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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2022-000981

Ralph Hooker as Personal Representative of the Estate of Linda Hooker.....Appellant,

v.

McDonald's Corporation, McDonald's Real Estate Company, JKS & K, Inc., Pam Hampton, and Proline Striping Service, Inc.....Respondents.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Respondents' primary argument ignores the evidence of a slippery condition observed and experienced by two witnesses to the incident.

As during the summary judgement hearing, Respondents effectively set forth arguably their best available evidence to make the case that the parking lot striping did not cause Ms. Hooker's fall. However, also consistent with the hearing, Respondents failed to address the best evidence in favor of Appellant, and in so doing have helped to demonstrate the presence of a scintilla of evidence through which this matter should be submitted to a jury. *See Zurich American Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) (*citing Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009)). Specifically, the two family member witnesses who were with Ms. Hooker on the day of her fall either (1) perceived a mark where her foot slipped on a painted line, or (2) experienced the same slippery condition of the line, albeit without falling.

Respondents' argument seeks to minimize the importance of the "smear" mark where Plaintiff fell by characterizing it as *res ipsa loquitor* and ignoring the immediate proximity of the mark to Plaintiff along with the perception of the slippery lines by her daughter. While the Respondents assert that Mr. Hooker did not connect the smear to Ms. Hooker's shoe and speculate in a footnote that she tripped over her shoes, the deposition testimony directly on those points contradicts such allegations:

Q: Yeah. And you testified earlier about what your wife indicated about what caused the slip Did she ever say anything about her shoes contributing to it?
A: No
. . .
A: And I could see where she slipped. I could see it. You could see the mark.
Q: You could?
A: Yes.
Q: Okay.
A: Where she slipped.
Q: What did it look like?
A: Just you could see like it smeared a little bit. That's all. That's all I could see. You

could see it.
Q: It was a smear?
A: It was a smear?
Q: Okay. The paint was dry, correct?
A: No. The paint was wet.
Q: Okay.
A: From the rain, it was still rain –

...

Q: Okay. But you still saw a smear?
A: Just a small smear where her shoe slipped.

Ralph Hooker Deposition dated 6/3/2021, pp. 74:7 – 24; 75:3 – 4. Transcript of Hearing, February 2, 2022, at pp. 19 – 20; Motion to Reconsider, June 20, 2022, at p. 3.

Respondents implicitly acknowledge the relevance of other patrons' contemporaneous experience with the slippery lines, noting that "[n]one of the family members experienced any trouble with traction as they walked in the rain across the wet parking lot in the painted crosswalk toward the restaurant." Resp. Initial Brief p. 5. This observation selectively omits the experience of Michelle Foxworth, Plaintiff's daughter, who testified that she did experience the slipperiness of the painted lines while she was attending to her mother who was still on the ground. Michelle Foxworth Deposition; June 3, 2021, p. 40:2–10. Ms. Foxworth's perception of the condition of the crosswalk lines, together with the smudged foot mark, could certainly permit a jury to conclude that the lines immediately where Ms. Hooker fell were slippery, lacked traction, and caused the fall in this case.

II. The additional sustaining grounds set forth by JKS & K, Inc. and Pam Hampton misapplies South Carolina law concerning the possession and control of the subject premises.

A. Negligence per se is evidence of a defective/dangerous condition in this case.

"[A] statute may be the source of a duty owed in negligence." *Rayfield v. S.C. Dep't of*

Corr., 297 S.C. 95, 101, 374 S.E.2d 910, 913 (Ct. App. 1988). "In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Id.* 297 S.C. at 103, 374 S.E.2d at 914. Once a plaintiff satisfies the elements set forth in *Rayfield*, negligence *per se* is established, "the jury need not decide if the defendant acted as would a reasonable man in the circumstances" because the "statute fixes the standard of conduct required by the defendant." *Id.* South Carolina Appellate Courts have also extended this jurisprudence to violations of regulations. *See e.g. Ravan v. Greenville Cty.*, 315 S.C. 447, 434 S.E.2d 296, (Ct. App. 1993) (upholding negligence per se jury charge based on regulatory violations).

The International Building Code ("IBC") and the International Property Maintenance Code ("IPMC") are published by the International Code Council ("ICC"). On the ICC's website, it describes the purpose of its published codes as follows:

> The *International Building Code* (IBC) is the foundation of the complete Family of International Codes®. It is an essential tool to preserve public health and safety that provides safeguards from hazards associated with the built environment. It addresses design and installation of innovative materials that meet or exceed public health and safety goals.

https://www.iccsafe.org/products-and-services/i-codes/2018-i-codes/ibc/. The ICC goes on to state that the principles of the IBC, in particular, "are based on protection of public health, safety and welfare." *Id.* The South Carolina legislature directed the South Carolina Building Codes Council to adopt ICC building codes via S.C. Code Ann. § 6-9-50 in order to maintain the "public health, safety, and welfare of its citizens", which the council does as directed by statute. *See* S.C. Code Ann. § 6-9-5(A).

Following Plaintiff's fall, Plaintiff engaged Dr. Bryan Durig as an expert in mechanical engineering and safety. Dr. Durig physically and visually inspected the premise twice and generated opinions based on the inspections. *See* Bryan Durig Deposition, p. 14:17–25, January 20, 2022 (R. p. ___). Dr. Durig concluded that there were multiple layers of paint present on the lines that obscured any natural abrasive materials the underlying concrete may have initially had. *See* Durig Preliminary Report dated July 1, 2019 (R. p. ___).; Durig Dep. at p. 93:5–14. He also concluded that the paint in Defendants' parking lot did not have any abrasive material. Durig Dep. at pp. 85:3–20, 117:14–25. Ultimately, as a result of his inspection of the premise, Dr. Durig has offered the opinion that the painted lines did not demonstrate any evidence of slip resistance. *Id.* at p. 118:1–14. In relevant part, Dr. Durig has opined that the lack of slip resistance is a violation of:

- International Building Code § 1003.4 ("Walking surfaces of the means of egress shall have slip resistant surface . . . ."), Durig dep.at pp. 39:17–40:2;
- International Property Maintenance Code § 302.3 ("All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be . . . maintained free from hazardous conditions.") Durig Preliminary Report at p. 2;
- ASTM F1637 § 5.1.3 ("Painted walkways shall contain an abrasive additive. . . ."); Durig Preliminary Report at p. 2.

Dr. Durig further opined that the IBC and IPMC are directed to the owner of a building or his designee. *See* Durig Dep. at pp. 118:16 – 119:20. (R. p. ___).

Plaintiff presented evidence that Defendants have violated statutorily adopted codes. Furthermore, Plaintiff, as both a member of the public and a citizen of the State of South Carolina was in the class of people the statute and code were designed to protect. Considering the statutes/codes speak directly to slip resistant surfaces, and Plaintiff has produced evidence that she in fact slipped, it stands to reason that she has suffered the type of harm the statute and code were intended to protect against. While Plaintiff readily admits that, even with a *prima facie* showing

of negligence *per se*, whether Defendants actually violated the statute is a question for the jury, it is still at least a scintilla of evidence that requires the case to be decided by a jury

B. The Respondents had control of the subject parking lot and knew they had a duty to warn of its slippery condition.

The evidence in this case shows that Respondents appreciated the need to warn of the condition prior to Plaintiff's fall. "Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception." *Sims v. Giles*, 343 S.C. 708, 716, 541 S.E.2d 857, 862 (Ct. App. 2001) (quoting Restatement (Second) of Torts § 332). "The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Id.*, 343 S.C. at 718, 541 S.E.2d at 863 (citing *Larimore v. Carolina Power & Light,* 340 S.C. 438, 531 S.E.2d 535 (Ct.App.2000)). "The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge." *Id.* (citing *Callander v. Charleston Doughnut Corp.,* 305 S.C. 123, 406 S.E.2d 361 (1991)).

J K S & K, Inc. states that it did not have anything to do with the lines painted in its parking lot other than selecting the painting contractor. They further suggest that they were not on notice of the allegedly defective condition. However, it is not controverted that J K S & K, Inc.'s employees exercised control over the parking lot by conducting inspections. Washington Dep. at pp. 28:25–29:2. (R. p. ___). Despite the regular inspections, J K S & K's manager admitted that not only did they never inspect the parking lot while it was raining, they also never inspected the painted lines when they were wet. *Id.* at 29:3–11. (R. p. ___). Even if Defendants claim they were not on actual notice of the allegedly defective condition that violated publicly available codes

enacted by state statute, "constructive notice ... 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." *LeFont v. City of Myrtle Beach*, 430 S.C. 534, 544, 846 S.E.2d 355, 360 (Ct. App. 2020), *reh'g denied* (Aug. 24, 2020), *cert. denied* (Apr. 19, 2021) (internal citations omitted).

The parking lot had been painted on or about April 4, 2018. As a result, Defendants had ample opportunity to inspect the condition of the parking lot and painted lines in various conditions they would expect their invitees to encounter it. Plaintiff would respectfully suggest that, had Defendants ever conducted the inspection at a time when substances are most likely to have been in a dangerous, slippery condition, they would easily have identified the same. A jury could certainly conclude that it is not reasonable to fail to conduct proper inspections over months, if not years, and then use the same failures to claim a lack of notice.

Plaintiff would also suggest that Defendants had actual notice that the parking lot and lines were slippery and unsafe when it was raining. As the manager on duty at the time of the accident, Sherrie Washington, stated in her deposition, the Defendants' procedure was to post a warning regarding the wet surfaces when it was raining. Sherrie Washington Dep. at pp. 29:22–30:5. (R. p. ___). Plaintiff would submit that the regular use of a warning device in the very vicinity of the fall is a tacit admission that a dangerous condition that required a warning existed. Furthermore, as depicted in the screenshot of the body worn camera, *supra*, it is clear that Defendants failed to follow their procedure and warn of what they knew to be a potentially dangerous condition as there are no warning signs in the parking lot.

C. Pam Hampton was not a mere employee and shared a duty to exercise reasonable care in this matter.

"A person who operates a commercial establishment but is neither an owner nor a lessee

may nonetheless have a duty to exercise reasonable care to remedy an allegedly dangerous condition." *Jones v. Ringer*, No. 4:17-CV-02182-RBH, 2017 WL 5077870, at *4 (D.S.C. Nov. 6, 2017) (citing *Benjamin v. Walmart Stores, Inc.*, 413 F. Supp. 2d 652, 655 (D.S.C. Feb. 9, 2006) "Liability in such a situation depends upon *control* of the premises, not necessarily ownership." *Id* (citing *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); *Nesbitt v. Lewis*, 335 S.C. 441, 446, 517 S.E.2d 11, 14 (Ct. App. 1999)). "When evaluating whether a person has sufficient control—and thus a duty to inspect the premises for dangerous conditions—a court should consider the person's power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property. *Id.* (citing *Benjamin*, 413 F. Supp. 2d at 655–56).

As the general manager of the store, Defendant Hampton testified that she was responsible for ensuring that assistant managers received any updated training on policies and procedures, directly trained store employees in regard to safety, kept track of employee training, and generally "manage[d] the store itself". Pamela Hampton Deposition, September 8, 2021, pp. 29:17–25, 30:8–17, 43:8–15 (R. p. ___).. Based on Ms. Hampton's own testimony and the applicable case law, she had requisite authority and control over the premise at the time of the accident such that suit can be maintained against her.

III. The additional sustaining grounds set forth by McDonald's Corporation and McDonald's Real Estate Company fail as a matter of law based on the control exercised over their franchisee.

"The decisive test in determining whether the relation of master and servant exists is whether the purported master has the right or power to direct and control the servant in the performance of his work and in the manner in which the work is to be done." *Jamison v. Morris*, 385 S.C. 215, 221, 684 S.E.2d 168, 171 (2009) (internal citations omitted). "In an actual agency

case, the question is not whether the purported principal could have exercised control over its agent, but whether it did so." *Id.*, 385 S.C. at 222. "[A] franchisor is not vicariously liable for a tort committed at an independent [franchised location] unless the plaintiff can show that the franchisor exercised more control over the franchisee than that necessary to ensure uniformity of appearance and quality of services among its franchisees." *Id.*

In determining whether a franchise exercises "more control over the franchisee than that necessary to ensure uniformity of appearance and quality of services among its franchisees", the Court begins the inquiry with the documents that govern the parties' relationship. In the present case, the relationship is governed by a Franchise Agreement and an Operator's Lease.[1] These documents were not produced without significant redaction by the Defendants until January 24, 2022 despite being responsive to Plaintiff's initial discovery requests.

The terms of the agreements that McDonald's Corporation and the McDonald's entity that is the owner of the property (collectively "McDonald's") highlight that they maintain a significant amount of control over every aspect of the operation of the franchise. In the very first paragraph of the Franchise Agreement, McDonald's assets that McDonald's operates a "comprehensive system for the ongoing development, operation, and maintenance of McDonald's restaurant locations." The first paragraph then goes on to describe that the very "essence of this Franchise is the adherence by Franchisee to standards and policies of McDonald's". The Franchise Agreement indicates that McDonald's provides the Franchisee with busines manuals with, in part, "required operations procedures" and McDonald's requires that the Franchisee "adopt and use exclusively the formulas, methods, and policies contained in the business manuals". Franchise Agreement at p. 3, ¶ 4. McDonald's specifies that the franchisee must comply with the entire McDonald's

[1] Both of these documents have been labelled Confidential and, therefore, will not be made exhibits to this Memorandum but will be provided to the Court under seal.

System and that it cannot "make any alterations, conversions, or additions to the building, equipment, or parking area" without the prior written consent of McDonald's. *Id.* at p. 7, ¶ 12(d). McDonald's also provides training and requires that all franchise operators and managers attend "Hamburger University". *Id.* at p. 4, ¶ 6.

In addition to requiring strict adherence to what McDonald's defines as an entirely comprehensive system of operation, McDonald's has the "right to inspect the Restaurant at all reasonable times to ensure that Franchisee's operation thereof is in compliance with the standards and policies of the McDonald's System." *Id.* at p. 7, ¶ 12. If McDonald's determines that the Franchisee is not "in compliance with the standards prescribed by the McDonald's System", it can terminate the Franchise. *Id.* at p. 11, ¶ 18(a). Not only does McDonald's maintain the right to terminate the Franchise, it also maintains "an immediate right to enter and take possession of the Restaurant in order to maintain continuous operation of the Restaurant . . . and to otherwise protect McDonald's interest." *Id.* at p. 13, ¶ 20(a). Defendants have produced several relevant portions of the McDonald's System that demonstrate the high level of control McDonald's maintains over its franchisees. In fact, McDonald's has a 32-page long policy dedicated entirely to planned and daily maintenance that mandates what maintenance takes place, when and how often each task takes place, and even how it is directed to be done in tedious step by step fashion (e.g. "use a water broom or garden hose with sprayer to rinse off the walks"). Planned and Daily Maintenance at p. 12.[2]

To further bolster the complete control maintained via the Franchise Agreement, the Operator's Lease also incorporates and requires compliance with the terms of the Franchise Agreement such that any breach of the Franchise Agreement operates as a material breach of the

[2] This document has also been marked confidential and will be provided to the Court.

Operator's Lease. Operator's Lease, p. 8, ¶ 4.07. The Operator's Lease also requires the Franchisee to get written permission to make any alteration to any part of the premise. *Id.* at p. 7, ¶ 4.03. Finally, the Operator's Lease ensures that, if McDonald's terminates the Franchise Agreement, the McDonald's entity that owns the land can terminate the lease and "either with or without process of law, re-enter, expel, remove and put out Tenant and all persons occupying the Premises under Tenant, using such force as may be necessary. . . ." *Id.* at pp. 10–11, ¶ 7.04.

To recap, McDonald's requires that J K S & K, Inc. follow a self-described comprehensive system that directs all manner of daily activities. McDonald's mandates that franchise owners and their managers get training at Hamburger University to ensure they know the system. McDonald's reserves the right to inspect at any time to ensure that J K S & K is following the comprehensive system. If McDonald's finds that J K S & K is not in compliance it terminates the franchise and the lease agreement, forcibly removes the franchisee, and takes over the operations of the restaurant. If any franchisor can be found to exercise "more control over the franchisee than that necessary to ensure uniformity of appearance and quality of services among its franchisees", it is McDonald's.

CONCLUSION

Based on the foregoing, Appellant respectfully submits that this Court should reverse the circuit court's grant of Respondents' Motion for Summary Judgment because a scintilla of evidence as to what caused Appellant's fall is in the record and the additional sustaining grounds set forth by Respondents were not considered by the trial court and also fail on their own merits to overcome the scintilla of evidence set forth by the Plaintiff.

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PROOF OF SERVICE

I certify that I have served Appellant's Reply Brief on all attorneys of record, by depositing a copy of it in the United States Mail, postage prepaid on January 24, 2023, addressed to the Respondents' attorneys of record.

January 24, 2023

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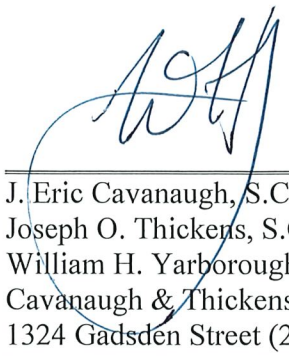

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