



The South Carolina Court of Appeals

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POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 21, 2018

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

Re: Robert J. Burke v. Republic Parking System, Inc.
Lower Court Case No. 2013CP1001400
Appellate Case No. 2015-000269

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Roopal S. Ruparelia, Esquire
Sarah Patrick Spruill, Esquire
Clayton B. McCullough, Esquire
Jamie A. Khan, Esquire

The South Carolina Court of Appeals

Robert J. Burke, Respondent,

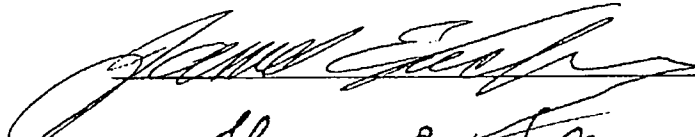

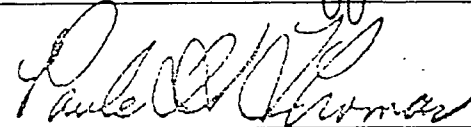
v.

Republic Parking System, Inc., Appellant.

Appellate Case No. 2015-000269

ORDER

After careful consideration of the amended petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:
Roopal S. Ruparelia, Esquire
Sarah Patrick Spruill, Esquire
Clayton B. McCullough, Esquire
Jamie A. Khan, Esquire
The Honorable R. Markley Dennis, Jr.

FILED

January 11, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert J. Burke, Respondent,

v.

Republic Parking System, Inc., Appellant.

Appellate Case No. 2015-000269

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. Op. 5519
Heard June 6, 2017 – Filed October 25, 2017

REVERSED AND REMANDED

Roopal S. Ruparelia and Sarah Patrick Spruill, both of
Haynsworth Sinkler Boyd, PA, of Greenville, for
Appellant.

Clayton B. McCullough and Jamie A. Khan, both of
McCullough Khan, LLC, of Charleston, for Respondent.

THOMAS, J.: Appellant Republic Parking System, Inc. (Republic) filed this appeal following a jury verdict in favor of Respondent Robert J. Burke. Republic claims the trial court erred by denying its motions for judgment notwithstanding the verdict (JNOV) and a new trial based on many arguments including that the trial court erred by excluding its expert witness. We agree the trial court erred by excluding Republic's expert witness and reverse for a new trial; thus, we decline to address Republic's remaining arguments.

witness in its pre-trial brief, the trial court incorrectly stated the pre-trial brief listed him as a fact witness.

Subsequently, Republic proffered Shuman's deposition in which he testified he reviewed records related to Burke's medical care following the incident in this case. Shuman asserted there were "several reasons" Burke could have fallen and his recovery was "greatly influenced" by his preexisting medical conditions. Specifically, Shuman noted Burke's preexisting conditions that could have caused his fall in the Lot included diabetes, "significant swelling" in his feet, and a prior stroke. Shuman also claimed "the extent of [Burke's] injuries may not be as great as were initially stated" by Burke's physician. Testifying specifically about Burke's records, Shuman claimed some of the records indicated Burke's knee injury was a chronic problem in existence prior to his fall in the Lot. The jury returned a verdict in Burke's favor, and the trial court denied Republic's post-trial motion for JNOV or a new trial. This appeal followed.

ISSUE ON APPEAL

Did the trial court abuse its discretion by excluding Shuman's testimony based on Republic's failure to timely identify Shuman as an expert witness?

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). Determining whether prejudice exists "depends on the circumstances" and "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). Prejudice in this context means "there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

witness. *Id.* at 509, 662 S.E.2d at 614. The *Bryson* court concluded, "[W]e find the special referee properly considered all factors set forth in *Jumper* when deciding to exclude [the witness], and therefore, the exclusion was not an abuse of discretion." *Id.*

Additionally, in *Arthur*, the trial court excluded multiple witnesses because the appellant failed to identify them within the deadline imposed by a scheduling order. *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 338, 628 S.E.2d 894, 900 (Ct. App. 2006). Although the trial court failed to specifically enunciate the *Jumper* factors when making its ruling, this court found the trial court "did not exclude the witnesses solely on the ground of [the appellant's] failure to comply with the time limits of the scheduling order. Instead, the [trial court] made the appropriate inquiry and considered the requisite factors." *Id.* at 341, 628 S.E.2d at 902. Thus, the trial court did not abuse its discretion because it based its decision on a consideration of the *Jumper* factors, rather than the initial finding that notice of the witnesses was untimely. *Id.*

Accordingly, based on our review of the case law, a trial court has discretion to decide the sanction for a party providing untimely notice of a witness but may exclude the witness from testifying only after considering each of the *Jumper* factors. A party's failure to provide timely notice of a witness triggers the trial court's obligation to then consider the factors. Thus, when a trial court excludes a witness for the sole reason that the party attempting to call the witness failed to provide timely notice under the rules of discovery, the trial court commits an error of law, which is an abuse of discretion.

In this case, the trial court abused its discretion because it excluded Shuman on the sole basis that Republic failed to provide timely notice of its intent to call him as an expert witness. After thoroughly reviewing the discussion between the trial court and the parties, we find the trial court based its ruling on the single finding that Republic did not serve a supplemental interrogatory. During the motion in limine, the trial court inquired whether Republic ever supplemented its interrogatories, and Republic admitted it had not. The trial court responded, "Very well, I am going to grant [Burke's] motion [to exclude Shuman]. He's not going to testify." The trial court further stated, "I am banking on the fact that you have answered interrogatories and today you've still not identified an expert witness." The trial court noted "[a]ll [Republic] had to do was to send them a letter." When

378 (reversing and remanding for a new trial after finding the trial court committed reversible error by excluding certain evidence).

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when disposition of a prior issue is dispositive).