to the jury's verdict. *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

ANALYSIS

I. Negligence Per Se

At trial, Plaintiff moved for directed verdict as to it cause of action for negligence per se, arguing that Defendant's work violated the applicable building code. "Negligence per se simply means the jury need not decide if the defendant acted as would a reasonable man in the circumstances. The statute fixes the standard of conduct required of the defendant[.]" *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103–04, 374 S.E.2d 910, 915 (Ct. App. 1988). Whether the defendant breached the statute, or in this case ordinance, is a question of fact reserved for the jury. *Id.* ("The statute fixes the standard of conduct required of the defendant, leaving the jury merely to decide whether the defendant breached the statute.").

The inquiry into negligence per se does not end with the jury determination that a statute/ordinance was breached. Instead, "to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991).

Following the close of the Plaintiff's case, and renewed after the Defendant closed its case, Plaintiff moved for directed verdict. The Court denied Plaintiff's motions because whether the ordinance was violated was a question of fact reserved for the jury. *See Rayfield* at 103–04, 374 S.E.2d at 915. The jury was charged with negligence per se and the language of the ordinance in contest. After being so charged, the jury returned a verdict for the Defendant. Inherent in this verdict is the jury's factual finding that Defendant did not violate the Georgetown ordinance and, as a result, was not negligent per se.

The case of *Sauers v. Poulin Bros. Homes, Inc.*, 493 S.E.2d 503 (1997) is directly on point. There, a general contractor presented evidence, largely through expert testimony, that the subcontractor had violated building codes with respect to the construction of a house. After the jury returned a verdict in favor of the subcontractor. The trial court denied the motions for JNOV and for new trial and the Court of Appeal affirmed. In doing so, the Court of Appeals stated:

> When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court must employ the same standard as the trial court-that is, we must consider the evidence in the light most favorable to the non-moving party. *See, e.g., Brady Dev. Co. v. Town of Hilton Head Island,* 312 S.C. 73, 439 S.E.2d 266 (1993). Neither a directed verdict nor judgment notwithstanding the verdict should be granted unless only one reasonable inference can be drawn from the evidence. *Id.; see also Dalon v. Golden Lanes, Inc.,* 320 S.C. 534, 466 S.E.2d 368 (Ct.App.1996). When considering the motions, neither this Court nor the trial court has authority to decide credibility issues or to resolve conflicts in

the testimony and evidence. *Garrett v. Locke,* 309 S.C. 94, 419 S.E.2d 842 (Ct.App.1992).

In this case, Poulin's expert testified that Moore's application of the stucco system violated industry standards as well as applicable building codes, causing water intrusion into the home. . . .

Moore did not refute this testimony with its own expert. Instead, the only evidence offered by Moore was the testimony of Lee Moore, the sole proprietor of Lee Moore Plastering. Mr. Moore, who was not qualified as an expert, did not offer testimony about industry standards for the application of stucco exteriors or the requirements of the applicable building codes. Mr. Moore testified only about his general practices in applying stucco, and about how the stucco was actually applied to the Homeowners' house.

Nonetheless, contrary to Poulin's assertion, the fact that the testimony of its expert was not directly refuted does not automatically entitle it to a directed verdict. As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness. *See State v. Milian-Hernandez,* 287 S.C. 183, 186, 336 S.E.2d 476, 478 (1985) (The jury may properly disregard expert testimony.); *State v. Campen,* 321 S.C. 505, 510, 469 S.E.2d 619, 622 (Ct.App.1996) (Although the only expert testimony established that the defendant had the ability to conform his conduct to standards of right and wrong, the expert's testimony was not "dispositive, inasmuch as the jury could have elected to disregard [the expert's opinion]."); *State v. Smith,* 304 S.C. 129, 131, 403 S.E.2d 162, 163 (Ct.App.1991) (The jury is free to believe one portion of a witness's testimony and disbelieve another.); *accord Smith v. Safeco Life Ins. Co.,* 303 S.C. 131, 399 S.E.2d 427 (Ct.App.1990), *cert. dismissed as improvidently granted,* 308 S.C. 94, 417 S.E.2d 537 (1992).

* * *

Moreover, even if the expert's uncontradicted testimony did establish Moore's *negligence* as a matter of law, it did not establish Moore's *liability* as a matter of law. Negligence is actionable only if it is a proximate cause of the injury. *Hanselmann v. McCardle,* 275 S.C. 46, 267 S.E.2d 531 (1980); *Vinson v. Hartley,* 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). . . .

* * *

Because the evidence in the record supports the verdict, "irrespective of how the jury may have arrived at it," *Steele v. Dillard,* 327 S.C. 340, 343, 486 S.E.2d 278, 280 (Ct.App.1997), the trial court properly

> denied Poulin's motions for directed verdict and judgment notwithstanding the verdict.

Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605–08, 493 S.E.2d 503, 504–06 (Ct. App. 1997)

During the trial of this case, the parties presented testimony to support their respective positions. Plaintiff's expert and the Georgetown City Code director testified regarding what the ordinance required and whether, in their opinion, the Defendant complied with those standards. Both the expert and county official stated that ordinance mandated the barricade be 42 inches tall and capable of directing traffic around the hazard. Both witnesses admitted that the code does not specify the manner in which the barricade is constructed, the color of the barricade, or the materials to be used. The project manager for the Defendant testified that the barricade, as originally constructed, was 42 inches high and complied with the ordinance. He also testified that the barricade was subsequently substantially modified without his knowledge. Plaintiff's witnesses never saw the barricade in situ, have not seen pictures of the original construction, and neither the expert nor the code official made any measurements.

The Court finds that evidence was presented sufficient to support the factual findings necessary to the jury's verdict as to negligence per se. *See Shupe*, 315 S.C. 510, 445 S.E.2d 651.

II. Negligence

"To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." *Vinson v. Hartley*, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct.App.1996). In an action for negligence that occurs on real property, the duty owed to the Plaintiff is determined by the Plaintiff's status on the property. "A business visitor . . . is an invitee whose purpose for being on the property is directly

or indirectly connected with business dealings with the owner." *Sims v. Giles*, 343 S.C. 708, 717, 541 S.E.2d 857, 862 (Ct. App. 2001). "The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety[.]" *Id.* at 718, 541 S.E.2d at 863. Inherent in this duty is a determination of whether the condition is known or obvious. Our Supreme Court adopted the Restatement (Second) of Torts Rule on known or obvious dangers in *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991). The Restatement provides that "[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." *See id.*

Consistent with the law of South Carolina, this Court charged the jury with the duty owed to an invitee:

> an invitor is not liable to an invitee for an injury resulting from a danger that was obvious or that should have been observed in the exercise of reasonable care. The entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injury. If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable. If an invitor does not have superior knowledge of a dangerous condition, in that the condition is obvious to the invitee or is known to the invitee, there is not a duty to warn the invitee of the potentially dangerous condition

This Court's charge addressed the ultimate question in the case: whether or not the bucket was open and obvious or a known danger and what the Defendant's resulting duty to warn was. To this effect, the jury saw photographs of the condition and heard testimony from various parties.

Plaintiff testified that he successfully navigated around the bucket on his way into the restaurant, although he denied seeing it. Plaintiff's wife was impeached during her testimony and evidence was submitted to the jury, in the form of parts of deposition transcript, that Plaintiff actually saw and appreciated the bucket prior to his fall. The Court finds that this testimonial evidence along with photographic evidence before the jury created more than one inference

including that the condition of the parking lot was an open and obvious hazard for which the Defendant was not liable. As evidence to support the factual findings necessary to the jury's verdict was presented, the Court must uphold the verdict.

Because the jury found that the Plaintiff had not proven liability on the part of the Defendant, there was no need for the jury to deliberate further. The verdict form, as completed and signed by the jury foreman, was accepted by the Court with no challenge by the parties. Therefore, the Court will not now revisit the verdict form.

For the reasons set forth above, the Court find that evidence was submitted to the jury to support the verdict and that JNOV was properly denied. Therefore, that Plaintiff's Motion is denied.

IT IS SO ORDERED.

Larry B. Hyman
Circuit Court Judge

October ___, 2017
Georgetown, South Carolina

Georgetown Common Pleas

Case Caption: Thomas Pope VS Gapway Rentals LLC , defendant, et al

Case Number: 2015CP2200175

Type: Order/Other

So Ordered

s/ Larry B. Hyman 2152