ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
Diane Connell,	)	CIVIL ACTION No.: 2018-CP-32-1750
	)	
Plaintiff,	)	
	)	
vs.	)	**ORDER AND ENTRY OF JUDGMENT**
	)	
Lexington County Health Services District, Inc. d/b/a Lexington Medical Center,	)	
	)	
Defendant.	)	

RECEIVED
Aug 10 2020
SC Court of Appeals

This premises liability matter came before this Court for a bench trial on March 2, 2020. Robert Goings, Esquire and Jessica Gooding, Esquire appeared on behalf of Plaintiff Diane Connell. Evan Gessner, Esquire appeared on behalf of Defendant Lexington County Health Services District, Inc. d/b/a Lexington Medical Center ("LMC"). Both parties were allotted thirty (30) days to submit proposed orders addressing their respective legal arguments.

Plaintiff Diane Connell ("Mrs. Connell") brought this premises liability action seeking to recover damages she sustained when she fell after entering an LMC parking garage which is owned and operated by Defendant LMC. Mrs. Connell asserts that she fell as a result of LMC leaving an elevation change or curb in a concrete pedestrian walkway unpainted, which had a camouflaging effect preventing her from seeing the elevation change. This fall resulted in painful injuries, medical bills, and other damages. The undersigned received 14 Exhibits into evidence and heard testimony from: Diane Connell; Steven Connell; Christopher Brewer; James Loging, M.D. (by video); Lindsay Moore, PA-C; Charles Alford, Ph.D.; Dale Thompson (live and by deposition); and Cory Andrews (by deposition). Exhibits also included several photographs from the subject garage as well as still shots from the surveillance video showing Plaintiff's fall. No dispositive motions for summary judgment were filed by either party prior to the bench trial.

Both parties agree that the Plaintiff was injured in the LMC garage and that her fall caused

her injury. The primary issue in dispute before this court is whether Defendant is legally responsible for the injury, and if so what damages should be awarded to the Plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PARTIES & JURISDICTION

Plaintiff, Mrs. Connell, is a 68 year old citizen and resident of Lexington County, South Carolina. Defendant LMC is a hospital district in Lexington County, South Carolina, and the facts and circumstances surrounding this action occurred on its premises in Lexington County. Accordingly, the Court has specific and general jurisdiction over the parties and venue is proper.

FACTS

On September 26, 2017, a clear and sunny day, Mrs. Connell accompanied her husband to a doctor's appointment on the LMC campus. Mr. Connell dropped Mrs. Connell off at the entrance to the doctor's office building and went to park their vehicle in the LMC garage by himself. After the appointment, Mr. & Mrs. Connell followed the sidewalk into LMC Parking Garage 3, where their vehicle was parked. This was Mrs. Connell's first time entering the garage, and not far from the pedestrian entrance to the garage there is a curb with a greater-than-six-inch elevation drop to the driveway utilized by vehicles leaving the garage. However, the evidence showed both the sidewalk and the driveway were gray concrete, and there was no paint or other demarcation on the top of the curb signaling the sudden elevation change. Mrs. Connell was unable to see the curb or visually recognize the change in elevation. As a result, her heel caught the curb, causing her to fall forward and strike her left knee and head on the concrete. She immediately experienced severe pain in her left knee. Mr. Connell, who was walking a few feet behind Mrs. Connell, testified that his wife screamed in agony, and that he was unable to get her to her feet. Others in the parking lot came to assist the couple, and together they were able to get Mrs. Connell to a seated position on the curb.

Chris Brewer, an off duty officer with Allen University who testified at trial, arrived on the

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

scene shortly after Mrs. Connell was seated on the curb. He stopped to render aid and assessed the scene. Mr. Brewer testified that he could see that Mrs. Connell had fallen off the curb, which was very difficult to discern from the direction where she was walking. Mr. Brewer also testified that other curbs in the parking garage were painted yellow, except for the curb that resulted in Mrs. Connell's fall. He recalled that she was clearly suffering and needed immediate medical attention. Another person present called for a security golf cart to come to the scene and transport Mrs. Connell to the LMC Emergency Room, as she was unable to ambulate without assistance. Mr. Brewer assisted Mrs. Connell onto the golf cart, being careful to keep her leg straight on the back seat. Mrs. Connell testified that bending her knee in any way was very painful.

In the LMC Emergency Room, Mrs. Connell was diagnosed with a right ankle sprain and displaced comminuted fracture of the left patella. She was required to spend two nights in the hospital and undergo an open reduction internal fixation surgery, where screws and metal wire were used to repair her kneecap.

After discharge, Mrs. Connell followed up with Lexington Orthopedic and went through in-home rehabilitation. Thereafter, in order to have an orthopedist not associated with LMC, Mrs. Connell sought continued treatment with Dr. James Loging of Palmetto Bone and Joint, PA. She has treated regularly with Dr. Loging for ongoing pain and discomfort in her left knee. In his video deposition, Dr. Loging opined that the hardware in Mrs. Connell's kneecap was irritating the joint and contributing to her discomfort. For this type of injury, he testified that almost a "hundred percent of the time" a hardware removal is needed "because of the high incidence of hardware irritation and problems from the hardware."

Subsequent to his *de benne esse* deposition on November 25, 2019, Dr. Loging performed a hardware removal surgery on Mrs. Connell on February 11, 2020. While Dr. Loging expressed hope that this surgery would reduce Mrs. Connell's discomfort, he also testified that the incongruity of her joint where the patella fracture healed would cause "grinding" and "mechanical

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

symptoms." Over time, Mrs. Connell will develop post-traumatic arthritis, which will "progressively get worse to the point where the pain would be intolerable," and she will require a knee replacement surgery. He testified that "given the incongruity of her joint, her chance of developing post-traumatic arthritis is essentially a hundred percent guaranteed," and he was confident that she will undergo a knee replacement surgery in the future. Dr. Loging was unable to say definitively whether Mrs. Connell's knee replacement would be a partial or a total knee replacement, but he testified that she would "definitely" need a knee replacement "because of the that trauma that's there." To a reasonable degree of medical certainty, however, Dr. Loging testified that he would "recommend a full knee replacement, actually, just because the longevity and the decreased chance of having to have a revision of that knee in the future and the success rate [of a total knee replacement] would be higher [than a partial knee replacement]." In the meantime, Dr. Loging recommends that she undergo Supartz injections in her knee every six months until her condition deteriorates enough to require the knee replacement.

Mrs. Connell has incurred $55,839.38 bills to date, and she is continuing to incur medical bills in her treatment with Palmetto Bone and Joint, PA. Dr. Loging has also indicated that Mrs. Connell will most probably need pain management injections and physical therapy. Based on Dr. Loging's recommendations, Lindsay Moore, PA-C, a Certified Nurse Lifecare Planner, put together a report estimating Mrs. Connell's future medical cost needs. The report includes two scenarios: one in which Mrs. Connell has a partial knee replacement and one in which she has a full knee replacement. Ms. Moore testified that Mrs. Connell's knee replacement surgery, whether it is a partial or full replacement, would most likely be an inpatient procedure, especially due to Mrs. Connell's comorbidities. Mrs. Connell further testified that she would rather have the

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

procedure in the hospital setting since it would require general anesthesia. Charles Alford, PhD took Ms. Moore's report and, accounting for inflation, provided the present value of Mrs. Connell's future medical costs.[1] Assuming Mrs. Connell does not have a knee replacement in the next three years, the present value of the pain management injections she will most probably need is $9,854.00. The present value of the knee replacement surgery ranges from $162,479.00 to $216,163.00 depending on when it takes place.[2]

In addition to the medical expenses Mrs. Connell has incurred and will continue to incur, she has suffered immense pain and been very limited by her injuries. Mrs. Connell and her husband testified that she was essentially bedridden for the first week after being discharged from LMC. She was unable to shower and used a bedside commode with assistance. After the first week, she began in-home rehabilitation, which consisted of frequent painful exercises to regain the use of her knee. She was required to use a walker for months and continued to rely upon her husband to prepare her meals, help her from the bed into a chair, assist her with bathing, handle the housework and laundry, take care of the grocery shopping, etc. The pain and discomfort limited her ability to spend time with her family and her grandchildren, as well as caused a significant loss of enjoyment of her life. She had a second open knee surgery to remove the hardware in her knee more than two years following the injury because she continued to have pain whenever she attempted to walk on an uneven surface or incline, go up and down stairs, stoop or kneel. Her limitations have forced Mrs. Connell to miss out on family holidays, time with her grandchildren, and gardening, which is her favorite hobby. Even at the time of trial, Mrs. Connell was still doing her exercises daily to attempt

[1] Because Ms. Moore's report is based on the recommendations Dr. Loging made in his deposition in November 2019, both Ms. Moore's report and Dr. Alford's report include the hardware removal surgery as a future cost. As trial was delayed and took place after the hardware removal was completed, those costs are now included in the past medical costs, and the Court has removed those expenses from the future costs projections for the purpose of determining damages in this case.

[2] Although Ms. Moore's report included alternate scenarios depending on whether Mrs. Connell had a full or partial knee replacement, the expenses in the two scenarios were very similar. Therefore, Dr. Alford's report assumed that Mrs. Connell will have a full knee replacement in the future.

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

to continue her slow progress with mobility.

Mrs. Connell asserts that the curb where she fell was a hazard to pedestrians, and LMC breached its duty to remedy or warn of the hazard. The curb was painted on its face (i.e. the rise), so it could be seen by vehicular traffic or pedestrians exiting the garage, but it was not painted on top (i.e the run). Importantly, it appears clear from the evidence that the remainder of the curbing throughout the parking garage is painted yellow on the top and the side. The top side painting was absent in the location where Mrs. Connell fell. There was no demarcation of the change in elevation that could be seen by a person walking in the direction Mrs. Connell was walking.

Cory Andrews, LMC's Director of Risk Management, testified that LMC is responsible for the upkeep and maintenance of their facilities, such as parking garages. Mr. Andrews recognized the purpose of painting curbs in parking garages is to make them visible and admitted that Diane Connell would not have been able to see any yellow paint on the curb where she fell from the direction she was walking. He testified that he believed yellow paint being on the side and tops of the curbs was prevalent throughout the garage and the yellow paint is used to make elevation changes visible to the human eye. He also agreed that elevation changes on concrete are hard to see without demarcations such as paint and that Diane Connell would not have been able to see any paint on the curb where she fell from the direction she was walking. Further, Mr. Andrews testified that Mrs. Connell appeared to be walking normally and at an acceptable speed, and he could not identify anything that she did wrong that contributed to her fall.

Dale Thompson, LMC's Director of Facility Services, also agreed that curbing can cause a trip hazard and that when the concrete curb is the same color as the concrete ground, it has a "camouflaging effect," making it difficult to see where there is a change in elevation. Neither party has identified any regulatory code or rule that designates when and how a curb in a parking garage must be painted, but Mr. Thompson testified that while he was not sure, he thought the yellow

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

paint markings or "striping" in the garage was required by code. He recognized that LMC is responsible for maintaining and inspecting the garage building to address any safety concerns, but prior to this incident, LMC had done nothing to call pedestrians' attention to the sudden change in elevation where invitees were expected to walk. Although Mr. Thompson testified that he was not aware of anyone else having fallen on that curb prior to Mrs. Connell's fall, he conceded that there may have been other falls where the injuries were just not severe enough to cause someone to report them. Mr. Thompson also conceded on cross-examination at trial that the condition of the parking garage as depicted in the photographs constituted a "trip hazard" because it was hard to see the curb or its change in elevation. Finally, Mr. Thompson conceded that the curb and its change it elevation would be more visible and safer to pedestrians if the top was painted yellow in a similar manner that curbs were found painted elsewhere in the parking garage.

At the close of the evidence Defendant renewed its objections and made a Motion for Directed Verdict and provided a memorandum in support of its motion to this Court. The parties stipulated they would submit proposed orders in lieu of closing arguments. After reviewing its motion, and hearing all the evidence, Defendant's Motion for Directed Verdict is denied. Accordingly, this Court makes the followings findings of fact and conclusions of law.

STANDARD OF REVIEW

In a bench trial, the trial judge acts as the finder of fact. *Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017). "[T]he judge, as the finder of fact, may believe all, some, or none of the testimony, even when [the testimony] is not contradicted." *Id.* (internal citation omitted). A trial judge will be accorded great deference where matters of credibility are involved. *Id.* (internal citations omitted). "Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to [circuit] court findings where matters of credibility are involved." *Forrester*, 282 S.C. at 516, 320 S.E.2d at 42. *Lollis v.*

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

Dutton, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017). On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. *Jordan v. Judy*, 413 S.C. 341, 347–48, 776 S.E.2d 96, 100 (Ct. App. 2015)

LIABILITY

Mrs. Connell has asserted a claim of negligence, and more specifically, premises liability, against LMC. "To prove a cause of action for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages." *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016). Thus, the Court must first determine, "as a matter of law, whether the defendant owed a duty of care to the plaintiff." *Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003).

The duty of care a landowner owes to a person upon its premises depends upon the classification of the individual; she may be an invitee, licensee, adult trespasser, or child. *Larimore v. Carolina Power & Light*, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000). "An invitee is a person who enters onto the property of another at the express or implied invitation of the property owner." *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct.App.1997). "[A] person is an invitee on the land of another if he enters by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." *Sims v. Giles*, 343 S.C. 708, 716–17, 541 S.E.2d 857, 862 (Ct. App. 2001). "Invitees include . . . patients in a physician's office" *Id.* As Plaintiff was accompanying her husband to a doctor's appointment on LMC's premises, Mrs. Connell was undeniably an invitee. LMC does

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

not dispute her status as an invitee.

"[T]he invitee is offered the utmost duty of care by the landowner." *Id.* at 715, 541 S.E.2d at 861. "[A]lthough the operator of a parking lot is not an insurer of the safety of those who use the lot, reasonable care must be used by the operator to keep the premises used by invitees in a reasonably safe condition." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009). A property owner "owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition." *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 51, 124 S.E.2d 580, 582 (1962). "A landowner owes an invitee a duty of due care to discover risks and to warn of or eliminate foreseeable unreasonable risks." *Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994). If a risk of injury is "reasonably foreseeable," the landowner must take action to prevent the injury. *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 392, 701 S.E.2d 776, 781 (2010).

In this case, LMC admits that Mrs. Connell was an invitee on its premises and that it owes her the duty above described. LMC further admits that Mrs. Connell sustained a patella fracture when she fell in the LMC parking lot. The issue in this case is whether the scope of the acknowledged duty of reasonable care extends to the particular risk that led to Mrs. Connell's injuries. Thus, Mrs. Connell prevails only by showing that it was reasonably foreseeable that someone might fall as a result of the unpainted curb and LMC either (1) created the hazard or (2) had actual or constructive knowledge of the hazard and failed to remedy it. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). Constructive notice may be proven by showing that the dangerous condition existed long enough that the defendant should have discovered it. *Wimberly v. Winn Dixie Greenville Inc.*, 252 S.C. 117, 121, 165 S.E.2d 627, 629 (1969). Based on the totality of evidence before this Court, in particular the photographs of the parking garage and the

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

unpainted curb where Mrs. Connell fell, as well as the testimony of LMC's witnesses Dale Thompson and Cory Andrews, Mrs. Connell has carried the burden of proof.

This case is similar to *Bruno v. Pendleton Realty*, where our Supreme Court upheld a verdict in favor of a store patron who fell "as a result of stepping on the edge of a curbing, which was concealed by a heavy growth of grass." *Id.* at 48, 124 S.E.2d at 581. In that case, there was a sidewalk and a walkway that intersected in the parking lot, and grass had grown in the crack at the intersection, which "gave the appearance that the walkway and sidewalk were on the same level." *Id.* at 52, 124 S.E.2d at 583. Testimony established that the patron had not used that particular walkway before, the patron had the impression that the sidewalk and the walkway were the same height, and the walkway and the sidewalk were the same color, "giving the impression that it was one continuous walk." *Id.* at 52-53, 124 S.E.2d at 583. Although evidence showed the property owner inspected the premises two or three times per week, the condition had existed for a month or more at the time the patron fell. The court held, "[t]he mere fact that there is a difference between the levels in the different parts of the premises does not, in itself, indicate negligence unless, owing to the character, location and surrounding condition of the change of level, a reasonably careful person would not be likely to expect or see it." *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 51, 124 S.E.2d 580, 582 (1962). Further, the court pointed out that where a property owner knew or should have known of a dangerous condition that is unknown to an invitee, "the owner is required to give proper warning in order to relieve himself from liability for injuries incurred by reason thereof." *Id.* at 52, 124 S.E.2d at 583. The *Bruno* court found that the evidence was sufficient to find that the property owner, "in the exercise of ordinary care to make its premises reasonably safe, . . . should have given warning of the situation, or taken other precautions to guard against injury to the [patron]." *Id.* at 54, 124 S.E.2d at 584.

Like the patron who fell in *Bruno*, the Plaintiff, Mrs. Connell, was unfamiliar with the

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

pedestrian walkway leading into the parking garage at LMC. She testified that she was looking ahead of her as she walked but was unable to see any curb or change in elevation and believed the surface before her to be flat. In addition, Mr. Connell and Mr. Brewer testified that both the walkway and the driveway were concrete, and it gave the appearance that they were on the same level.

It is foreseeable that a reasonably prudent person walking into the garage, as Mrs. Connell was, would not expect or observe the curb or elevation change of the walking surface. LMC completed construction of this parking garage in or around 2008 and regularly inspected the premises. Nine years is certainly sufficient time for LMC to have realized that the lack of paint on a curb between two levels of concrete had a camouflaging effect, but more than that, LMC created this hazard by failing to paint the curbs when it built the garage in 2008. The fact that LMC painted both the top and side of other curbing/elevation changes on walking surfaces throughout the parking garage, but failed to ensure that the top of the curb was painted where Mrs. Connell fell, is evidence that LMC created the hazardous condition, or at the very least, knew or should have known this condition existed. In spite of its knowledge that the concrete pedestrian walkway suddenly dropped down to the concrete driveway, with no color change or other distinguishing characteristics, LMC did nothing to alert pedestrians to this change in elevation. This failure is a breach of the duty of care LMC owes invitees on its premises.

LMC argues that *Bruno* actually supports its position on the theory that there can be no liability where there is no new defect. Essentially, LMC argues that its failure to paint the curb on the top side, which would make it visible to pedestrians walking into the garage, cannot make LMC liable for Mrs. Connell's injury because the curb has been in that state since construction, and there is no grass hiding the curb or other defect that has developed to make this area more hazardous. This argument is not persuasive. The court in *Bruno* found sufficient evidence of

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

negligence to uphold the verdict based on the invitee's inability to see the change in elevation and the landowner's failure to make the elevation change visible or warn of its existence. The grass that had grown in the crack between the walkway and the sidewalk contributed to the inability to see the curb in that instance, but there is nothing to say that a curb cannot be difficult to see, and thus, hazardous, to an invitee unfamiliar with the parking area without the growth of grass or some other obstacle. This is especially true in the instant case, where there is clear evidence that the curb or change in elevation is not visibly apparent. The photographs and testimony of the witnesses, including LMC representatives, present strong and credible evidence of a trip hazard due to the inability to readily visualize the change in elevation. In this case, just like in *Bruno*, it should have been obvious to the property owner that a pedestrian using the appropriate walkway might be unable to see the change in elevation, thereby making it unreasonably hazardous. Thus, LMC's failure to remedy or warn of the potential danger is a breach of its duty to Mrs. Connell.

In addition to its argument based on *Bruno,* LMC argued at trial that it cannot be liable for Mrs. Connell's injuries because (1) Plaintiff has not identified a statute or code that LMC violated; (2) there is no evidence that it had constructive notice of this hazardous condition; (3) no one ever reported being injured by falling on this curb prior to Mrs. Connell's fall; and (4) even if LMC was negligent, Mrs. Connell was also negligent, and her negligence outweighs that of LMC, barring her claim. Each of these arguments is addressed in turn below.

First, relying on *Nelson v. Piggly Wiggly,* LMC argues that it cannot be liable because Mrs. Connell has not pointed to a statue or code regulation that requires the curb be painted on both sides. In *Nelson*, a store customer was injured when her grandmother's car drove over the wheel stop in the Piggly Wiggly parking lot and pinned her to the exterior store wall. *Id.* at 386, 701 S.E.2d 776, 778. The customer argued that the wheel stops were installed too close to the building because "there was no room for a pedestrian to escape injury if a car crossed a wheel stop" and the

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

improper installation of the wheel stops "created hazards." *Id.* at 387, 701 S.E.2d at 778. The customer's expert witness testified to the hazardous design but could not identify any specific code violations. *Id.* at 386-87, 701 S.E.2d at 778. The court held that Piggly Wiggly did not have a duty to protect the customer from this injury because it was "legally unforeseeable." It explained that "the injury resulted not from the condition or placement of the wheel stops but from the operation of Grandmother's vehicle," and the grandmother's car accelerating over a wheel stop after stopping in a parking space was "unexpected and unusual." *Id.* at 394, 701 S.E.2d at 782. The court also held that the expert witness's opinion did not "as a matter of law, establish a duty on [Piggly Wiggly] to guard against the possibility that an improperly operated vehicle would injure [its customer]." *Id.* at 393, 701 S.E.2d at 781-82. In essence, the *Nelson* court found that Piggly Wiggly was not required to protect this customer from her grandmother's negligence. *Id.* at 394, 701 S.E.2d at 782.

LMC's interpretation of this case to say that a plaintiff cannot recover unless she is able to identify a code violation is flawed. A code violation is not required to prove negligence. The lack of liability in *Piggly Wiggly* was not based on the failure to point to a code violation, but based upon the unforeseeability of the intervening cause of injury to its customer. A violation of statue or code is relevant because if a violation is found, it may establish that there was a duty as a matter of law, and constitute negligence *per se*. However, the absence of a code violation does not rule out the possibility of negligence. LMC has an obligation to use due care to keep its parking garage in a reasonably safe condition. Regardless of whether there is any regulatory code that required the tops of the curbs to be painted, doing so was evidently the Defendant's standard custom in the subject garage. [3] Visible yellow painting on the top and side of the curbs is prevalent throughout

[3] Black's Law Dictionary defines "Standard" as "a model accepted as correct by custom, consent, or authority." See STANDARD, Black's Law Dictionary (11th ed. 2019)

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

the remainder of the garage, and Dale Thompson testified that he believed this striping was required by code. Further, Corey Andrews testified that curbs were generally painted in order to make changes in elevation visible to the human eye. Painting the top of the curbs, where pedestrians are intended to walk, clearly falls within what acts should be performed to eliminate foreseeable risks and to keep the parking garage reasonably safe whether or not it is specifically required by a code.

Next, LMC argues that there is no evidence that it had notice of the condition of the curb, and therefore, it cannot be held liable for Mrs. Connell's injuries. First, this argument is without merit because it ignores the fact that LMC created this hazard. LMC's own witnesses testified that LMC built the parking lot and had it "striped" (painted) in or around 2008 and thereafter would routinely inspect the garage for hazards. However, there is nonetheless evidence that LMC should have known of this condition because it had existed for years in a parking garage it maintains and is regularly accessed and utilized by its employees. Constructive notice may be proven by showing that the dangerous condition existed long enough that the defendant should reasonably have discovered it. *Wimberly v. Winn Dixie Greenville Inc.*, 252 S.C. 117, 121, 165 S.E.2d 627, 629 (1969). Defendant argues, without reliance on any authority, that the time a hazard existed may only provide evidence of constructive notice in foreign substance cases, such as where a store customer slips on something spilled on a floor. However, *Bruno*, discussed above, and *LeFont v. City of Myrtle Beach Convention Center*, App. Case No. 2017-001258, Opinion No. 5175 (S.C. Ct. App. Mar. 11, 2020), are both parking lot cases where an invitee tripped on an uneven surface, not a foreign substance, and the respective courts found evidence of notice based on the amount of time the hazards existed.[4] In *LeFont*, the invitee tripped in a pothole in the defendant's parking lot. *Id.* at slip op. *2. The trial court held that there was no evidence the defendant had constructive

[4] The *Bruno* court cited testimony indicating that the walkway and sidewalk had been in the same condition for at least a month before the patron fell there. *Id.* at 52, 124 S.E.2d at 583.

notice of the pothole, but the court of appeals reversed, citing testimony that the pothole contained dirt and debris, which would allow a fact finder to infer that the hole had existed long enough for the defendant's employees to discover it. *Id.* at slip op. *8. Thus, it is appropriate to impute knowledge of the hazardous curb on LMC based on its opportunity to observe the hazard over the nine years since construction.

LMC also argues that it did not have notice of the hazardous condition because no one reported any injuries resulting from a fall in that location prior to Mrs. Connell falling. To hold that this lack of report was proof that there was no constructive notice of the hazard that existed would be to grant property owners a "one free fall" rule, excusing them from liability the first time a hazardous condition on their property caused an injury. This idea is inconsistent with the law of this state. In South Carolina, if it is "reasonably foreseeable" that the property poses a risk to an invitee, the landowner must take action to prevent the injury. *See Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 392, 701 S.E.2d 776, 781 (2010). "The mere fact that a particular kind of an accident has not happened before does not . . . show that such accident is one which might not reasonably have been anticipated." *Bass v. Gopal, Inc.*, 395 S.C. 129, 136-37, 716 S.E.2d 910, 914 (2011). A defendant is not excused from liability based on "the fortuitous absence of prior injury." *Id.* LMC's own witnesses agreed that elevation changes could create trip and fall hazards and that the lack of paint on the top portion of the curb where Mrs. Connell fell created a "camouflaging effect" on the elevation change, such that a reasonably prudent person is likely not to see it. This creates a foreseeable risk of falling and sustaining injury, and LMC had a duty to protect against that risk.

Finally, there is no evidence that Mrs. Connell's conduct contributed to her fall. The security camera footage corroborates Mrs. Connell's testimony that she was walking straight and looking ahead when she fell. There is no evidence that she was distracted, not looking where she

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

was walking, or behaving unreasonably. LMC's own witness admitted that upon reviewing the video, he did not observe any action on her part that contributed to her fall. Therefore, this court holds that there was no contributory negligence on her part. As to the question of the whether Defendant breached its duty to Mrs. Connell for which Defendant is legally responsible, this court finds in the affirmative.

INJURIES AND DAMAGES

Because the Court has concluded that LMC is liable for the injuries and damages Mrs. Connell sustained when she fell in its parking garage, it is necessary to determine the amount of Mrs. Connell's damages. "Actual damages are awarded to a litigant in compensation for his actual loss or injury." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 594 S.E.2d 867, 874 (Ct. App. 2004). Such damages "include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant." *Id*. The elements that are properly considered in determining the amount of actual damages for personal injury include medical expenses, pain and suffering, loss of income and earning power, and loss of enjoyment of life. *See Schumacher v. Cooper*, 850 F. Supp. 438, 453 (D.S.C. 1994) (citing *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964)).

"In a personal injury action, the plaintiff must recover for all injuries, past and prospective, which arose and will arise from the defendant's tortious activity." *Haltiwanger v. Barr*, 258 S.C. 27, 32, 186 S.E.2d 819, 821 (1972). "Thus, recovery must be had for future pain and suffering, and for the reasonable value of medical services and impaired earning capacity, to the extent that these injuries are reasonably certain to result in the future from the injury complained of." *Id*.; *see also Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 228, 136 S.E.2d 286, 291 (1964) (stating a plaintiff is "entitled to recover all damages proximately resulting from the negligent acts of the defendant," including "pain and suffering, and medical expenses, including any future damages

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

resulting from permanent injuries"). "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." *Boan v. Blackwell*, 343 S.C. 498, 501–02, 541 S.E.2d 242, 244 (2001). "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." *Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962). "Separate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." *Boan*, 343 S.C. at 501–02, 541 S.E.2d at 244. "[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." *Boan*, 343 S.C. at 502, 541 S.E.2d at 244. A plaintiff may also recover damages for permanent physical scarring. *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 601, 344 S.E.2d 157, 165 (Ct. App. 1986). The monetary value to assign a plaintiff's damages is "a matter resting within the sound judgment of the" fact-finder. *Id*.

Mrs. Connell suffered significant injuries when she fell in the LMC garage. Her husband, Steven Connell, testified that as soon as she fell, she started screaming in agony. He was unable to get Mrs. Connell to her feet, but with the assistance of some passersby, they were able to get her to a seated position on the curb. She was taken immediately to the Emergency Room at LMC, where she was admitted and had surgery the next day. She testified that bending her knee at all caused her excruciating pain. Following surgery, which left a large scar on her knee, Mrs. Connell was discharged from the hospital but had very limited mobility. She was not able to shower for the first week she was home, and she required assistance to use a bedside commode. Mrs. Connell

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

relied on her husband to prepare her meals, assist her with personal hygiene, and handle all household tasks such as grocery shopping, housework, and laundry, for weeks. Even after regaining some mobility, she has been very limited in her ability to squat or kneel, which has resulted in her being unable to return to gardening, which she loves. Mr. Connell still accompanies her to the grocery store so he can assist with reaching things on lower shelves because stooping causes her such pain. At the time of trial, Mrs. Connell had just recently undergone a hardware removal surgery with Dr. James Loging, which she hoped would alleviate some of her pain. Still, Dr. Loging made it clear that Mrs. Connell would develop post-traumatic arthritis in her knee because of the way her injury healed, which will lead to more pain and, ultimately, a knee replacement surgery.

LMC did not present any expert testimony or other evidence to refute that Mrs. Connell's medical treatment was reasonable and necessary or to present alternative figures for the costs of her future treatment. LMC also does not dispute Dr. Loging's testimony that Mrs. Connell will require a third knee surgery in the future. LMC's only contest to any element of the damages Mrs. Connell presented was to challenge Ms. Moore's determination that Mrs. Connell would most likely have the recommended knee replacement surgery inpatient in large part due to her preexisting comorbidities. In objecting to her testimony, LMC argues that she is not qualified to give this opinion because she does not have hospital admitting privileges. The Court disagrees and in overruling the objection holds that Ms. Moore properly based her opinion on her clinical experience, training she has received regarding common practices, and research on this subject.[5] As a Certified Nurse Life Care Planner, Ms. Moore has been trained on common practices amongst physicians in various treatment scenarios. In addition, as a Physician's Assistant practicing in the

[5] Subsequent to trial, and in conjunction with providing proposed orders, the parties emailed this Court with additional arguments on the merits including deposition evidence from witnesses, as well has Ms. Moore's testimony and opinions. As this email exchange addressed the merits of the case and was reviewed by this Court it will be supplemented to the record as a Court's Exhibit.

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

Emergency Room, Ms. Moore evaluates patient risks and makes recommendations regarding when patients should be admitted. Ms. Moore's testimony and the evidence before the court supports the fact that Mrs. Connell's knee replacement surgery would be in a hospital setting due to existing cardiovascular condition and the need for general anesthesia. It is not necessary that Ms. Moore be able to make the final determination on whether Mrs. Connell should be admitted to the hospital because future damages need not be proven to absolute certainty. *See Pearson v. Bridges*, 344 S.C. 366, 371, 544 S.E.2d 617, 619 (2001) (holding that plaintiffs must prove that their future damages are "reasonably certain to occur"). While Ms. Moore's opinions are not guaranteed to occur verbatim, they are far from speculative. The evidence Mrs. Connell presented is sufficient to show that a future inpatient surgery is reasonably certain to occur.

Mrs. Connell has proven by a preponderance of the evidence that she incurred causally-related health care expenses of $55,839.38 and that she will incur additional medical expenses in the future all of which are reasonable and necessary as a direct and proximate result of injuries she suffered from the September 26, 2017 fall. In addition, Mrs. Connell has shown by a preponderance of the evidence that she has suffered significant pain, mental anguish, inability to care for herself, and loss of enjoyment of her life, and that she will suffer these damages into the future for an indefinite period of time.

Mrs. Connell has proven her case by a preponderance of the evidence and shown an award of actual damages, to include past and future medical costs, past and future pain and suffering, mental anguish, anxiety, and loss of enjoyment of life to be appropriate. In light of the all the testimony and documentary evidence, as well as the arguments of counsel, this Court awards a judgment for the Plaintiff against Defendant in the amount of $225,000.00.

IT IS SO ORDERED.

[SIGNATURE PAGE TO FOLLOW]

ELECTRONICALLY FILED - 2020 Jul 10 3:47 PM - LEXINGTON - COMMON PLEAS - CASE#2018CP3201750

Lexington Common Pleas

Case Caption: Diane Connell VS Lexington County Health Services District Inc , defendant, et al

Case Number: 2018CP3201750

Type: Order/Civil Judgment

It Is So Ordered

s/ Walton J. McLeod