

Diversified never acted in any managerial, agency, employee, or servant capacity on behalf of Village as it was no longer in existence when Village was formed.

Because neither Diversified nor Village owned the Premises at the time of the Incident, they moved for summary judgment on October 1, 2019, after securing the necessary supporting documentation¹. A hearing on the motion was held on February 10, 2020, which resulted in a February 10, 2020, Order referring this matter to this Court for a hearing on all pending motions²

This Court heard the motion for summary judgment on March 4, 2020, as directed in the February 10, 2020, Order of Reference and granted the motion as to Diversified, dismissing it from this action, but held the motion in abeyance as to Village to allow Wallace time to move to amend the Complaint with relation back to the original filing – since the statute of limitations had run by that point – to name the current defendants which shall hereinafter collectively be referred to as the “TICs³.” Wallace moved to amend the Complaint on May 1, 2020⁴.

The TICs are twenty-three separate Delaware limited liability companies. On November 19, 2015, the TICs owned the Premises as tenants in common. On December 8, 2021, this Court

¹ *Motion for Summary Judgment as to All Issues of Liability of Defendants Diversified Realty Ventures, LLC, and Village Medical Park, LLC, Pursuant Rule 56(b), S.C.R.Civ.P.* dated and filed with this Court October 1, 2019.

² This case has not yet been returned to the Circuit Court and still remains with the Orangeburg County Master-In Equity Court.

³ The TICs are collectively comprised by Village Medical TIC (1), LLC; Village Medical TIC (2), LLC; Village Medical TIC (3), LLC; Village Medical TIC (4), LLC; Village Medical TIC (5), LLC; Village Medical TIC (6), LLC; Village Medical TIC (7), LLC; Village Medical TIC (8), LLC; Village Medical TIC (9), LLC; Village Medical TIC (10), LLC; Village Medical TIC (11), LLC; Village Medical TIC (12), LLC; Village Medical TIC (13), LLC; Village Medical TIC (14), LLC; Village Medical TIC (15), LLC; Village Medical TIC (16), LLC; Village Medical TIC (17), LLC; Village Medical TIC (18), LLC; Village Medical TIC (19), LLC; Village Medical TIC (20), LLC; Village Medical TIC (21); Village Medical TIC (22), LLC; and Village Medical TIC (23), LLC.

⁴ *Motion to Amend Pleadings* dated April 29, 2020, and filed with this Court May 1, 2020.

granted the May 1, 2020, motion to amend, substituting the TICs as party defendants and dismissing Village⁵. Yet, though the motion to amend was granted, no amended complaint naming a Personal Representative of the Estate of Doris J. Wallace or the TICs as parties has been filed.

This matter came before this Court on Wednesday, November 9, 2022, for a WebEx hearing on the motion for summary judgment as to all issues of liability. Present at the WebEx hearing were Russell A. Blanchard IV, Esq., appearing on behalf of the Plaintiff, Doris J. Wallace, and Edward K. Pritchard, III, Esq., on behalf of the TICs.

After hearing arguments of counsel, considering the matters on file in the record, the pleadings on file and after considering the applicable law, it is clear to the Court that there is no genuine issue as to any material fact and that the TICs are entitled to a judgment as a matter of law because the undisputed evidence fails to establish that the TICs owed Wallace a duty which they breached proximately causing her injuries. Accordingly, for the reasons set forth hereinbelow, the TICs' motion for summary judgment as to all issues of liability must be granted.

STANDARD OF REVIEW

“Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Nelson v. Chas. Co. Parks & Recreation Comm.*, 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. AT&T*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). “In determining whether a genuine issue of fact exists, a court must consider everything in the records, pleadings, depositions, interrogatories, admissions on file, affidavits, etc.” *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

⁵ See Order dated December 8, 2021.

Summary judgment must be granted when the record demonstrates that the requirements of Rule 56(c) have been met. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether to grant summary judgment, the Court must view the facts and inferences in the light most favorable to the non-moving party. *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). While the Court is required to construe the facts and all reasonable inferences arising there from in a light most favorable to the non-moving party, wholly speculative and/or conclusory assertions are insufficient to withstand a motion for summary judgment. *Felty v. Graves-Humphrey Co.*, 818 F.2d 1126 (4th Cir. 1987). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. *Id.* A factual dispute is genuine if the evidence is such that a reasonable jury could resolve the dispute in favor of the non-moving party. *Id.* The judge is not to weigh the evidence himself but rather to determine if there is a genuine issue for trial. *Id.*

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact but is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Celotex Corp. v. Catrett, supra*. The moving party is under no obligation to negate or disprove matters on which the non-moving party bears the burden of proof at trial. *Id.* Rather, the moving party need only demonstrate that there is an absence of evidence to support the non-moving party's case. *Id.* The burden then shifts to the non-moving party to "designate" specific facts showing "that there is a genuine issue for trial." *Id.* at 324, 106 S.Ct. at 2253, 91 L.Ed.2d at ____ (*quoting* Fed.R.Civ.P. 56(e)). To carry this burden, the party opposing

a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers. *Anderson v. Liberty Lobby, Inc.*, *supra*. The non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Co. v. Zenith Radio Corp.*, *supra* at 586, 106 S.Ct. at 1356, 89 L.Ed.2d at _____. “The mere existence of a scintilla of evidence will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, *supra* 252, 106 S.Ct. at 2512, 91 L.Ed.2d at ____; *see also*, *Ross v. Comm’ns Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985) (“Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes”).

**DOCUMENTS AND MATTERS IN THE RECORD
CONSIDERED BY THE COURT IN RULING ON THE MOTION**

In addition to the applicable law and pleadings on file with this Court, the Court has before it the following documents and matters of record both on file with the Office of the Orangeburg County Clerk of Court and through the official website of the South Carolina Secretary of State for review and consideration in connection with the TICs’ motion for summary judgment:

1. *Commonwealth of Virginia Articles of Organization for Diversified Realty Ventures, LLC* dated June 15, 2004, filed with this Court October 1, 2019;
2. *Commonwealth of Virginia State Corporation Commission Articles of Cancellation of a Virginia Limited Liability Company for Diversified Realty Ventures, LLC* dated February 27, 2013, filed with this Court October 1, 2019;
3. *Affidavit of David C. Humphreys. III. Esq.*, dated September 17, 2019, filed with this Court October 1, 2019;

4. *State of Delaware Articles of Formation for Village Medical Park, LLC* dated July 19, 2016, filed with this Court October 1, 2019; *State of South Carolina Secretary of State Certificate of Authority for Village Medical Park, LLC* dated September 1, 2016, filed with this Court October 1, 2019;
5. *State of South Carolina Secretary of State Certificates of Authority for: Village Medical TIC (1), LLC* dated June 26, 2006; *Village Medical TIC (2), LLC* dated June 26, 2006; *Village Medical TIC (3), LLC* dated June 26, 2006; *Village Medical TIC (4), LLC* dated June 30, 2006; *Village Medical TIC (5), LLC* dated July 13, 2006; *Village Medical TIC (6), LLC* dated July 13, 2006; *Village Medical TIC (7), LLC* dated July 13, 2006; *Village Medical TIC (8), LLC* dated July 13, 2006; *Village Medical TIC (9), LLC* dated July 13, 2006; *Village Medical TIC (10), LLC* dated July 13, 2006; *Village Medical TIC (11), LLC* dated July 13, 2006; *Village Medical TIC (12), LLC* dated July 13, 2006; *Village Medical TIC (13), LLC* dated July 18, 2006; *Village Medical TIC (14), LLC* dated July 18, 2006; *Village Medical TIC (15), LLC* dated July 18, 2006; *Village Medical TIC (16), LLC* dated August 31, 2006; *Village Medical TIC (17), LLC* dated August 31, 2006; *Village Medical TIC (18), LLC* dated August 31, 2006; *Village Medical TIC (19), LLC* dated August 31, 2006; *Village Medical TIC (20), LLC* dated August 31, 2006; *Village Medical TIC (21) LLC* dated August 31, 2006; *Village Medical TIC (22), LLC* dated August 31, 2006; and *Village Medical TIC (23), LLC* dated September 28, 2006;
6. *Plaintiff's Answers to Defendants' First Set of Interrogatories* dated February 21, 2022;
7. *Transcript of the Deposition of Susan Wallace* given March 10, 2022; and,
8. A copy of an Orangeburg County EMS Patient Care Record dated November 20, 2015, for treatment rendered to Doris Wallace (hereinafter referred to as the "EMS Record").

FACTS⁶

All that is now known with regard to the Incident is what is alleged in the Complaint. According to the Complaint, just prior to falling, Wallace had left Palmetto Urology (hereinafter referred to as "Palmetto"), a tenant in a building located on the Premises, and was walking to her car. Wallace claims that she was directed – presumably by someone with Palmetto, though she does not specify exactly by who – to exit the building through a door which is not located near the handicap access to the building. Wallace contends that she fell as she stepped off the curb into the parking lot. Wallace maintains that the curb is unmarked.

Wallace's husband died on September 21, 2020. Wallace died June 21, 2021. There is no claim that Wallace died as a result of her alleged injuries sustained in her alleged November 19, 2015, fall.

ANALYSIS

In order to be held liable in negligence for failure to act, a defendant must have a relationship with the plaintiff recognized by law which provides the foundation for a duty to prevent the plaintiff's injury. *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 644 S.E.2d 43, 46 (2007). "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711, 714 (2003). If there is no duty, the defendant is entitled to a judgment as a matter of law. *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007).

A premises liability action is one sounding in tort. *See Shipes v. Piggly-Wiggly St. Andrews, Inc.*, 269 S.C. 479, 238 S.E.2d 167 (1977). As in any other tort action, in order to prevail, a plaintiff

⁶ Many of the facts herein are for the most part taken from the Complaint. This is not an endorsement of the facts as alleged in the Complaint. Based on the denials in the Answer, Defendants clearly disagree with many of facts alleged by Wallace.

in a premises liability case must establish by a preponderance of the evidence that: (1) the defendant owed the plaintiff a duty, (2) the defendant breached such duty and (3) the defendant's breach of such duty proximately caused the plaintiff damages. *Id.* "A legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large. Without a violation of such a legal duty, there is no negligence." *Byerly v. Conner*, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992)(citation omitted).

Generally speaking, "one who controls the use of property has a duty of care not to harm others by its use." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997). "An owner of land possesses a general duty to warn others of latent hazardous conditions on his land. This duty arises from the owner's superior knowledge of conditions on the premises within his control." *Byerly v. Conner, supra* at 443, 415 S.E.2d at 798.

Where injury is caused by a dangerous or defective condition on the premises of real estate, the decision of whether a person has an affirmative duty to keep the premises in a safe condition or warn of dangers on the premises "depends in general upon his having control of the property." *Dunbar v. Charleston & W.C. Ry. Co.*, 211 S.C. at 216, 44 S.E.2d at 317 (1947). Consequently, "[o]ne who controls the use of property has a duty of care not to harm others by its use." *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing *Dunbar*, 211 S.C. at 216, 44 S.E.2d at 317; *Peden v. Furman Univ.*, 155 S.C. 1, 19, 151 S.E. 907, 913 (1930)).

Under South Carolina law, the duty owed by an owner or occupier of land to one who enters upon his land depends upon such person's classification and status under the law. *See Sims v. Giles*, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001). One who enters upon the land of another is typically classified as either: 1) an invitee; 2) a licensee; 3) an adult trespasser; or 4) a child. *Id.*

“In premises liability cases, the invitee is offered the utmost duty of care by the landowner and a trespasser is generally offered the least.” *Id.* at 715, 541 S.E.2d at 861.

There is no admissible evidence as to how the alleged Incident took place; Wallace cannot rest on the allegations in the Complaint to defeat the TICs’ motion for summary judgment. *See* Rule 56(e), S.C.R.CIV.P. The only people known to have been present at the time of the alleged incident were Wallace and her husband. Neither Wallace nor her husband gave sworn testimony prior to their respective deaths. There are no other known witnesses to the alleged Incident and none have been identified.

The TICs, as the moving parties, bear the initial burden of demonstrating the absence of a genuine issue of material fact. The TICs have no obligation to negate or disprove matters on which Wallace bears the burden of proof at trial. Rather, the TICs need only demonstrate that there is an absence of evidence to support Wallace's case. The TICs have met this burden.

Wallace as the plaintiff in this action must establish by a preponderance of the evidence that the TICs owed her a duty, which they breached proximately causing her damages. *See Shipes v. Piggly-Wiggly St. Andrews, Inc., supra.* Since the TICs have met their burden of demonstrating an absence of evidence to support Wallace's case, the burden has shifted to Wallace to designate specific facts showing that there is a genuine issue for trial. She has failed to meet her burden.

Wallace has provided no admissible evidence as to how the alleged Incident took place. The only evidence she has is the inadmissible hearsay testimony of her daughters, neither of whom witnessed the alleged Incident and, therefore, have no direct personal knowledge of what took place. *See* Rules 602, 801, 802, 803, 804 and 805, S.C.R.EVID. In order to successfully thwart this summary judgment motion, Wallace must come forward with admissible evidence sufficient to meet her burden of proving her case by a preponderance of the evidence; clearly inadmissible

hearsay testimony fails to meet this standard. *See, e.g., Hall v. Fedor*, 349 S.C. 169, 176, 561 S.E.2d 654, ___ (Ct. App. 2002)(“This statement is clearly hearsay and does not fall under any of the hearsay exceptions enumerated in the Rules of Evidence. Therefore, it would be inadmissible evidence at trial and is inadmissible to refute a motion for summary judgment.”); *see also Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003). Wallace cannot rest upon mere allegations in her Complaint in opposition to this motion.

Wallace argues that the EMS Record is sufficient to meet her burden as it establishes a genuine issue for trial. According to Wallace, the following statement contained in EMS Record is evidence on which the jury could reasonably find in her favor “AOS TO FINO PT SITTING ON THE GROUND IN THE PARKING LOT OF DRS OFFICE. . . . PT ADVISED THAT SHE ACCIDENTALLY STEPPED OFF OF THE CURVE AND FELL.” Wallace contends that the foregoing statement in the EMS Record is an exception to the hearsay rule as a statements made for purposes of medical diagnosis or treatment. *See* Rule 803(4), S.C.R.EVID.⁷ Wallace’s reliance on the EMS Record is misplaced.

Whether the statement quoted is “reasonably pertinent to diagnosis or treatment” is, at best questionable. The emergency medical personnel responded to the scene to transport Wallace to the emergency room for medical diagnosis or treatment. What caused Wallace to fall was not really pertinent to her to diagnosis or treatment. Furthermore, no custodial affidavit or other method authenticated was submitted in connection with EMS Record which is not in and of itself self-authenticating. *See* Rules 901 and 902, S.C.R.EVID. To be considered for purpose of defeating a

⁷ Rule 803(4) provides in relevant part: “The following are not excluded by the hearsay rule . . . : Statements made for purposes of medical diagnosis or treatment . . . or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

motion for summary judgment the matter submitted must be admissible into evidence. *See* Rule 56(e).

Moreover, even if admissible, the EMS Record does not establish either breach or proximate cause. The EMS Record does not establish Wallace's classification and status on the Premises at the time of the alleged Incident. Consequently, Wallace cannot establish that the TICs owed her a duty or what that duty was. Thus, Wallace cannot sustain the first element of her cause of action.

The EMS Record does not establish how Wallace fell or what allegedly caused her to fall. In no way does it show that Wallace's alleged fall was caused by a latent or hidden defect upon the Premises or that such defect was not open or obvious. In fact, it does not even establish that Wallace fell while on the Premises. Therefore, Wallace cannot establish that the TICs breached any duty they owed to her. Hence, Wallace cannot sustain the second element of her cause of action as well.

Finally, the EMS Record does not establish what caused Wallace's fall. Thus, Wallace cannot prove that her injuries and damages were proximately caused by a fall as a result of a breach of any duty owed to her by the TICs. Accordingly, Wallace cannot sustain the third element of her cause of action either.

CONCLUSION

Wallace cannot sustain her burden of proof in this action. Consequently, there is no issue of material fact as to the alleged negligence of Defendants, and therefore, the Defendants, are entitled to an entry of judgment dismissing this matter as to them as a matter of law.

NOW, THEREFORE, based on the forgoing, it is hereby ordered adjudged and decreed that Defendants' motion for summary as to all issues of liability is hereby granted and this matter is hereby dismissed with prejudice.

James B. Jackson, Jr., Master-in-Equity
for Orangeburg County

January 9, 2023
Charleston, South Carolina



Orangeburg Common Pleas

Case Caption: Doris J Wallace VS Diversified Realty Ventures, Llc , defendant, et al

Case Number: 2018CP3801460

Type: Order/Summary Judgment

So Ordered

James B. Jackson, Jr. 3077 Master in Equity