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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Steven H. John, Circuit Court Judge

Appellate Case No. 2021-000803

Priscilla Peterkin, ...Appellant,

v.

Bummz on the Beach, Inc., individually and d/b/a Bummz on the Beach……Respondents.

FINAL BRIEF OF APPELLANT

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I. The trial court improperly granted Bummz on the Beach, Inc.'s motion for summary judgment because there was sufficient evidence to create a jury question.

II. The trial court improperly ruled Priscilla Peterkin's affidavit was a sham affidavit because there were multiple explanations for why the affidavit was filed that go far to prove the affidavit was not filed as a sham.

STATEMENT OF THE CASE

This is a trip and fall case. Appellant Priscilla Peterkin filed a lawsuit against multiple Defendants including Respondent Bummz on the Beach, Inc., individually and d/b/a Bummz on the Beach Café for injuries she sustained when she suffered a fall on private property which is maintained by the City of Myrtle Beach and leased to Bummz on the Beach, Inc. (R. at 15-16). Following Respondent's Motion for Summary Judgment, the trial court granted the motion. (R. at 1-4). This appeal followed.

STATEMENT OF FACTS

During the 2018 Thanksgiving holiday, Appellant Priscilla Peterkin along with friends and family were vacationing in Myrtle Beach, South Carolina. On the evening of November 25, 2018, Priscilla and her group decided to walk down to the SkyWheel. As the group returned from the SkyWheel to their hotel—Breakers Myrtle Beach Resort, they walked on the sidewalk adjacent to their hotel.[1] (R. at 43).

Priscilla, who had been walking ahead of the group, suddenly, she tripped and fell on a piece of raised sidewalk concrete directly in front of Respondent's establishment. At the time, a palm bush hung over the sidewalk—covering the raised concrete at first blush. (R. at 162). (R. at 43).

Because Priscilla had taken the lead, the entire group saw her fall. (R. at 46-47). Her daughter, Antisha Peterkin, described that the fall occurred in a "very dark corner." (R. at 41-42). As a result of the fall, Priscilla sustained injury to her shoulder, knee, wrist and collarbone. Her collarbone was fractured. (R. at 118).

The sidewalk where Priscilla fell is maintained by the City of Myrtle Beach ("The City"). It is undisputed that The City is charged with maintaining, cleaning, inspecting, and repairing sidewalks on an as needed basis. The City does not own the parcel where the Respondent's business is situated; and is not responsible for maintaining the landscaping on Respondent's leased premise.

[1] When the group left for the SkyWheel they had used a different path---walking on the opposite side of the street from the hotel.

The area surrounding the sidewalk where the fall occurred—including the landscaping, is Respondent's responsibility based on its lease agreement. Paragraph 9 of the lease agreement states, in pertinent part:

> Maintenance by Tenant. During the Term of this Lease, and in addition to all of Tenant's Work set forth in Exhibit "A" attached hereto, Tenant shall maintain the roof, structural members, foundation, exterior walls, *landscaping* and parking areas of the Demises Premises, together with the building's plumbing, sewer, heating, air conditioning, ventilation, electrical, wiring and mechanical systems.

(R. at 162) (emphasis added). At the time of the fall, the lease agreement, in which Respondent was the tenant was enforceable. *(Id.).*

Appellant brought this lawsuit alleging the City and Respondent were negligent and subsequently liable for her injuries. (R. at 17-21). Specifically, Priscilla alleged that Respondent was responsible for failure to properly maintain the landscaping and that both Respondent and the City were negligent because they knew or should have known of the crack in the sidewalk. Following the normal course of litigation, a series of depositions were taken and Respondent filed a motion for summary judgment.

In preparing for argument, Appellant's counsel realized there were blatant errors in William D. Rippy's deposition transcript. (R. 215-216). (explaining the Rippy transcript erroneously listed defense counsel as taking the deposition when Appellant's counsel took the deposition). And effectively, caused counsel to question the validity of both the Rippy transcript and the Appellant's transcript since they were handled by the same court reporter. *(Id.).* Because of these concerns, counsel requested both transcripts be reviewed and authenticated. Appellant's deposition could not be authenticated prior to the hearing, and out of an abundance of caution counsel had Appellant file an affidavit prior to the hearing. *(Id.).*

At the hearing, Respondent argued summary judgment was proper because Appellant could not identify what caused her to trip and fall. (R. at 202). Respondent explained that Appellant was repeatedly asked at her deposition what made her fall and she answered that she did not know. *(Id.)*. Additionally, Respondent took issue with the submission of Appellant's affidavit—submitted after the deposition—in which Respondent contends Appellant changed her answer to say that the palm tree caused her to fall. (R. at 57-58). (R. at 203-204). And therefore, should be found as a sham affidavit. *(Id.).*

In response, counsel explained that while Appellant did indicate that she did not know if the palm tree made her fall, as discussed by Respondent's counsel, she also stated that she did not know if it did or did not. (R. at 206-207). Counsel further explained that the distinction was key for the purpose of summary judgment because it could not be definitively ruled in or out for purposes of causation. (R. at 209). In support of this position, counsel argued that Respondent's quoting of testimony was only a snapshot of the deposition's ongoing discussion over the causation issue. Counsel explained that Appellant also testified that she fell heading back to the hotel as she passed the entrance of Respondent's establishment and that the fall happened quickly as she felt her foot tip forward as she was passing. (R. at 206-207). (quoting Plaintiff Exhibit 18—Peterkin's deposition). Additionally, Appellant testified that several witnesses saw her fall and that they too could account for the events that occurred.

Counsel argued that Appellant's deposition testimony when coupled with the two witnesses' affidavits—both of whom identified the crack in the sidewalk and that the palm tree bush was overhanging/covering the crack where Appellant fell, creates genuine issues of material fact for causation. (R. at 207-209).; *see also* (R. at 43). (R. at 44). (showing the crack in the sidewalk with the bush overhanging the crack), & (R. at 45). Additionally, counsel submitted that

Respondent's admission that the business is responsible for maintaining the palm tree bushes and

that the palm tree bush overhangs the sidewalk over the crack also leaves open a genuine issue of material fact for a jury to determine. (R. at 212). (R. at 162).

In ruling, the trial court took serious issue of the timing of the filing of the affidavit. (R. at 212-213). (explaining that Appellant's deposition was on March 9, 2021, and the affidavit was filed on June 3, 2021 in anticipation of the hearing). The trial court explained that Respondent's admission "in conjunction with the affidavit of Ms. Priscilla Peterkin was more than sufficient to defeat a motion for summary judgment." *(Id.)*. Yet, the deposition testimony removed the genuine issue. While the trial court made this assessment from the bench, the final order reflected a different basis for the granting of summary judgment.[2] The trial court's order found there was *no evidence* of what specific act created the dangerous condition. (R. at 3). Specifically, the trial court held

> [Priscilla] has been unable to articulate what caused her to fall, there has been no evidence set forth by an expert to opine as to any specific condition, and no testimony has set out a code or standard that was not followed. In addition, there is no evidence that [Respondent] was on notice of any allegedly dangerous condition.

(Id.). While the trial court acknowledged that Respondent admitted it has a duty to maintain the palm tree bush and that it overhangs the sidewalk, the court found Priscilla's deposition testimony undermined the admission of duty and its breach. (R. at 3-4). Specifically, Priscilla's testimony was that she could not say for certain that the tree caused her to fall. In comparing that testimony and her affidavit in which she stated that because of the tree bush she could not see raised concrete,

[2] See generally, *Brailsford v. Brailsford*, 380 S.C. 443, 452, 669 S.E.2d 342, 346 (Ct. App. 2008) (holding an oral ruling does not bind a court when a written order is later entered).

the trial court found the affidavit was a sham. (R. at 4). In sum, the trial court found that because the affidavit was a sham there was no genuine issue of material fact. *(Id.).*

In response, Priscilla filed a Rule 59(e) Motion to Reconsider arguing that affidavit was not a sham. Motion to Reconsider; see also (R. at 215-216). (explaining the reason for the affidavit's submission). Significantly, Priscilla explained that even if the affidavit was a sham, the Antisha Peterkin and Tate affidavits when coupled with Rippy' s deposition provided ample evidence to overcome Respondent's motion. (R. at 182-187).; *See also* (R. at 41-42), (R. at 46-47), and (R. at 162). The motion was denied and this appeal followed.

STANDARD OF REVIEW

On appeal from an order granting summary judgment, this Court reviews the matter through the same lens as the trial court, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Rule 56, SCRCP. All ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to appellant, the non-moving party below. *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004). Notably, summary judgment is *only* proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp*, 341 S.C. 372, 379, 534 SE 2d 688, 692 (2000); *Moriarity v. Garden Sanctuary Church of God*, 534 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual

issues." *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999).

ARGUMENTS

I. The trial court improperly granted Respondent's motion for summary judgment because there was sufficient evidence to create a question of fact that belongs with the jury.

The trial court's grant of summary judgment must be reversed because it failed to apply the proper standard by ignoring the other evidence in the record. The trial court's analysis turned on its finding of a sham affidavit. (R. at 4). In so doing, the trial court effectively rejected the existence of other evidence by finding that because there was a sham affidavit there was no longer a genuine issue. While Priscilla contends the sham affidavit finding was improper (Issue 2), the remaining evidence provides ample evidence to create a genuine issue. This evidence when coupled with Respondent's admission that there was a duty and a breach by the palm bush tree overhanging the sidewalk warrants reversal. For these reasons, the grant of summary judgment should be reversed, and this matter remanded for a jury trial.

At the outset, it is undisputed that Respondent owed a duty and breached that duty by allowing the palm bush tree to overhang and cover the sidewalk. (R. at 4). ; *See generally Shirley's Iron Works, Inc. v. City of Union,* 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (holding an unappealed ruling is the law of the case). While the Court found absolution in the phrasing of deposition questions, such framing fails to provide finality when causation remains a question of fact. It is well-settled that the question of proximate cause is one that can be left to the jury, especially when one defendant is not required to be the sole reason for causation. *e.g.*, *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) (reversing

grant of summary judgment and explaining a "defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence. The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." (citations omitted)); *Est. of Mims v. S.C. Dep't of Disabilities & Special Needs*, 422 S.C. 388, 403, 811 S.E.2d 807, 815 (Ct. App. 2018) (where multiple inferences may be drawn from the evidence presented at summary judgment, a jury must resolve the question of proximate cause).

Here, the trial court's finding on the sham affidavit incorrectly side-stepped the issue of causation. The evidence submitted allows for multiple inferences to be drawn, including that the area was very dark, and that the raised concrete was covered by a palm tree bush—both of which were demonstrated in the pictures supplied to the trial court. (R. at 44). and (R. at 47). Moreover, both affidavits identify the crack in the sidewalk which is exactly the place where the palm tree bush overhangs as the exact place with [*sic*] Ms. Peterkin tripped and fell. (R. at 7: 3-10). (R. at 44). (R. at 47). This was even acknowledged by the trial court.

(R. at 213:16-22). (trial court stated "[t] he pictures show a crack, couple strands of what appears to be a palm bush on the side of the picture").

Additionally, Appellant's deposition further demonstrates that multiple inferences could be drawn. While the trial court relied on a snapshot, the reality is Priscilla knew she tripped and fell because she couldn't see the crack in the sidewalk.

For these reasons, this question of causation belongs to a jury and therefore, this matter warrants reversal.

II. The trial court improperly ruled Appellant's affidavit was a sham by ignoring trial counsel's reason for filing the affidavit and the remaining evidence that independently created genuine issues of material fact. .

Appellant's affidavit was not a sham. While the trial court found the timing of the filing – following Appellant's deposition—demonstrative of a sham, this position is unsupported by the record. And warrants reversal.

Appellant readily acknowledges that *any* trial court should be suspect of an affidavit filed after a deposition is taken. Such action warrants detailed scrutiny, especially if such a filing artificially or allegedly creates the *only* genuine issue of material fact. *See generally*, *McAlhany v. Carter*, 415 S.C. 54, 65, 781 S.E.2d 105, 111 (Ct. App. 2015), aff'd, No. 2016-000405, 2017 WL 4873655 (S.C. May 3, 2017) (holding "[t]he last-minute submission of the affidavit indicate[d] [he] was attempting to create an issue of fact for purposes of summary judgment"). Such a filing, however, cannot equate to an automatic sham. Instead, it invites a thorough explanation by counsel submitting the affidavit as to procedural or substantive reasons for submission.

Here, the affidavit was submitted due to evidentiary concerns. Specifically, counsel could not attest to the authenticity of the deposition and thereby questioned whether the deposition testimony could be submitted. In raising those concerns, counsel was not utilizing the affidavit to create a genuine issue of material fact. This is highlighted by the other evidence that was submitted by Appellant. See William D. Rippy Dep., Calian Tate Aff. and Antisha Peterkin Aff. Moreover, this is even echoed by the trial court at the hearing in which it acknowledged that the Rippy admission coupled with Appellant's daughter's deposition created a genuine issue of material fact. (R. at 214).

As it stands, the order's finding of a sham affidavit is unsupported by the record. Not only does the Appellant's affidavit not contradict her earlier deposition testimony; it is explained that the only reason the Appellant provided an affidavit was to ensure the evidence presented at the motion hearing was accurate.

Allowing this finding to stand when it is unsupported by the record and the trial court's finding that a genuine issue of material of fact exists is an error of law.

The court emphasized the date Appellant's affidavit was filed in its final ruling on this matter. However, prior to May 24, 2021, there wasn't a need for the Appellant to submit an affidavit. It wasn't until May 24, 2021 that errors were discovered by Appellant's counsel. The errors were found in William D. Rippy's deposition; and because the same reporter took both William D. Rippy's deposition and Priscilla Peterkin's deposition; there was concern that either or both could be inaccurate and unauthenticated ahead of the June 8, 2021 hearing.

In *McAlhany v. Carter*, the court balanced the timing issue regarding the filing of an affidavit when there is an upcoming hearing. The Appellant's case is distinguishable from *McAlhany v. Carter* because her affidavit, although submitted days before the hearing, was submitted to protect the integrity of the evidence brought before the court and not to create a sham issue of fact. When the court reporter responsible for the errors filed an affidavit on June 1, 2021 (R. at 195). curing the William D. Rippy transcript errors; she had not done so for the Appellant. Since transcript errors could still arise as to the Appellant's deposition transcript, the Appellant's affidavit was necessary.

The court has also held, "the competing affidavit rule is an exception to a general prohibition against a judge excluding a contradictory affidavit from consideration and is used **only when** the affidavit is an attempt to create a sham issue of material fact in Cothran v. Brown, 357 S.C.

210, 218, 592 S.E.2d 629, 633 (2004). Here, Appellant's counsel does not attempt to create a sham issue of material fact; she tries to avoid one. Since the court reporter's affidavit for the William D. Rippy's transcript was filed less than one week before the motion hearing, the timing of the filing of the Appellant's affidavit is logical and meaningful.

Not surprisingly, after the motion hearing it was confirmed that Appellant's deposition transcript did in fact have an error. An Affidavit was created by the reporter on June 9, 2021 to cure errors in Appellant's transcript. (R. at 196).

Finally, Priscilla's affidavit did not contradict her earlier deposition testimony. The court, when assessing whether an affidavit is a sham, will look at "whether an explanation is offered for the statements that contradict prior sworn statements." Id. Priscilla, in her affidavit, never actually says the palm bush tree caused her to fall. Instead, Priscilla says, "since it was both dark, and because a Bummz palm tree bush was hanging over the raised concrete I couldn't see the danger and I tripped." (R. at 58). In her deposition she says,

Q. All right. This is back to that picture we were looking at earlier. It's marked as Plaintiff's Exhibit Four, but I'll -- I think it's Number 1 for our transcript purposes. Do you see on the right-hand side a palm bush or some other shrubbery. Do you see that on the right?

A. Uh-huh.

Q. Did that cause you to fall?

A. I can't say that it did.

Q. Just so I understand that, is that a no it

did not cause –

A. No.

Again, she never says the palm bush tree caused her fall in her affidavit and she does not say the palm bush tree caused her fall in her deposition. Therefore, there is no contradiction.

Even if Priscilla's affidavit is deemed a sham affidavit; there is substantial evidence from Antisha Peterkin and Calian Tate that show there exists a genuine issue of material fact as to causation.

In Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC, No. 2014-UP-062, 2014 WL 2579900, at *1 (S.C. Ct. App. Feb. 12, 2014) the Plaintiff's presented an expert affidavit that formed the entire basis of the Plaintiff's complaint. The affidavit in that matter was found to be a sham and when it was excluded, no genuine issue of material fact existed. Priscilla's case is distinguishable from *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC,* because even without Priscilla Peterkin's affidavit, the affidavits of Antisha Peterkin and Calian Tate show that the dark corner where Priscilla fell is the same place where the crack exists, thus a genuine issue of material fact exists as to whether the palm bush tree contributed to the Appellant's trip-and-fall.

CONCLUSION

Based on the forgoing, the trial court's order granting summary judgment to the Respondent should be overturned.

Respectfully submitted,

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