THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2015-CP-10-02191
Appellate Case Number 2019-001403

Karrie Gurwood & Howard Gurwood ..... Appellants

v.

GCA Services Group, Inc. & GCA Services Group of North Carolina, Inc. ..... Respondents

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FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This appeal arises from a jury verdict in a suit brought by Appellants Karrie and Howard Gurwood for negligence and loss of consortium (R. pp. 27-36). Karrie Gurwood alleged that she sustained injuries, including Complex Regional Pain Syndrome, "CRPS", as a result of a slip and fall that occurred at a school where she was employed after the floors had been waxed. The Respondents, collectively "GCA," is a large janitorial services company contracted to provide those services at Liberty Hill Academy, the school where Karrie Gurwood was employed.

The case was tried beginning on April 22, 2019 and was given to the jury for consideration on April 26, 2019 (R. pp. 44-1125). During deliberations, the jury submitted three questions to this Court asking for the charge on negligence; asking whether Karrie Gurwood had filed a workers' compensation claim; and asking whether Karrie Gurwood would receive any recovery if she were found more than fifty percent (50%) negligent for her own injuries. This trial court answered the questions by recharging the jury with the instruction for negligence, advising that whether a workers' compensation claim had been filed was not material to their deliberations, and recharging them with the instruction for comparative negligence, which indicated that any recovery would be barred if Karrie Gurwood was found to be more than 50% negligent.

After further deliberations, the jury returned a verdict and found GCA negligent and awarded Karrie Gurwood total damages of $170,629.10 (R. pp. 22-26). On the verdict form, the jury expressly declined to award Karrie Gurwood her damages for lost wages and benefits, declined to find in favor of Howard Gurwood's claims for lost consortium and found that Karrie Gurwood was 50% at fault.

After the verdict was read, counsel for GCA asked this Court to question the jury as to whether the jury had reduced their award to Karrie Gurwood by the percentage of Karrie Gurwood's fault. Without objection from Appellants' counsel, the trial court made the inquiry and the foreperson stated that the jury had not reduced the total damages awarded by 50%, explaining that the jury expected the trial court to reduce their award by 50%. The trial court advised that a 50% reduction in their award would result in a total award of $85,314.55, which the foreperson advised was the total sum the jury intended to award Karrie Gurwood after taking into account her degree of fault. Judgment was then entered in the amount of $85,314.55.

On May 6, 2019, Appellants filed post-trial motions which were briefed by both Appellants and GCA. On or around June 5, 2019 the trial court denied the motions and requested that counsel for GCA prepare the order. On or around June 24, 2019 that order was circulated for review. On July 10, 2019 the Appellants notified the trial court that they would not submit a proposed order and on July 25, 2019, the trial court entered its order denying Appellants 'post-trial motions (R. pp. 1-18). Appellants filed a notice of appeal on August 15, 2019 (R. pp. 1427-1429).

LEGAL ARGUMENT

I. The jury's findings were consistent with the evidence presented at trial and the jury's questions during the deliberation of the verdict show that the resulting verdict represented the jury's appropriate and supportable verdict given the evidence presented at trial.

Appellants assert that the jury's verdict was not consistent with the evidence and that the jury was confused. A review of the evidence that was presented at trial, the parties' stipulations and the questions the jury had during deliberations compel just the opposite finding. This jury was fully engaged in the trial, was aware of the facts, and wanted to make certain that it understood the applicable law before rendering its decision.

The bar is set very high for the Appellants and they seek to nullify a decision of the jury in this case. To grant a motion for *additur*, the trial judge must find and state compelling reasons as to why it is necessary to invade the province of the jury, since a jury's verdict should be upheld when possible. *Camden v. Hilton*, 360 S.C. 164, 173, 600 S.E.2d 88, 93 (Ct. App. 2004) (citing *Anderson v. Aetna Cas. & Sur. Co*., 175 S.C. 254, 283-284, 178 S.E. 819, 830 (1934). However, "granting or denying a new trial, either for excessiveness or inadequateness of the verdict, is discretionary with the trial court." *Williams v. Jones*, No. 3:12–cv–00365–JFA. 2013 WL 3306159, (D.S.C. July 1, 2013) citing *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 511 F.2d 839, 846 (4th Cir.1975). "The weight of evidence and the credibility of witnesses is solely within the province of the jury." *Great Coastal Express* at 844.

Contrary to Appellants' arguments, the jury's questions during deliberations and their verdict do not evidence confusion as to the evidence presented. In fact, the jury's questions during deliberations, verdict and their post-verdict response to the trial court's request for clarification indicate that this jury was deliberate both with respect to its consideration of the evidence and the law and that it reached precisely the verdict it believed the evidence warranted. The jury found the Respondents liable, meaning a standard of care was breached which proximately resulted in damages to Karrie Gurwood. At the same time, the jury also found the Appellants' other claims, including those for future medicals, pain and suffering and loss of consortium, to be without merit.

To begin with, the parties agreed to several stipulations before trial concerning the amounts of past medical damages, future medical damages and lost wages, and the amount of the lost consortium claim. (See Trial Transcript at R. 427, lines 5-21 (stipulation of past medical

bills), *Id.* at R. p. 349, line 10 - p. 352, line 10 (objection to testimony regarding future medicals), *Id.* at R. p. 967, lines 3-5 (stipulation of economic loss and loss of services).)

So, the jury was fully advised of the amounts of damages being claimed by Appellants. They were also told that to recover those damages, Appellants needed to prove their case. (*See* Trial Transcript at R. p. 1002, lines 10-17.)

The verdict form that was used was also very clear and outlined all of the claims asserted and all of the categories of damages being claimed by Appellants. (*See* Verdict Form on R. pp. 22-26.) The jury was literally able to pick and choose from that menu what to award her. The jury then expressly delineated the claims that Karrie Gurwood prevailed on and the ones Appellants did not. *Id.* There was no confusion at all.

Ultimately, the trial was about the credibility, and the believability, of the key fact witnesses. In fact, the lawyers for both Appellants and GCA stressed the importance of the credibility and believability of the witnesses in their closing arguments. (*See* generally Trial Transcript at R. p. 1006, lines 4-7, p. 1007, lines 19-20, p. 999, lines 10-4, (closing by Appellants' Counsel) and p. 1021, line 25 - p. 1022, line 7 (closing by Respondents' Counsel).) That was a tacit acknowledgement by both sides that the evidence was conflicting in the case and each side understood that the jury was going to have to sift through the evidence and decide who and what they believed as they deliberated their verdict.

As noted in Judge Kinlaw's Order denying Appellants' post-trial motions, in the first several days of trial, Appellants presented evidence in support of their case. *See* Order, filed July 31, 2019 (R. pp. 1-18). That evidence included the testimony of GCA's janitorial employee, Bonnie Every, Karrie Gurwood, Howard Gurwood, Karrie Gurwood's, Dr. Timothy Lubenow and Dr. Robert J. Blackwell, and Appellants' human factors expert, Dr. Zdenek Hejzlar. The

evidence of those witnesses concerned GCA's policies and procedures, the circumstances of the floor waxing that was done prior to Karrie Gurwood's fall, the facts and circumstances of Karrie Gurwood's employment and her fall on August 5, 2012, the causal connection of the slip-and-fall to Karrie Gurwood's claimed injuries, her pain and suffering, her loss of enjoyment of life and ability to work, and the likelihood that her injuries will not improve. There was also testimony of the pain and suffering she claims to experience as a result of her injuries. Indeed, Karrie Gurwood appeared at trial in a reclining wheelchair and was positioned next to the jury each day at trial.

However, evidence was also elicited by GCA, which was factually contrary to Appellants' evidence and much of which cast doubt on the credibility of Appellants. For example, Bonnie Every and Sarah Jamme gave testimony that prior notice of floor waxing was given to Karrie Gurwood. Ms. Every testified that she notified the school secretary and Karrie Gurwood about the waxing:

> *Q. Now the Friday before the weekend which was August the 3rd, right; that was ---*
>
> *A. Yes.*
>
> *Q. --- a Friday, August the 3rd. The fall happened on Sunday, August the 5th. Friday, August the 3rd did you tell anybody at the school that you intended to wax over the weekend?*
>
> *A. Yes.*
>
> *Q. And who did you tell?*
>
> *A. Ms. Wood.*
>
> *Q. Who?*
>
> *A. Ms. Wood.*
>
> *Q. Okay.*

A. She is the secretary.

Q. And why did you tell Ms. Wood?

A. Because she most generally takes care of things if Ms. Jamme isn't there.

Q. And what did you tell her?

A. I said that I would be waxing the floors the weekend.

Q. Why was it important to tell her?

A. In case anybody would -- she could tell anybody that needed if they were coming in. I always told when I was waxing so if something happened then it wouldn't -- I wouldn't be blamed for it.

Q. Okay.

Q. All right. Now did you speak to anybody else on that Friday about waxing the floors?

A. Let me see what my thing says here.

Q. Well, why don't you tell me what you can remember ---

A. What I can remember is that I went and spoke to Ms. Wood and asked her if anybody else was in the school, and Ms. Gurwood was in her room.

Q. Okay.

A. And I went and spoke with her.

Q. Okay.

A. And told her I would be waxing the floors.

Q. Did you meet -- did you know Mr. Gurwood?

A. No, just I knew that she worked at school.

Q. Okay. And you talked to her?

A. Yes.

Q. Are you sure about that?

A. Yes.

Q. And what did you tell her?

A. I told her I would be waxing the floors on the weekend and that Monday they should be dry and to come back to school on Monday.

(*See* Trial Transcript at R. p. 266, lines 21-24 and p. 265, line 22-p. 266, line 17.)

The school principal, Ms. Jamme (who was not a party and had no interest in the case whatsoever) testified that Ms. Every told her about the waxing before it was done and that she made an announcement over a loud speaker at the school about the waxing to warn the staff, including Mrs. Gurwood.

Q. And what did you learn about waxing over the weekend on August the 3rd?

A. I spoke with Ms. Every at the time, that the floor would be waxed; and also with Mary Wood who was the secretary.

Q. Okay. And what if anything did you do with that information on Friday, August the 3rd?

A. I spoke with Ms. Every. And Ms. Every was always very particular about putting signage out whenever there was a spill or anything, so Ms. Every put up the signs that the floors would be waxed. And then I also made an announcement when -- because there was staff in the building. To make sure they knew not to come in that weekend. Because some teachers did want to come in and set up their classrooms.

Q. Is that something you would customarily do, make an announcement about waxing?

A. Yes.

Q. And what did you say over the announcement?

A. I said that the school would not be available, the school would be locked because the floor would be waxed and it would be dangerous to be in the building.

Q. Okay. Now when I hear a principal, they make an announcement over the loud speaker, it sends shutters down my back. We need to talk about it a little bit more. Where are the speakers in the school?

A. The speakers are all over. And I do remember we have conference rooms. We have two conference rooms that when the announcements play it is so loud in the conference rooms you have to stop your meeting. And then we also have speakers outside. Because sometimes we may have students that run and teachers would be outside. But you could hear the speakers outside of the building and all over the inside of the building.

Q. Was it your belief or expectation when you made the announcement that anybody at school would have heard it?

A. Yes.

Q. At the time you made the announcement did you see Karrie Gurwood?

A. I did not physically see her when I made the announcement. I had seen Mrs. Gurwood earlier in the day.

Q. Okay. Did you have any reason to believe that she was in the building or near the building?

A. I did because her office door was open.

Q. And you recall that?

A. Yes

(Trial Transcript at R. 497, line 4-p. 498, line 23.)

In addition to the testimony concerning notice to Karrie Gurwood, GCA's evidence focused on the subjective nature of a diagnosis of Complex Regional Pain Syndrome (CRPS) (Karrie Gurwood's claimed condition) and raised issues about the reasonableness of her actions concerning treatment of that condition. For example, GCA established that Mrs. Gurwood had only been evaluated by Dr. Lubenow during the pendency of the litigation, approximately four years after her fall. (*See* Trial Transcript at R. p. 372, lines 9-16.) While Dr. Blackwell, CRPS expert for the defense, testified that he could not disagree with Dr. Lubenow's diagnosis based

on his report, (*See* Trial Transcript at R. p. 726, line 25-p. 733, line 8), he gave extensive testimony regarding how a CRPS diagnosis is given and opined that the reliability of the diagnosis is largely dependant on the reliability of the patient. *Id.* In fact, because the diagnosis is so subjective, even Dr. Lubenow agreed that it would be possible for another expert in the CRPS field to evaluate Mrs. Gurwood and disagree with the diagnosis.

Q. In your experiences is it possible for similarly qualified reasonable doctors to disagree about a CRPS diagnosis?

A. Yes.

Q. And so somebody who has your credentials or is well 18 credentialed might examine her and find that she doesn't have 19 CRPS? 20

A. It is possible.

(Trial Testimony at R. p. 371, lines 13-20.)

Since the CRPS diagnosis was so subjective and dependent on the believability of Mrs. Gurwood, GCA pointed out that even though Dr. Lubenow had recommended treatment, at the time of this trial Mrs. Gurwood had not sought the treatment she claimed she was entitled to for CRPS. (Trial Transcript at R. p. 482, lines 5-10.) Dr. Blackwell then testified that CRPS patients typically seek treatment based on severity of their symptoms and that patients with significant pain from CRPS, as claimed by Mrs. Gurwood, typically seek whatever treatment is offered:

Q. In your patients, the patients that you have treated with CRPS, your patients, is it your experience that those patients typically seek interventional therapy for pain involving things like spinal cord stimulation?

A. That is probably why I went into the narrative. If patients have relatively mild CRPS, yes, they are not very motivated to seek out treatment. They might not even want medication.

If you have a patient whose whole life has changed such that they are altered those patients seek out treatment enthusiastically, quickly, and are highly motivated to get relief for their pain, as you would expect.

Trial Testimony at R. p. 737, lines 14-25. This medical testimony obviously cast doubt on the significance of Mrs. Gurwood's CRPS.

Mrs. Gurwood also made claims for loss of wages resulting from her fall. However, on cross examination Mrs. Gurwood testified that she had actually resigned from her job with the school district, in July of 2012, prior to her fall. (*See* Trial Transcript at R. p. 128, line 25-p. 129, line 3.) She also could not identify places she had worked prior to the job with the CYDC she had resigned from before the fall. (*Id.* at R. p. 429, lines 12-18.) Finally, while she testified that she resigned from CYDC to seek a job with less hours, but she did not have another job. (*Id.* at R. p. 429, lines 7-11.) In other words, Mrs. Gurwood had no long-term employment history to support a lost wages claim and the loss of the only job she could ever recall having, at CYDC, was not the result of the fall.

Mrs. Gurwood was not the only witness whose credibility mattered. The jury expressly rejected the consortium claim brought by Mr. Gurwood which may have been the result of the jury's belief that he was not a credible witness. That belief may have stemmed from his testimony that one of the effects of her CRPS was that the Gurwood's dreams of having children had been impacted by her fall and resulting CRPS, only to have to admit, on cross examination

that Mrs. Gurwood had had a hysterectomy prior to her fall. (*See* Trial Transcript at R. p. 537, line 8-p. 538, line 9.)

All that evidence establishes that there was significant evidence at trial that 1) Gurwood knew of the condition of the floor; 2) her injuries were subjective and had only been diagnosed by Dr. Lubenow while the case was in litigation; 3) she had not sought treatment for CRPS as other people with significant CRPS would be likely to do; 4) her lost wages claim was not the result of the fall and she had no meaningful, long-term history on which to base such a claim; and 5) her husband, the other Appellant, was caught directly misrepresenting facts concerning their claimed damages. The jury considered all of those facts, evaluated the claimed damages, and decided to award her past medical damages only, and assessed her with 50% of the fault. That verdict is fully supported by the evidence.

Appellants argue that the jury failed to award Karrie Gurwood pain and suffering damages after it awarded her actual damages in the amount of her medical costs, which were $170,629.10, and which Appellants contend is inconsistent with South Carolina law. However, Appellants failed to provide any law that requires an award of pain and suffering damages where a jury awards damages for medical costs. In fact, South Carolina law does not require a jury to award non-economic damages if it awards medical damages nor is this the first case in which a jury awarded only the amount of a plaintiff's medical expenses. *See e.g., Nestler v. Fields*, 426 S.C. 34, 41, 824 S.E.2d 461, 465 (Ct. App. 2019), reh'g denied (Mar. 29, 2019) and *Todd v. Joyner*, 385 S.C. 509, 517-518, 685 S.E.2d 613, 618 (Ct. App. 2008). The fact that the jury found GCA was negligent and awarded Karrie Gurwood the cost of some of her medical expenses without awarding any other category of damages is not a valid basis for a decision to grant a new trial.

Further, Appellants' post-trial motion was the first time Appellants' counsel suggested that an award of medical costs must be accompanied by an award of pain and suffering damages. Appellants did not propose, much less demand, that this Court charge the jury that if medical damages were awarded, pain and suffering must also be awarded. Therefore, this argument has been waived. *See generally* Rule 51, *SCRCP*, ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection"); *see also, McGee v. Bruce Hosp. Syst.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) (a party may not raise an issue for the first time in a post-trial motion).

The jury also found that Mrs. Gurwood was 50% at fault. After the verdict was read, the jury was asked if the past medical bills awarded had already been reduced by 50% and they said no, we want the award of past medical bills reduced by 50% (R. p. 1119, line 22-p. 1121, line 18). This clarification by the jury is simply more evidence that they knew exactly what they were doing when they awarded only Mrs. Gurwood's past medical bills.

Where a jury's verdict is "contrary to the fair preponderance of the evidence" the court can grant a new trial under the thirteenth juror doctrine. However, the evidence in this case shows that the jury was provided with evidence that created doubt as to the Appellants' claims for damages beyond past medical expenses. *See Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460 (1978).

Appellants cite *Johnson v. Parker*, in their brief to support their claim that the award in this case was illogical and inconsistent. *Johnson v. Parker* is not analogous to the matter at hand because it deals with situation where a new trial was granted because evidence was found that the forelady had written 'we find the Respondents guilty' but the clerk published the verdict as

'we find for the Respondents'. *See Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). In the present action, the jury returned a verdict for the Appellants for the exact total of Mrs. Gurwood's past medical bills and intentionally excluded all other damages on the verdict form which was very clear.

In the present action there is no evidence that the jury intended a different outcome than that occurred, especially when you consider their questions during deliberations and their response after the verdict was read. As such, the trial court properly found that the jury's verdict was supported by the evidence presented at trial.

II. The trial court did not abuse its discretion in granting directed verdicts on the issue of punitive damages or charging the jury on assumption of the risk.[1]

A. The trial court did not abuse its discretion in granting Respondents' motion.

Appellants argue that the trial court's directed verdict on the issue of punitive damages was improper. The plaintiff had the burden to prove, by clear and convincing evidence, that the defendant's conduct was willful, wanton, or reckless. *S.C. Code Ann.* § 15-32-520(D), *Solanki v. Wal-Mart Store No. 2806,* 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014) (quoting *Bell v. Atl. Coast Line R. Co.*, 24 S.E.2d 177, 182 (1943)); and *see Martin v. Martin*, 262 S.C. 168, 174, 203 S.E.2d 385, 387 (1974) (where willful, wanton, or reckless conduct is the conscious invasion into the rights of the plaintiff). Punitive damages are a drastic remedy and the Appellants bore the burden of showing they were warranted in this case. *See Stevens v. South Atlantic Canners*, 848 F.2d 484, 489 (Ct. App. 1988) citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268, 101 S.Ct. 2748, 2760, 69 L.Ed.2d 616 (1981).

At the close of Appellants' case, GCA requested a directed verdict on punitive damages on the basis that Appellants had failed to offer evidence, by clear and convincing evidence, of

[1] Respondents have combined Appellants Legal Arguments, identified in Appellants' brief as II and VI.

willful and reckless conduct. Exercising his obligations under the law, including *S.C. Code Ann.* §15-32-520(D), the trial court properly excluded the issue of punitive damages from the jury's consideration.

Appellants' argument about punitive damages is based upon Appellants' willfully incomplete review of the evidence presented at trial. Specifically, Appellants make multiple references to the "testimony" of Ms. Every concerning the equipment she was given by GCA and her compliance with GCA guidelines for wet/waxed floors, however, the Court should note that Appellants failed to provide reference to the relevant trial transcript. That is because Ms. Every's testimony does not support Appellants' arguments.

Bonnie Every testified that she had received, understood and utilized safety procedures provided to her by GCA Services Group, Inc. to reduce the risk of accidents.

Q: You were asked by Mr. McGarrah if you try to follow the GCA guidelines and recommendations. Did you do that?

A: Yes.

Q: Do you think signage and warnings are important?

A: Yes.

Q: Independent of the GCA rule is that important to you?

A: Yes.

Q: Why are signs important?

A: So people don't get hurt.

Q: Okay. Are you concerned about that?

A: Yes.

(Trial Transcript at R. p. 258, lines 13-25.)

In support of their argument that GCA acted willfully and recklessly, Appellants argue that Ms. Every did not utilize every possible safety procedure in the GCA manual and that GCA's failed to provide Mrs. Every with each and every safety device referenced in its manual. *See* Appellants Trial Exhibits 1 (R. p. 1227), Trial Transcript (R. pp. 44-1125) and Exhibits. However, the clear intent of the safety procedures in the GCA manual was to illustrate the types of safety equipment that could be used to reduce the risk of injury. Moreover, the clear intent of the safety procedures is that one or some of the available methods be used. GCA did not have a requirement that all of the suggested safety equipment was to be used at all times.

Appellants introduced two guide sheets promulgated by GCA titled "Methods Guide Sheet." *See* Appellants Trial Exhibits 4 and 5 (R. pp. 1224-1225). These sheets illustrate that GCA was conveyed to its employees that safety methods were important and illustrated the types of methods and equipment that could be used to safeguard an area that was being cleaned. There was no testimony by Hejzlar or any other witness that these methods were inadequate or violated any applicable standard. Further, Appellants cannot show any evidence that Ms. Every did not comply with the guidelines on either sheet. In fact, just the opposite was true. Regarding the procedures in the manual, Ms. Every testified:

Q: Now does that thing say or does that sheet say these are the only types of signs you can use?

A: No.

Q: It just says types of signage?

A: Yes.

Q: Does it say you have to use every type of signage every time?

A: No.

(Trial Transcript at R. p. 262, line 18-p. 263, line 6.)

The evidence presented at trial showed that Ms. Every did follow safety procedures by placing appropriate signs and warnings in the area where the floors were being waxed. This included her testimony that she 1) coordinated the waxing with the principal for the weekend when the faculty and staff would not likely be in the office; (*See* Trial Transcript at R. p. 497, line 4-p. 498, line 23.) 2) requested that the principal make an announcement about the waxing before the weekend when faculty and staff were present; *Id.* 3) testified that she told Mrs. Gurwood directly that she would be waxing the floor over the weekend; (*See* Trial Transcript at R. p. 265, line 22-p. 266, line 17) 4) placed wet floor signs in the anteroom leading to the area in question before waxing; (*See* Trial Transcript at R. p. 281, line 17-p. 284, line 11 and Respondents' Trial Exhibits 2 and 3; and 5) made up handwritten signs warning anyone who tried to enter that the floor was wet from waxing. *Id.*

The principal confirmed Ms. Every's testimony and testified that she believed Karrie Gurwood was present for this announcement and should have heard it.

> *Q. Did you hear anything about the waxing over the weekend on that Friday, August the 3rd?*
>
> *A. Yes.*
>
> *Q. And what did you learn about waxing over the weekend on August the 3rd?*
>
> *A. I spoke with Ms. Every at the time, that the floor would be waxed; and also with Mary Wood who was the secretary.*
>
> *Q. Okay. And what if anything did you do with that information on Friday, August the 3rd?*

A. I spoke with Ms. Every. And Ms. Every was always very particular about putting signage out whenever there was a spill or anything, so Ms. Every put up the signs that the floors would be waxed.

And then I also made an announcement when

Because there was staff in the building. To make sure they knew not to come in that weekend. Because some teachers did want to come in and set up their classrooms.

Q. Is that something you would customarily do, make an announcement about waxing?

A. Yes.

Q. And what did you say over the announcement?

A. I said that the school would not be available, the school would be locked because the floor would be waxed and it would be dangerous to be in the building.

Q. Okay. Now when I hear a principal, they make an announcement over the loud speaker, it sends shutters down my back. We need to talk about it a little bit more. Where are the speakers in the school?

A. The speakers are all over. And I do remember we have conference rooms. We have two conference rooms that when the announcements play it is so loud in the conference rooms you have to stop your meeting.

And then we also have speakers outside. Because sometimes we may have students that run and teachers would be outside. But you could hear the speakers outside of the building and all over the inside of the building.

Q. Was it your belief or expectation when you made the announcement that anybody at school would have heard it?

A. Yes.

Q. At the time you made the announcement did you see Karrie Gurwood?

A. I did not physically see her when I made the announcement. I had seen Ms. Gurwood earlier in the day.

Q. Okay. Did you have any reason to believe that she was in the building or near the building?

A. I did because her office door was open.

Q. And you recall that?

A. Yes.

(Trial Transcript at R. p. 497, line 4-p. 498, line 23.)

Based on the totality of the evidence, and the unrefuted evidence that Ms. Every was conscious of the risks involved in waxing and undertook several efforts to communicate that concern to the staff in general, and to Mrs. Gurwood in particular, the trial court properly concluded that the Appellants simply did not meet their burden of establishing sufficient clear and convincing evidence that the Ms. Every's actions were reckless, willful, wanton, or malicious to merit submission of the issue of punitive damages to the jury, performing the precise function required by the legislature in *S.C. Code* §15-32-520.

B. The trial court's denial of a directed verdict as to not charging the jury on assumption of the risk was proper because evidence was presented that the Plaintiff knew of the dangerous condition and appreciated the nature and extent of the danger.

Appellants conversely argue that there was no evidence to support a jury charge on assumption of the risk and that this Court should have granted Appellants' directed verdict

motion on that issue. This is also incorrect. First, there was sufficient evidence to warrant the submission of the issue of assumption of the risk to the jury. Second, any error was harmless because the trial court also properly charged the jury with comparative fault without objection from Appellants counsel.

To establish an assumption of the risk defense in South Carolina, the defense must show the: 1) plaintiff had knowledge of the facts constituting a dangerous condition; 2) plaintiff knew the condition was dangerous; 3) plaintiff appreciated the nature and extent of the danger; and 4) plaintiff voluntarily exposed herself to the danger. *Singleton v. Sherer*, 377 S.C. 185, 206, 659 S.E.2d 196, 207 (Ct. App. 2008). Assumption of risk also no longer serves as a complete bar to a negligence claim; rather, the defense is simply another factor to consider in comparing the parties' negligence. *Id.* "The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury." *Senn v. Sun Printing Co.*, 295 S.C. 169, 173, 367 S.E.2d 456, 458 (Ct. App. 1988).

Here, there was evidence to support an instruction for the assumption of the risk. Evidence was presented that Karrie Gurwood was made aware of the hazardous condition that led to her fall in numerous respects. Every and Jamme testified that they told Karrie Gurwood about the waxing before it occurred. (*See* Trial Transcript at R. p. 265, line 22-p. 266, line 17 and R. p. 497, line 4-p. 498, line 23.) There was also abundant evidence of what Ms. Every did to warn of the wet floor at the time it was waxed, such as the floor signs and the handwritten signs she placed at the entrance of the area in question. Finally, the jury heard about the missing black

mat from Mrs. Gurwood and saw her small, cautious steps in the video. (*Id.* at R. p. 484, line 7-p. 485, line 6.)

Assumption of the risk is a question for the jury. *Creighton v. Coligny Plaza Ltd Partnership*¸334 S.C. 96,113 512 S.E.2d 510 (Ct. App. 1998) citing. *Id.* citing *Small v. Pioneer Mach., Inc.*, 316 S.C. 479, 450 S.E.2d 609 (Ct.App.1994); *Singletary v. South Carolina Dep't of Educ.*, 316 S.C. 153, 447 S.E.2d 231 (Ct.App.1994). Given all of that evidence and testimony, the trial court properly charged the jury on the assumption of the risk and denied the Appellants' directed verdict motion for the same.

Further, any error was harmless. In this action the jury was charged on comparative fault without objection.

III. The Trial Court did not abuse its discretion in regard to expert testimony.[2]

A. Dr. Leah Hartman's testimony was based her knowledge and expertise and was properly admitted.

Appellants also contend that this Court erred by admitting the testimony of Dr. Leah Hartman, who testified as a human factors expert regarding her observations of Karrie Gurwood's movements in the surveillance video showing her fall. Those observations led Dr. Hartman to conclude that Karrie Gurwood was aware of the hazardous condition of the floor when she entered the hallway and fell.

The Appellants erroneously challenge the admission of Dr. Hartman's testimony on the basis that it amounts to scientific expert testimony. Their challenges are grounded in the *Council* factors, which goes to the reliability of scientific expert testimony. *State v. Council,* 335 S.C. 1, 515 S.E.2d 508 (1999).

[2] Respondents have combined Appellants Legal Arguments, identified in Appellants' brief as III and IV.

However, the foundations for scientific and non-scientific expert testimony are not the same. *See State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.")

The admission of all expert testimony is based on the qualifications and reliability of the expert, as well as the relevance of the testimony such that it will assist the trier of fact. Rule 702, *SCRE*; and *see State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). The qualification of a witness as an expert is within the trial court's discretion, and the appellate court will not reverse that decision unless there was an abuse of discretion that resulted in prejudice. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

As stated above, Dr. Hartman's testimony amounted to nothing more than an analysis of how Karrie Gurwood responded to her environment as seen in the video of her fall. (*See* Trial Transcript at R. p. 868, line 6-p. 869, line 15.) Unlike Dr. Hejzlar's testimony, Dr. Hartman's was non-scientific and, therefore, fell under a non-*Council* rubric as to reliability. *See State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony.")

Because her testimony was not scientific, this Court was required to evaluate her testimony under Rule 702, *SCRE*, which required consideration of the following factors: 1)

whether Dr. Hartman was qualified as an expert in her field; 2) whether her testimony was relevant; and 3) whether her testimony was sufficiently reliable to assist the trier of fact with respect to the issues it was being asked to decide.

Since Appellants opposed the admission of Dr. Hartman's testimony, the trial court conducted extensive *voir dire* of her before admitting her testimony to the jury. (Trial Transcript at R. p. 852, line 15-p. 902, line 5.) During *voir dire*, both GCA and Appellants' counsel asked questions of Dr. Hartman concerning her qualifications, the basis for her opinions and the methodology employed to create a graph she wished to show to the jury. *Id.* Outside of the presence of the jury, Dr. Hartman explained her analysis of the video, which had been shown to the jury numerous times by Appellants and GCA up to that point. *Id.* In the video, Karrie Gurwood walks into the hallway, takes steps, falls, gets up and then exits the hallway. In Dr. Hartman's *voir dire* testimony and in front of the jury, Dr. Hartman explained her interpretation of Karrie Gurwood's step pattern/length, her arm placement, and where she was looking as she walked into the hall, before she fell, all of which suggested cautious movement by Karrie Gurwood when she entered the hall. (*See* Trial Testimony at R. p. 908, line 2-p. 911, line 13.)

Reviewing the same video, Dr. Hejzlar had already testified about the length of Karrie Gurwood's steps, concluding they were small or short as she entered the hallway, and offered his interpretation of her steps. (Trial Transcript at R. p. 626, line 4-p. 627, line 6.) Dr. Hartman's interpretation was different than Dr. Hejzlar's. While both Dr. Hejzlar and Dr. Hartman agreed the steps Karrie Gurwood took before and after the fall were small or short, Dr. Hartman testified that the small steps were cautious movements. (Trial Transcript at R. p. 908, line 2-p. 911, line 14.) She then compared Karrie Gurwood's step length upon entering the hall, before the fall, and immediately after the fall, when Karrie Gurwood unquestionably knew the floor was slippery.

(Trial Transcript at R. p. 881, line 8-p. 887, line 21.) Dr. Hartman found the step length when Karrie Gurwood first entered the hall and after the fall to be the same. *Id.* Because the step lengths were the same before and after the fall, Dr. Hartman's opinion was that Karrie Gurwood appreciated the condition of the floor when she entered the hall, before falling. *Id.*

During *voir dire*, Dr. Hartman also testified that she endeavored to graphically depict the length of Karrie Gurwood's steps in the hall, which both she and Dr. Hejzlar agreed were small. *Id.* To do so, Dr. Hartman marked the location of Karrie Gurwood's steps onto a graph of the hallway floor and explained how the graph was created at her office. *Id.* She was cross-examined extensively during *voir dire* about the methodology of creating the graph but there was no testimony by Dr. Hejzlar or anyone else that the graphic depiction of the steps on the floor as graphed by Dr. Hartman was incorrect or in error. Further, Dr. Hartman testified that the graph was merely an illustration of Karrie Gurwood's steps that she, Dr. Hejzlar, and anyone else seeing the video could observe. She testified that her opinions were not based on the graph but instead were based upon what she observed in the video, which was the same basis of analysis used by Dr. Hejzlar. (*See* Trial Transcript at R. p. 624, lines 2-13.) The graph merely illustrated, more clearly, what was shown on the video.

Upon completion of the *voir dire* of Dr. Hartman, the trial court evaluated the admissibility of her testimony under Rule 702, *SCRE* and found that, having a Ph.D. in Human Factors Psychology, Dr. Hartman was clearly qualified to testify about the subject of human factors. The relevance of her testimony had been established by Dr. Hejzlar, who had previously interpreted the steps taken by Karrie Gurwood as reflected in the video. The final factor the trial court considered was whether Dr. Hartman's testimony was sufficiently reliable to assist the trier of fact. Based upon her testimony in the extensive *voir dire*, and before the jury, the trial court

found her testimony to be sufficiently reliable and allowed her to offer her opinions to the jury. The evidence from the *voir dire*, and at trial, overwhelmingly supports the trial court's ruling.

Further, any error with respect to the admission of Dr. Hartman's testimony has to be prejudicial to warrant reversal. Dr. Hartman's testimony was only relevant to the issue of Karrie Gurwood's comparative fault. Whether the jury relied on Dr. Hartman or not is unknown because other substantial evidence was introduced establishing that Karrie Gurwood was on notice of the waxed condition of the floor before she fell, which would have supported the jury's verdict of comparative fault.

As previously shown herein, GCA presented witnesses, Every and Jamme, who testified that Karrie Gurwood was told of the waxing that was being done over the weekend when she fell. There was also testimony that Every placed warnings prior to waxing, and that a black mat Karrie Gurwood knew to normally be in place at the door she entered was not in place the morning she entered and fell. (*See* Trial Transcript at R. p. 484, line 7-p. 485, line 7.) The jury also watched the video of Gurwood's fall, that Hejzlar and Hartman analyzed, dozens of times during the trial and the jurors were free to draw their own conclusions about what they saw as Karrie Gurwood entered the area, walked across the floor, fell and then left the area. In short, the Appellants cannot say that it is probable that the jury relied on the testimony of Dr. Hartman in finding Karrie Gurwood comparatively at fault; thus, the admission of Dr. Hartman's testimony cannot be said to have been prejudicial even if in error.

B. The trial court correctly excluded part of the testimony by Appellants expert, Dr. Zdeneck Hejzlar, based upon speculation and any error was not prejudicial to Appellants.

Appellants argue that the trial court abused its discretion with respect to the testimony of their scientific expert, Dr. Hejzlar. This is not correct, and any error was manifestly not prejudicial.

Dr. Hejzlar was presented as a scientific expert, to testify about GCA's negligence. As such the admissibility of his testimony falls within the *Council* requirements. *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). His testimony was required to be based on reliable methods and scientific process. *Id.* Prior to trial GCA moved to exclude his testimony because in his deposition Hejzlar had failed to cite to any applicable standard of care that had been breached by GCA. (Trial Transcript at R. p. 553, lines 1-22.)

Hejzlar was allowed to testify extensively at trial but because of GCA's motion, the trial court held an extensive *voir dire* of Dr. Hejzlar outside of the presence of the jury, which lasted an hour and fifteen minutes. (Trial Transcript at Pgs. 512-546.) During that *voir dire*, Dr. Hejzlar testified about the Safety Hierarchy he suggested applied to GCA's floor waxing process, which admittedly created a hazardous condition. The Safety Hierarchy requires, in order of priority, that hazards be eliminated, guarded against, or, if those cannot be done, that warnings of the hazardous conditions be arranged. (Trial Transcript at R. p. 609, line 22-p. 611, line 24.) Dr. Hejzlar then tried to testify about various ways GCA *could have* eliminated the hazardous condition. However, in *voir dire* GCA established that the things Hajzler testified GCA *could have done* were mere speculation, since Dr. Hejzlar's opinions about what GCA might or could have done to eliminate the risk of a waxed floor was not based upon or referenced any applicable standard of care for the janitorial industry. (Trial Transcript at R. p. 630, line 20-p. 637, line 7.) For example, Dr. Hejzlar's testified in *voir dire* that GCA could have used fans to more quickly

dry the waxed floor and eliminate the hazard. *Id.* However, Dr. Hejzlar admitted that fans were not required to be used by any applicable industry standard. *Id.*

After hearing the proffered testimony of Dr. Hejzlar on that specific objection, outside the presence of the jury, and listening to the arguments of counsel, the trial court allowed Hejzlar to testify about his extensive credentials, the Safety Hierarchy and many other aspects of the case. However, he excluded Dr. Hejzlar from speculating about what GCA *could or might have done* to eliminate the risk of a wet floor that was not set forth in an applicable industry standard of care. (Trial Testimony at R. p. 630, line 8-p. 637, line 10.) Hejzlar's testimony about what GCA could have done was properly excluded because it was speculative and did not apply any recognized standard of care. As such it would not have assisted the trier of fact. Rule 702, *SCRE*; and *see State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).

Further, even if the exclusion of that aspect of Dr. Hejzlar's testimony was in error, it was not prejudicial because the jury found the Respondents liable in negligence, thus Hejzler's excluded testimony was not necessary. *See Fetner v. Aetna Life Ins. Co.*, 199 S.C. 79, 18 S.E.2d 521, 523 (1942).

IV. The trial court properly allowed evidence of collateral sources to impeach Appellant where the Appellant opened the door to the evidence.

Appellants contend that it was error to allow Karrie Gurwood to be cross-examined on the issue of her insurance coverage in violation of the collateral source rule. *Covington v. George*, 359 S.C. 100, 103, 597 S.E.2d 142, 144 (2004) (citing *Citizens and S. Natl. Bank of South Carolina v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) ("that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer"). Despite this rule, "[O]ur courts have created a clear exception to the collateral source rule when the admission of such testimony is relevant to the

witness's credibility." *Stewart v. Flynn*, No. 2006-UP-240, 2006 WL 7285973, at *2 (Ct. App. May 15, 2006).

Here, counsel for GCA elicited testimony on cross-examination that at the time of trial, Karrie Gurwood had not sought the treatment recommended by her treating physician, Dr. Lubenow, in 2016. (Trial Transcript at R. p. 481, line 23-p. 483, line 2.) On re-direct, Appellants' counsel asked Karrie Gurwood why she had not sought treatment and she testified that she could not afford it. (Trial Transcript at R. p. 485, line 19-p. 487, line 16.) On re-cross, GCA counsel sought to establish that Mrs. Gurwood had Medicare coverage. After hearing extensive argument by Appellants' counsel and Respondents' counsel regarding whether the door had been opened, the trial court allowed defense counsel to cross-examine Karrie Gurwood regarding her medical insurance coverage to impeach her credibility. (Trial Transcript at R. p. 457, line 8-p. 481, line 19.)

The trial court was correct because the admission falls within the *Stewart* exception referenced above since the evidence was relevant to the witness's credibility. *See also, Bonaparte v. Floyd*, 291 S.C. 427, 443, 354 S.E.2d 40, 50 (Ct. App. 1987) (The court allowed cross-examination about the plaintiff's medical insurance for purposes of impeaching the witness and finding, "Where such evidence has relevance to the witness's credibility, it has been held admissible"). In short, Karrie Gurwood opened the door on the issue of her ability to afford the suggested treatment when it was first recommended, and it would have been unfair not to allow defense counsel an opportunity to impeach her credibility on that issue.

CONCLUSION

Based on the legal arguments contained herein, Respondents respectfully pray that this court affirm the trial court's Order and rulings at trial.

Respectfully submitted,

s/Robert T. Lyles, Jr.

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