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 REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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I. THE TRIAL COURT'S ORDER AND ENTRY OF JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE IN THE RECORD AND MUST BE REVERSED

As previously argued by LMC in its opening Brief, the trial court's Order and Entry of Judgment is not supported by the evidence in the record and instead improperly relies on the doctrine of *res ipsa loquitur* to reach its conclusion. Respondent, in her Brief, as failed to point to any evidence that actually supports the trial court's conclusion. As a result, the trial court's Order and Entry of Judgment must be reversed.

A. LMC Properly Preserved the Argument that it Cannot Be Held Liable for the Creation of the Allegedly Hazardous Condition

Respondent, without identifying the elements to be applied when analyzing whether a party has properly preserved an issue for appellate review, erroneously claims that LMC has failed to preserve its argument that it cannot be held liable for the creation of an alleged hazardous condition for this Court to review. LMC fairly raised the issue of whether it can be held liable for the creation of the allegedly hazardous curb before the trial court, and the trail court ruled upon that issue, preserving LMC's argument for appellate review. *See State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010).

In order to preserve an issue for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007). A party need not use the exact name of a legal doctrine in order to preserve the issue for appellate review. *See Brannon*, 388 S.C. at 502, 697 S.E.2d at 595-96). A litigant is required only to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue. *Id.* Parties are required to file a post-trial

motion to alter or amend only when the issue is raised, but the court fails to rule upon it. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422 526 S.E.2d 716, 724 (2000). "So long as the judge had an opportunity to rule on an issue, and did so, it is 'not incumbant upon . . . counsel to harass the judge by parading the issue before him again.'" *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (quoting *Dunn v. Coca-Cola Bottling Co.*, 331 S.C. 43, 426 S.E.2d 756 (1993)). Even if an issue is raised without specificity, when it is clear from the record that both the parties and the trial court immediately understood the issue being raised, the issue is preserved. *State v. Hendricks*, 408 S.C. 525, 531, 759 S.E.2d 434 (2014).

Here, LMC argued at trail, in response to Respondent's assertion that LMC created the hazard, that LMC in fact did not create the hazard. (R. p. 47, lines 11-15, p. 211, lines 13-16.) At closing, when LMC's Motion for Directed Verdict was renewed and the trial judge requested proposed orders and additional information, LMC argued that it did not create the hazard, that it was created by an independent contractor, and that LMC pursuant to the South Carolina Tort Claims Act cannot be held liable for the acts or omissions of an independent contractor. (R. p. 253, lines 12-21, p. 256, lines 5-24, pp. 592-93.) In its proposed order, LMC timely addressed the issue with sufficient specificity.[1] The trial court, in its Order and Entry of Judgment, plainly ruled on the issue and overruled LMC's arguments when it found that "LMC created this hazard." (R. p. 14.) Consequently, LMC adequately preserved the issue of whether LMC had created the alleged hazardous condition.

[1] To the extent Respondent now argues that Appellant's arguments in its proposed order were untimely or otherwise improper, Respondent did not object to Appellant's proposed order when it was submitted and, as a result, her objection here is untimely, and she has failed to preserve any objection she may have had for appellate review. *See Moore v. Florence Sch. Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994); *Ligon v. Norris*, 371 S.C. 625, 633 n. 1, 640 S.E.2d 467 (Ct. App. 2006).

To the extent Respondent argues that LMC did not raise the issue of whether the creation of a hazard, by itself, is sufficient to prove a premises liability claim, she has taken an overly narrow interpretation of our issue preservation rules. While LMC may not have cited the exact cases it now relies upon on this specific issue, LMC has consistently argued that there was no evidence of negligence and that the LMC could therefore not be held liable. (R. p. 589, p. 593.) LMC fairly raised the issue of the lack of evidence of any negligent act or omission on the part of LMC. The fact that a specific line of cases may not have been cited is irrelevant.

Finally, courts may not allow litigants to use issue preservation rules to prevail when it would result in a violation of the law. *See Ward v. W. Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010). It is the law in the State of South Carolina that a defendant cannot be found liable simply for the creation of a hazardous condition without a showing of negligence. *See Pringle v. SLR, Inc.*, 382 S.C. 397, 403-04, 675 S.E.2d 783, 786 ("the Pringles argue the court should have considered the principle that, in a premises liability case, if the defendant created the allegedly dangerous condition, it is not necessary for the plaintiff to show the defendant had prior actual or constructive notice of the dangerous condition. We disagree.") It is also the law that a governmental entity cannot be held liable for the acts or omissions of an independent contractor. *See* S.C. Code Ann. § 15-78-60(20). As a result, Respondent cannot use issue preservation rules as a basis for upholding the trial court's findings.

Consequently, and for the reasons stated herein, LMC has properly preserved all issues it has raised before this Court.

B. Respondent has Failed to Identify any Evidence to Support the Trial Court's Findings

In her Brief, Respondent sets forth several examples of what she argues is evidence to support the trial court's conclusion that LMC was negligent and therefore liable to Respondent for her injuries. As explained herein, Respondent's arguments are unavailing.

Respondent argues that LMC representatives' testimony established that LMC created and/or had notice of the hazardous unpainted curb that caused Respondent's fall. (Respondent's Brief, p. 15.) This is false. All testimony indicated that LMC hired licensed contractors to design and build the parking garage. (*See, e.g.*, R. p. 237, lines 8-12, p. 246, lines 18-23.) Additionally, there is no evidence in the record indicating that LMC was in any way negligent in the construction of the curb. Respondent failed to present any authority to establish that LMC, as a governmental entity entitled to the limitations on liability contained within the South Carolina Tort Claims Act, can be held liable for the acts or omissions of an independent contractor. Respondent's failure is a tacit admission that LMC's argument is correct.

With respect to notice, the testimony to which Respondent cites contains nothing more than post hoc discussion of the incident location. Respondent's counsel directed the LMC representatives' attention to photographs of the incident location and the representatives, with the benefit of hindsight, testified that the curb could have presented a trip hazard. (R. p. 252, line 25–p. 253, line 1 ("Q. "You agree that this can create a trip hazard? A. Yes. Based on that picture, I agree with you.").) LMC's representative also testified, in very general terms, that similarly colored concrete surfaces can blend together, causing a camouflaging effect. (R. p. 244, line 20–p. 245, line 11.) LMC's representative then testified, with the benefit of hindsight, and with his attention drawn to photographs of the incident location, that it would be reasonable and prudent to paint all curbs on the top. (R. p. 250, line 22–p. 251, line 1.)

The testimony of LMC's representatives does not establish that LMC had notice of the alleged hazardous condition prior to Respondent's fall. *Cf. Cook v. Food Lion*, 328 S.C. 324, 329, 326, 491 S.E.2d 690, 691-92 (Ct. App. 1997) (referencing evidence of the floor mat's tendency to wrinkle, and Food Lion's knowledge of this tendency, on occasions prior to Cook's accident). Respondent failed to inquire as to LMC's representatives' knowledge prior to the incident. Consequently, the testimony of LMC's representatives does not constitute evidence indicating that LMC was on notice of a hazardous condition prior to Respondent's fall.

LMC's Representative testified that he was unaware of any building code that requires the tops of curbs to be painted yellow. (R. p. 242, lines 4-7.) As to the inclusion of yellow paint, the representative did testify that it was his guess that there is code requirement. (R. p. 92, lines 20-23 (Q: Why does this parking garage even have yellow paint in it? A: My guess is that it's going to be a code requirement.").) The representative's testimony does not establish the existence of any code or any other requirement regarding the painting of the tops of curbs. Respondent's failure to present any such code is a tacit admission that no such code exists.

To the extent Respondent argues that LMC should have discovered the alleged hazard during its inspections, Respondent failed to elicit any testimony or submit any evidence that LMC's inspections were negligent. (Respondent's Brief, p. 16.) LMC's representative testified that LMC inspects areas that they have been made aware of that are issues and conducts monthly inspections wherein they look for "spots that have broken concrete, sidewalks where they've heaved and they're uneven; we look for standing water in different areas, and those types of things." (R. p. 240, line 20–p. 241, line 22.) Respondent presented no evidence to show that LMC's inspections were negligent. Respondent could have presented testimony regarding an industry standard for inspections but did not. The mere fact that an alleged hazard escaped LMC's

inspections is not evidence of negligence. Additionally, as previously argued, the hazard alleged by Respondent is a latent defect. (Appellant's Brief, pp. 12-13.) Respondent has failed to explain how LMC should have seen the hazard when it is, by its very nature, camouflaged.

To the extent Respondent maintains her argument that she can prove negligence here simply by relying on the length of time an alleged hazard has existed on LMC's property, this Court has unequivocally and consistently held that foreign substance slip-and-fall cases are inapplicable 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); *Force v. Richland Mem. Hosp.*, 322 S.C. 283, 285, 471 S.E.2d 714, 715 (Ct. App. 1996) ("Slip-and-fall cases are distinguishable from the present case. In those cases, the floor is generally considered safe, absent a foreign substance which renders it unsafe."). Appellant has previously distinguished the case law upon which Respondent relies to support her argument that foreign substance jurisprudence can be applied here to show constructive notice by the length of time that the curbing had existed on LMC's property and will not endeavor to match the spurious counterarguments set forth by Respondent in her Response Brief. Instead, Appellant will simply point out that in each of the cases relied upon by Respondent, the length of time the defect existed was not the court's sole consideration. *See Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 53-54, 124 S.E.2d 580, 583-84 (1962); *LeFont v. City of Myrtle Beach*, 430 S.C. 534, 545, 846 S.E.2d 355, 360 (Ct. App. 2020). The plaintiffs in each of those cases presented actual evidence showing that the property owner was negligent. In *Bruno*, it was established that the property owner had negligently allowed a foreign substance, grass, to grow to the extent it concealed a change in elevation. *See* 240 S.C. at 53-54, 124 S.E.2d at 583-84. In *LeFont*, it was established that the property owner was on notice of the hazard presented by potholes when it adopted a maintenance code that specifically addressed the locating and repair of potholes and was

negligent in failing to discover and repair the pothole on which Ms. LeFont tripped and fell. 430 S.C. at 545, 846 S.E.2d at 360. Here, Respondent provided no such similar evidence. Instead, Respondent and the trial court simply assume that LMC should have known. Unfortunately for Respondent, assumptions do not equal evidence.

Respondent's arguments that because some other curbs had paint on the top surface is somehow indicative of negligence on the part of LMC is equally unavailing. (Respondent's Brief, p. 17.) Again, LMC did not construct the garage. So it is not the case that LMC endeavored to paint some curbs but not others. Additionally, there is no indication that LMC was ever made aware that some curbs were painted on the top and others were not. There is no evidence that LMC's attention was ever directed to this omission. Respondents are again relying solely on the fact that the alleged defect existed to show negligence on the part of LMC.

Respondent, and the trial court, rely on the very nature of the unpainted curb and the fact that it was present on LMC's property to assume negligence on the part of LMC. Respondent is, despite her assertions to the contrary, attempting to hold LMC liable under a theory of *res ipsa loquitur* by arguing that the only way the curb could have remained in its unpainted condition was through LMC's negligence. "*Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence." *Watson v. Ford Motor Co.*, 389 S.C. 434, 453 n. 7, 699 S.E.2d 169, 179 n. 7 (2010). More specifically, it is:

> [t]he doctrine whereby when something that has caused injury or damage is shown to be under the management of the party charged with negligence, and the accident is such that in the ordinary course of things it would not happen if those who have the management use proper care, the very occurrence of the accident affords reasonable evidence, in the absence of the explanation by the parties charged, that it arose from the want of proper care.

Black's Law Dictionary (11th ed. 2019). With the consistent rejection of *res ipsa* in this state, Respondent is required to show actual evidence of negligence. *See, e.g., King v. J.C. Penny Company,* 238 S.C. 336, 120 S.E.2d 229, 230 (1961); *Hunter v. Dixie Home Stores,* 232 S.C. 139, 101 S.E.2d 262, 265 (1957).

The trial court's order, finding LMC negligent in the creation of an alleged hazard or in being on notice of an alleged hazardous condition, is not supported by the evidence in the record. The trial court assumed that LMC was negligent, based on the nature of the unpainted curb, without any evidence of any negligent act or omission on the part of LMC. In her Brief, Respondent has failed to point to any evidence that would support the trial court's findings.

Consequently, the trial court's Order and Entry of Judgment, finding in favor of Respondent and awarding her damages, is not supported by the evidence in the record and must be reversed.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EXPERT WITNESS TESTIMONY OF LINDSAY MOORE

The trial court abused its discretion in admitting the testimony of Ms. Moore stating that Respondent requires a future inpatient surgery and incorporating those estimated damages in its award.

A. LMC Properly Preserved All Arguments Relating to the Admissibility of Ms. Moore's Testimony

Respondent's argument that LMC failed to preserve the argument that the damages award should be reduced by the amount Ms. Moore assigned for an inpatient surgery lacks merit. LMC has already set forth the applicable case law regard the preservation of issues for appellate review and incorporates the same herein as if repeated verbatim.

LMC objected to the admission of Ms. Moore's testimony that Respondent would require inpatient surgery. (R. p. 110, line 21–p. 112, line 11, p. 113, line 21–p. 115, line 14.) At the close of the evidence, LMC again addressed Ms. Moore's testimony and the trial court allowed the parties to submit more information. (R. p. 259-60.) LMC submitted a proposed order to the trial court specifically requesting the amount of damages estimated for an inpatient surgery be removed from any damages calculation. (R. p. 615-19.) Again, Respondent failed to object to LMC's proposed order. As a result, Respondent has failed to preserve her arguments for appellate review.

Consequently, LMC's arguments regarding to the reduction in damages were adequately preserved for appellate review.

B. Ms. Moore's Testimony Relating to a Future Inpatient Surgery and the Associated Costs were Erroneously Admitted

LMC's objections to Ms. Moore's testimony were not about the "defects in the amount and quality of [her] education or experience" but were instead about the fact that she is prohibited by law from making the decision she tries to make here. *State v White*, 372 S.C. 364, 375, 642 S.E.2d 607, 612 (Ct. App. 2007). As a result, LMC's objections were to the admissibility of her testimony, not the weight. *See id.* Respondent has failed to identify any authority that would allow a licensed professional to testify as an expert witness in excess of her licensure. The single case to which Respondent cites, *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 487 S.E.2d 596 (1997), is factually distinguishable from this case. In *Gooding*, the Supreme Court determined that the EMT, who "had intubated over one hundred patients, and instruct[ed] and test[ed] physicians on intubation and extubation procedures" should have been qualified to testify as an expert, finding that the EMT had the necessary training and experience to testify as an expert in the limited area of intubation. *Id.* at 251, 253-54, 487 S.E.2d at 597-98. Apparently, intubation is within the licensure of an EMT.

Here, Ms. Moore admitted at trial that as a Physician's Assistant, she is prohibited from admitting patients to a hospital and must rely on a physician to make that decision. (R. p. 110, lines 2-6, p. 134, lines 1-14, p. 134, line 24–p. 135, line 2.) The evidence in the record clearly showed that Respondent's treating physician never recommended an inpatient procedure and that he himself performed an outpatient procedure on Respondent. (R. pp. 564-86.) Consequently, Ms. Moore's testimony that Respondent will require a future surgery in the inpatient setting, as opposed to an outpatient setting, exceeded the scope of her licensure and, as a result, the trial court improperly admitted the testimony.

With Ms. Moore's testimony improperly admitted, the estimated costs of Respondent's future medical needs were inflated by over one hundred thousand dollars and this figure was considered by the trial court in its calculation of damages. (R. pp. 4-5, 18-19.) LMC was undoubtedly prejudiced by the erroneous inclusion of an additional one hundred thousand dollars in damages. Consequently, LMC respectfully requests this Court reverse the trial court's admission of Ms. Moore's testimony regarding a future inpatient knee replacement and reduce the damages award accordingly. To the extent that a reduction in the damages award is not possible, LMC requests in the alternative that this case be remanded for further proceedings for the trial court to determine damages without the cost of an inpatient knee replacement.

III. THE TRAIL COURT ABUSED ITS DISCRETION IN DENYING LMC'S MOTION FOR LEAVE TO DEPOSIT IN COURT

Respondent's arguments supporting the trial court's denial of LMC's Motion for Leave to Deposit fail to show that the trial court did not abuse its discretion in denying the motion. Respondent freely admits that it is an abuse of discretion for a trail court to base its decision on an error of law or a factual conclusion without evidentiary support. (Respondent's Brief, p. 27.) Respondent then falsely claims that "LMC has not identified any error of law or unsupported

factual conclusion on which the trial court based its denial." (*Id.* at 28.) LMC has shown that the trial court based its decision on the erroneous factual conclusion that granting LMC's motion would deprive Respondent of post judgment interest. (Appellant's Final Brief, pp. 18-19.) Because the trial court's decision was based on a factual conclusion contrary to the evidence in the record, the trial court abused its discretion in denying LMC's motion and its order 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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Lexington, South Carolina