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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2020-001089

Diane Connell, ……..Respondent,

v.

Lexington County Health Services District, Inc.
d/b/a Lexington Medical Center, ……..……Appellant.

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

On May 22, 2018, Diane Connell filed a civil action against the Lexington County Health Services District d/b/a Lexington Medical Center (LMC) in the Lexington County Court of Common Pleas. (R. pp. 25-30.) Respondent alleged a premises liability action against LMC relating to a trip and fall that occurred in one of LMC's parking garages. (*Id.*) LMC filed an Answer on June 22, 2018 denying liability and asserting affirmative defenses alleging, among other defenses, that LMC had no notice of a dangerous or defective condition and that Respondent's claim was subject to certain provisions of the South Carolina Tort Claims Act. (R. pp. 31-36.)

The case was brought to a bench trial before the Honorable Walton J. McLeod on March 2, 2020. (R. p. 1.) At the close of Plaintiff's case, LMC orally moved for directed verdict and presented a Memorandum of Law in support of its motion, which was denied by the trial court. (R. pp. 209; 235, lines 7-12.) At the close of LMC's case, the Motion for Directed Verdict was revived, and Respondent also moved for directed verdict on the issue of negligence, which was denied. (R. pp. 253, lines 14-21, 254, line 2; 256, lines 2-4.) The parties agreed to submit proposed orders in lieu of closing argument and Judge McLeod took the matter under advisement. (R. p. 256, lines 5-17.)

On July 10, 2020, Judge McLeod issued an Order and Entry of Judgment finding in favor of Respondent and awarding her damages in the amount of $225,000.00. (R. pp. 19-20.) On, August 10, 2020, LMC timely filed a Notice of Appeal and served copies of the same on counsel for Respondent. (R. p. 646.) An Amended Notice of Appeal correcting a deficiency was later filed on August 18, 2020 and served on counsel for Respondent. (R. p. 649.)

On July16, 2020, LMC filed a motion seeking leave of court to deposit funds with the court while the case was on appeal. (R. p. 639.) Respondent objected to LMC's motion and by Order dated July 31, 2020 Judge McLeod denied LMC's motion. (R. pp. 640-42; 643-45; 21-24.)

STATEMENT OF FACTS

This is a premises liability action involving a change in elevation in a parking garage at the Lexington Medical Center. The parking garage was designed and built by independent contractors hired by LMC and construction was completed in 2008. (R. p. 237, lines 5-12.) On September 26, 2017, the Respondent, Diane Connell, and her husband were walking to their vehicle after a doctor's appointment. (R. p. 2.) As Respondent walked into the garage, she proceeded from a sidewalk onto a concrete walkway. (*Id.*) Respondent continued walking into a lane of traffic when she stepped half on/half off a curb. (*Id.*) The lane of traffic onto which Respondent was walking was also of concrete, of a similar color to the concrete walkway. (*Id.*) The curb was painted yellow on the face or front, but not on the top. (*Id.*) From her vantage point, Respondent would not have been able to see the yellow paint on the face of the curb. (R. p. 6.)

Respondent fell to the ground, causing the patella of her left knee to fracture, in addition to other injuries. (R. p. 3.) Respondent alleged that had the top of the curb been painted yellow, the change in elevation would have been more visible and she would not have fallen. (R. p. 27.) Respondent alleged that LMC was negligent in failing to paint the top of the curb when it was constructed, or in failing to discover that the top of the curb was unpainted and failing to correct it. (R. pp. 27-30.)

ARGUMENT

I. TRAIL COURT ERRED IN DENYING LMC'S MOTION FOR DIRECTED VERDICT AND FOR FINDING IN FAVOR OF RESPONDENT

Standard of Review - Directed Verdict/Cases Tried by a Judge

In reviewing the denial of a directed verdict motion, the appellate court employs the same standard as the trial court, viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Welch v. Eptstein*, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418 (Ct. App. 2000). The reviewing court must reverse the trial court when there is no evidence to support the ruling below. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

On appeal from a case tried by a judge in an action at law, "the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); *Alexander's Land Co., L.L.C. v. M&M &K Corp.*, 390 S.C. 582, 892, 703 S.E.2d 207, 212 (2010). In other words, the judge's findings are treated in the same manner as a jury's findings in an action at law tried before a jury. *Townes Assocs.*, 266 S.C. at 86, 221 S.E.2d at 775; *see also Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 495, 719 S.E.2d 656, 658 (2011).

Argument

The trial court erroneously determined that LMC created a hazardous condition and had notice of a hazardous condition and failed to remedy it. A premises owner cannot be held liable when there is no evidence of a negligent act or omission in the creation of a hazardous condition or the failure to correct a hazardous condition of which the owner had actual or constructive notice.

In any negligence action, the plaintiff must show the defendant did not use the amount of care one ordinarily would have under the circumstances. *See Snow v. Columbia*, 305 S.C. 544,

555, 409 S.E.2d 797, 803 (Ct. App. 1991) (citing *South Carolina State Ports Authority v. Booz-Allen & Hamilton*, 289 S.C. 373, 346 S.E.2d 324 (1986); *Carter v. Columbia Gas & Railway Co.*, 19 S.C. 20 (1883)). The doctrine of *res ipsa loquitur* is not recognized in South Carolina, and as a result, negligence cannot be presumed from injury. *See Fletcher v. Med. Univ.*, 390 S.C. 458, 463, 702 S.E.2d 372, 374 (Ct. App. 2010). "[A plaintiff's] burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care." *Snow*, 305 S.C. at 555; 409 S.E.2d at 803.

The duty of care a landowner owes to a person upon its premises depends on the classification of the individual; she may be an invitee, licensee, adult trespasser, or child. *See Larimore v. Carolina Power & Light*, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000). An invitee is a person on the land of another that enters by express or implied invitation, connected with the owner's business, and there is a mutuality of benefit or a benefit to the owner. *See Sims v. Giles*, 343 S.C. 708, 716-17, 541 S.E.2d 857, 862 (Ct. App. 2001). At trial, the parties agreed that Respondent was an invitee. (Order and Entry of Judgment, pp. 8-9.)

"[T]he operator of a parking lot is not an insurer of the safety of those who use the lot," but instead must exercise "reasonable care . . . to keep the premises used by invitees in a reasonably safe condition." *Sims*, 343 S.C. at 715, 541 S.E.2d at 861; *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009). Specifically, for an invitee to prove negligence in a premises liability action, "the plaintiff must show either that the defendant or defendant's employees created the condition, or that the defendant had 'notice' of it" and failed to correct it. *See Cook v. Food Lion*, 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct. App. 1997) (citing *Anderson v. Racetrac Petroleum, Inc.*, 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988)).

The trial court's finding that LMC created the hazardous condition and had notice of the

hazardous condition and failed to remedy it was not supported by the evidence presented at trial, is in direct contravention of existing law, and must be reversed.

A. The Trial Court's Finding that LMC Created the Hazard is Not Supported by the Evidence Presented at Trial

In its Order finding for the Respondent, the trial court erroneously held that "LMC created this hazard by failing to paint the curbs when it built the garage in 2008." (R. p. 11.) However, the parking garage was built by an independent contractor, and as a governmental entity, LMC cannot be held liable for the acts and omissions of independent contractors. *See* S.C. Code §§ 15-78-30(c), 15-78-60(20); (R. p. 246, line 8–p. 247, line 17).

LMC is an incorporated health services district created in 1988 pursuant to section 44-7-2010 of the South Carolina Code and is entitled to the protections and limitations contained within the South Carolina Tort Claims Act. *See Lexington County Health Services District v. S.C. Dep't of Revenue*, 384 S.C. 647, 649, 682 S.E.2d 508 (Ct. App. 2009); S.C. Code § 15-78-30(j); *Smith v. Reg'l Med. Ctr.*, 394 S.C. 110, 114-16, 713 S.E.2d 656, 658-59 (Ct. App. 2010).

"A governmental entity is liable for its torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained [within the Tort Claims Act]." S.C. Code § 15-78-40. The Tort Claims Act specifically states that a "governmental entity is not liable for a loss resulting from . . . an act or omission of a person other than an employee" and independent contractors are specifically excluded from the Tort Claims Act's definition of "employee". S.C. Code §§ 15-78-30(c) ("employee . . . does not include an independent contractor"); 15-78-60(20). Additionally, "[t]he provisions of [the Tort Claims Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." S.C.

Code § 15-78-20(f).

This Court has previously held that a governmental hospital cannot be held liable for torts committed by an independent contractor. *See Smith*, 394 S.C. at 114-16, 713 S.E.2d at 658-59. In *Smith*, the doctrine of nondelegable duty was specifically rejected and found to be inapplicable to a governmental hospital, even when the hospital in question hired physicians as independent contractors to treat patients. *See id.* at 114, 713 S.E.2d at 659.

At trial, it was established that LMC hired a licensed architect and a licensed contractor to build the parking garage. (R. p. 246, line 18–p. 247, line 17.) There was no testimony or other evidence presented at trial that would indicate LMC had any input on the design of the parking garage or had any involvement in its construction. LMC argued at trial that it could not be held liable for the creation of the alleged hazard because it was created by an independent contractor, not an employee. (R. pp. 592-93.) Nevertheless, the trial court determined, without citing to any evidence or authority, that LMC itself created the alleged hazard. (R. p. 11.)

Consequently, the trial court's finding that LMC created the alleged hazardous condition that contributed to Respondent's fall was completely unsupported by the evidence presented at trial and is in direct contravention of existing law. As a result, the trial court's Order and Entry of Judgment must be reversed.

B. The Trial Court's Finding that LMC Could be Held Liable Simply for the Creation of an Alleged Hazard is Erroneous

Even if LMC had created the alleged hazardous condition, the trial court's Order and Entry of Judgment must still be reversed because the creation of a hazardous condition, by itself, is insufficient to establish liability without evidence of negligence. *See Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009).

When it is shown that a defendant created a dangerous condition, a plaintiff must also

present evidence that the defendant created the condition through some negligent act or omission. *See id.* ("The showing that a defendant created a condition that led to a plaintiff's injury is not, however, sufficient to survive a summary judgment motion unless there is evidence that in creating the condition, the defendant acted negligently."). The party alleging negligence has the burden of proving actionable negligence and "[t]his burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." *King v. J.C. Penny Company*, 238 S.C. 336, 120 S.E.2d 229, 230 (1961); *see also Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262, 265 (1957) (noting "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of *res ipsa loquitur* does not apply in this State.").

Therefore, even if LMC could be held liable for the acts or omissions of an independent contractor, Respondent failed to present any evidence of actionable negligence in the construction of the curb. Had the contractor violated a standard of care by violating an ordinance, building code, or industry standard, Respondent may have been able to show evidence of actionable negligence. However, at trial, Respondent admitted that there was no ordinance, building code, or industry standard that required the curb to be painted on the top. There was no evidence presented at trial that the alleged defect was created through any negligent act or omission. Instead, the Respondent, and the trial court, simply determined that the curb speaks for itself and assigned liability, in clear violation of this State's rejection of the doctrine of *res ipsa loquitur*.

Consequently, even if LMC had constructed the curb where Respondent fell, the trial court's finding that LMC could be liable simply for the creation a hazardous condition that contributed to Respondent's fall is contrary to existing law and must be reversed.

C. The Trial Court's Finding that LMC had Notice of a Hazardous Condition is Not Supported by the Evidence Presented at Trial

In its Order finding for the Respondent, the trial court erroneously held that "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." (R. p. 15.)

If a plaintiff cannot show that a premises owner created the alleged hazard, she may prove her case by showing that the premises owner had actual or constructive knowledge of the dangerous condition and failed to remedy it. *See Anderson*, 296 S.C. at 205, 371 S.E.2d at 531 (internal citations omitted). "Actual notice means all the facts are disclosed and there is nothing left to investigate" and "is synonymous with knowledge." *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 63 n. 6, 504 S.E.2d 117, 122 n. 6 (1998).

> Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other undisclosed facts. Therefore this person is presumed to have actual knowledge of the disclosed facts.

Id. To show constructive notice, Plaintiff must present actual evidence indicating that Defendant was on "inquiry", meaning that Plaintiff must show evidence that something alerted or should have alerted Defendant that there might be an issue with that particular area, requiring further investigation.

In premises liability cases involving foreign substances, a plaintiff can show constructive notice by presenting evidence that the foreign substance that contributed to the accident "had been on the floor sufficiently long that the defendant should have discovered it." *Wimberly v. Winn-Dixie Greenville*, 252 S.C. 117, 121, 165 S.E.2d 627, 629 (1969); *see also Cook*, 328 S.C. at 327, 491 S.E.2d at 691. However, that method for proving constructive notice is applicable only to cases involving foreign substances and it is error for a trial court to apply that standard to cases

not involving foreign substances. *See Cook v. Food Lion*, 328 S.C. 324, 327, 491 S.E.2d 690, 691 (Ct. App. 1997) ("She argues that the present case is factually distinguishable from a classic slip-and-fall case, and thus the trial judge's reliance on 'foreign substance' cases is misplaced. We agree."). As a result, a plaintiff in a premises liability action that does not involve a foreign substance cannot rely on the length of time the alleged defect existed to show constructive notice and must show actual evidence that Defendant was on actual notice or was put on inquiry and failed to correct or warn of the hazardous condition.

At trial, Respondent presented no evidence indicating that LMC was on actual or constructive noticed of the alleged defect. Instead, Respondent relied on case law from foreign substance premises liability cases and argued that because the curb had existed in much the same condition for several years, constructive notice could be imputed because the alleged hazard was there long enough that LMC should have discovered it. (R. p. 15.) In response, LMC argued that foreign substance cases are not applicable to this case because there was no foreign substance involved here, and as a result, the time the hazard existed cannot be used to impute constructive notice. (R. p. 14.) The trial court sided with Respondent and found that the length of time the curb had existed could be used to show that LMC should have discovered the alleged defect. (R. p. 15.)

The trail court pointed to *Bruno v. Pendleton Realty* and *LeFont v. City of Myrtle Beach* and described them as "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." (R. p. 14.) The trial court then concluded that "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." (R. p. 15.) However, *Bruno* and *LeFont* are factually

distinguishable and the trial court's application of and reliance on those cases was erroneous.

The trail court first cited to *Bruno v. Pendleton Realty*, 240 S.C. 46, 124 S.E.2d 580 (1962), and stated that in that case "the walkway and the sidewalk were the same color, 'giving the impression that it was one continuous walk.'" (R. p. 10). However, while *Bruno* did involve a change in elevation between two similarly colored concrete surfaces, the issue there was that the premises owner had allowed grass to grow in a crack between the two surfaces, and it was the grass that concealed the change in elevation. *See* 240 S.C. at 52, 124 S.E.2d at 583. There was no discussion by the Court as to whether the similar appearance of the two surfaces contributed to the accident. *Id.* at 52-53; 124 S.E.2d at 583. *Bruno* is, in fact, a foreign substance case and is inapplicable here.

The trail court then cited to *LeFont v. City of Myrtle Beach*, 430 S.C. 534, 846 S.E.2d 355 (S.C. Ct. App. 2020), and described it as a case where an invitee tripped on a pothole in defendant's parking lot and the Court of Appeals reversed a directed verdict because there was evidence of constructive notice in the form of "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." (R. pp. 14-15.) However, this Court's holding in *LeFont* is more detailed than the trial court describes, and the specific holding there can be distinguished.

In *LeFont*, the plaintiff presented actual evidence that the city was on notice that potholes were hazardous and should be repaired, and also presented evidence that the city had endeavored to find and repair potholes but had failed to do so. *See* 430 S.C. at 545, 846 S.E.2d at 360. The plaintiff there presented an expert witness who testified that the property owner had breached a standard of care. The expert in *LeFont* established that the property owner had a maintenance code that required their parking lot to be maintained free from hazardous conditions and had specific

procedures in place for fixing potholes. *See id.* Because the defendant in *LeFont* had argued that there was no evidence that the pothole existed at any time prior to the date of LeFont's injury, the plaintiff presented testimony that the pothole had contained dirt and debris, evidence from which the jury could infer the hole had existed long enough for the city's employees to discover it. *See id.* While the *LeFont* court did note that there was evidence from which a finder of fact could determine that the pothole had existed long enough for the defendant to discover and repair it, this Court discussed that only after establishing that the defendant knew of the hazards associated with potholes, had endeavored to find and repair potholes, and had failed to do so in that instance.

Here, Respondent failed to present any evidence in line with the evidence presented by the plaintiff in *LeFont*. Respondent did not offer any expert testimony that would have established the painting of the tops of curbs as a standard of care. Respondent did not present evidence of any statute, regulation, code, ordinance, industry standard, or best practice that would have put LMC on constructive notice that the curbs in its parking garage should have paint on the top surface. Respondent did not present any evidence of any fact known to LMC, prior to Respondent's fall, that was sufficient to put LMC on inquiry. *See Strother*, 332, S.C. at 63 n. 6, 504 S.E.2d at 122, n. 6.

Additionally, the trail court's comparison of potholes to a curb is erroneous. A pothole is not like a curb. A pothole is a broken section of pavement, is an open and obvious defect, and is not supposed to be there. The curb at issue here was not broken or in a state of disrepair. The defect alleged by Respondent was a latent defect. *See Meadows v. Heritage Vill. Church & Missionary Fellowship*, 305 S.C. 375, 378, 409 S.E.2d 349 (1991) ("[A latent defect] is one which a reasonably careful inspection will not reveal.") Respondent failed to present any evidence to prove that prior to Respondent's fall, LMC should have known that when viewed from a certain

angle, the change in elevation presented by the curb was not as readily visible to pedestrians as it would have been had the top of the curb been painted. This Court's holding in *LeFont* is not applicable here and the trail court's reliance upon it was misplaced.

The trial court held, without citation to any authority, that the "[p]ainting 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." (R. p. 14.) The trail court treats the curb as obvious to LMC yet camouflaged to Respondent. (R. p. 12 ("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.") Essentially, the trail court found that the curb speaks for itself, in violation of our Supreme Court's repeated refusal to adopt the doctrine of *res ipsa loquitur*. *See King*, 120 S.E.2d at 230; *Hunter*, 101 S.E.2d at 265; *Fletcher*, 390 S.C. at 463, 702 S.E.2d at 374. Our case law requires that there be some evidence of a bad act and without such evidence, dismissal is appropriate. *See Snow*, 305 S.C. at 555, 409 S.E.2d at 803 ("we conclude the Snows have not shown, to the exclusion of all other reasonable inferences, that the City ought to have known about and repaired the leaking pipe joint before Mr. Snow reported a problem Moreover, there is no evidence of any neglect of the City to perform a reasonable program of maintenance on its water mains. The Snows also failed to establish why the flange joint leaked. For these reasons, we cannot hold the City was negligent as a matter of law."); *Fletcher*, 390 S.C. at 463, 702 S.E.2d at 374 ("Simply no evidence establishes how Dr. Brothers or Dr. Rios deviated from the standard of care.").

Consequently, the trial court's Order and Entry of Judgment, finding in favor of the Respondent on her premises liability claim, is not supported by the evidence presented at trial, is

in direct conflict with existing precedent, and must be reversed.

II. THE TRAIL COURT ERRED IN DENYING LMC'S MOTION TO LIMIT THE TESTIOMNY OF RESPONDENT'S EXPERT WITNESS

Standard of Review – Qualification of Expert Witnesses/Admission of Evidence

The qualification of a witness as an expert in a particular field is a matter within the sound discretion of the trial court, and the appellate court will not reverse the trial court's decision absent an abuse of discretion. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *see also Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)).

The admission of evidence is a matter left to the discretion of the trial judge and, absent a clear abuse of discretion, will not be disturbed on appeal. *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 407 S.E.2d 630 (1991); *see also Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005); *Jamison v. Ford Motor Co.*, 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007). For the appellate court to reverse a case based on the admission or exclusion of evidence, a party must demonstrate both error and prejudice. *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970); *see also Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005) ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence.")

Argument

The trial court erroneously admitted the testimony of an expert witness in excess of the confines of her profession. While there is no South Carolina precedent that specifically addresses the scope of admissible testimony of a life care planner, a survey of other jurisdictions reveals that to be admitted as an expert to present a life care plan, one must be generally qualified in the area of life care planning, and must also be qualified to substantiate the need for each element of care included in the plan.

The U.S. District Court for the District of South Carolina routinely excludes portions of a life care plan that are not supported by the testimony of the treating physician. *See, e.g., Holt v. Brown*, 185 F.Supp.3d 727, 739 (D.S.C. 2016) ("The Court does not, however, adopt the plan's overall cost projections because they are based on unsupported assumptions that Travis will need certain treatments for the rest of his life."); *Juaire v. U.S.*, CA No. 4:09-cv-709-TLW, 2012 WL 527598, at *37-38 (D.S.C. Feb. 16, 2012) ("Additionally, as no physician has ordered any further physical therapy, the Court finds the one time amount for physical therapy listed in the life care plan . . . is an amount not appropriately awarded."). In Connecticut, the testimony of a certified life care planner was admissible even though he was not a medical doctor because he reviewed his report with medical doctors and sought the approval of the patient's health care providers. *See Oram v. deCholnoky*, No. X05CV0540055135, 2008 WL 4984752 (Conn. Super. Nov. 3, 2008). The Indiana Court of Appeals held that a certified nurse could testify to what rehabilitation expert told her when she prepared the life care plan in question because as a life care planner, it is expected to rely on experts in preparing their plans. *See Dan Cristiani Excavating Co., Inc. v. Money*, 941 N.E.2d 1072 (Ind. Ct. App. 2011). In New York, a vocational rehabilitation specialist retained to prepare a life care plan was not permitted to testify as to the costs of future medical procedures

when the treating physician testified only as to existing medical expenses and not to the future medical needs proffered by the life care planner. *See Donaldson v. Ryder Truck Rental & Leasing*, 737 N.Y.S.2d 783 (Sup. Ct. N.Y. 2001). In Missouri, an expert witness who was a doctor, board certified in physical medicine and rehabilitation, sub-board certified in spinal cord injury medicine, was a wound care specialist, and certified by disability evaluation commission as a life care planner was qualified to testify that the life care plan in question was based upon a reasonable degree of medical certainty. *See Mitchem v. Gabbert*, 31 S.W.3d 538 (Mo. App. 2000).

In other words, a life care planner can testify as to the projected costs of future medical care when properly qualified experts opine that such services are necessary. When the life care planner lacks the qualifications to testify whether a particular service is necessary, he or she must rely on the testimony of other properly qualified experts. This is in line with the plain meaning of our Rules 702 and 703, SCRE.

Here, LMC moved to limit Ms. Moore's testimony because, as a Physician's Assistant, she is unqualified to determine whether Respondent would require future surgeries in the inpatient setting. (R. p. 110, lines 2-6.) Ms. Moore had testified as to the projected costs for future surgeries the treating physician had testified would be extremely likely. (R. p. 122, lines 6-19, p. 126, lines 7-11.) However, when Ms. Moore amended an earlier report to more accurately reflect the options available to Respondent, she changed the setting of a future knee replacement from the outpatient setting, with a projected facility fee of $7,338 to $13,352 to the inpatient setting at a projected facility fee of $124,373. (R. p. 129, lines 16-24, pp. 547-53.) Respondent's treating physician did not testify that Respondent would require inpatient surgery and has recently performed a procedure on Respondent in the outpatient setting. (R. p. 571, p. 582.) Respondent's treating physician even reviewed Ms. Moore's first report, which projected only outpatient procedures, and he testified

that the listed procedures were reasonable and are typically associated with the procedures he recommended. (R. p. 391, lines 3-16.)

Ms. Moore testified that Respondent has multiple comorbid conditions that place her at a higher risk and, as a result, her future knee replacement must be conducted inpatient. (R. p. 129, line 16–p. 130, line 2.) However, Ms. Moore is not permitted to make this decision because Physicians Assistants are not permitted to admit patients to hospitals in South Carolina. (R. p. 110, lines 2-6.) The decision as to whether Plaintiff should be admitted as inpatient for an anticipated future surgery is outside the scope of Ms. Moore's profession and licensure. As a result, Ms. Moore cannot testify that Plaintiff would need to be admitted to a hospital for inpatient treatment without a qualified expert opining such would be necessary. Had Respondent's treating physician testified that Plaintiff would require inpatient surgery for the knee replacement, Ms. Moore could then testify as to the projected cost of the inpatient surgery.

The trial court denied LMC's Motion to Limit the Testimony of Ms. Moore, finding that although Ms. Moore cannot admit patients, she "properly based her opinion on her clinical experience." (R. p. 18.) However, because South Carolina law forbids Ms. Moore from deciding whether any patient should be admitted inpatient, and there was no other evidence in the record indicating that Respondent would require inpatient surgery, the trial court's ruling was based upon an error of law and factual findings that were without evidentiary support, resulting in an abuse of discretion that prejudiced LMC insofar as Respondent's damages award increased by more than $100,000. Consequently, the trial court's ruling on LMC's Motion to Limit the Testimony of Ms. Moore must be reversed, and any damages award must be reduced accordingly.

III. THE TRIAL COURT ERRED IN DENYING LMC'S MOTION FOR LEAVE TO DEPOSIT

Standard of Review - Deposit Money with Court

"The granting of leave to deposit money with the court pursuant to Rule 67, SCRCP, is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion." *S.C. Dep't of Transp. v. First Columbia Corp. of S.C.*, 369 S.C. 150, 153, 631 S.E.2d 533, 535 (2006).

Argument

The trial court erred in denying LMC's Motion for Leave to Deposit.

Rule 67, SCRCP, requires only two things: (1) notice to all parties and (2) leave of court. Motions for Leave to Deposit are routinely granted and it is an abuse of discretion to refuse to allow the funds to be deposited when the moving party complies with the terms of Rule 67. *See, e.g., Small v. Pioneer Mach., Inc.*, 330 S.C. 62, 64, 496 S.E.2d 884 (Ct. App. 1998).

The rationale behind the awarding of post judgment interest is to disincentivize defendants from drawing out proceedings to benefit from interest earned on funds while an appeal is pending. By depositing the judgment amount with the Court, LMC would not get the benefit of collecting interest on the judgment amount during the pendency of this appeal. While there does not appear to be any precedent in this jurisdiction that specifically addresses this issue, Federal Courts, applying a nearly identical Federal Rule, deny additional interest to a prevailing party when the funds were deposited with the court because the non-prevailing party did not receive any interest or other benefit. *See, e.g., Reliable Marine Boiler Repair, Inc. v. Mastan Co.*, 325 F. Supp. 58 (S.D.N.Y. 1971).

Admittedly, the trial court's Order and Entry of Judgment contemplates the accrual of interest to the judgment amount sufficient to satisfy the projected future costs of Respondent's

future medical needs, as calculated by Dr. Alford. (R. p. 5.) At first glance, it would appear that allowing LMC to deposit funds with the court would deprive Respondent of the interest to which she is entitled. To that end, LMC requested that the funds be placed in an interest-bearing account in line with Dr. Alford's calculations. (R. pp. 644-45.) While Rule 67, SCRCP, does not specify that the funds are to be deposited in an interest-bearing account, there are references in the applicable case law indicating that this practice is common. *See, e.g., Duval b. Heritage Life Ins. Co.*, 339 S.C. 616, 618-19, 529 S.E.2d 566, 568 (Ct. App. 2000) (funds deposited into an interest-bearing Merrill Lynch account).

The trail court appears to have ignored LMC's request that the funds be placed in an interest-bearing account and denied the motion, stating that "denying the accrual of post-judgment interest by depositing the funds with the Court would be inappropriate under the circumstances of this specific case." (R. p. 23.) At no point did LMC ever suggest that Respondent, if successful in this appeal, be denied interest on the judgment amount. The result of the trial court's denial of LMC's Motion for Leave to Deposit is to subject LMC to an award of post judgment interest at the statutorily mandated interest rate, which may exceed the interest Defendant is actually able to earn on the judgment amount during the pendency of this appeal. *See* S.C. Code § 34-21-20(B). It was an abuse of discretion for the trial court to deny LMC's Motion based on inaccurate factual assumptions, resulting in prejudice to LMC in the form of additional post-judgment interest on any judgment to which Respondent may be entitled. Consequently, the trial court's Order Denying Leave to Deposit must be reversed.

CONCLUSION

For the reasons argued above and established in the record, and for such other and further grounds as the Court may find appropriate, the Circuit Court's Order and Entry of Judgment and Order Denying Leave to Deposit, must be reversed.

Respectfully submitted,

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