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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Edgar Warren Dickson, Circuit Court Judge

Civil Action No. 2020-CP-38-00428
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., Defendants,

Of which McDonald's Corporation, McDonald's Real Estate Company, JKS & K, Inc., and Pam Hampton are Respondents.

FINAL BRIEF OF RESPONDENTS JKS & K, INC. AND PAM HAMPTON

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STATEMENT OF ISSUES ON APPEAL

I. The trial court correctly granted summary judgment to Respondents on the ground that there is not even a scintilla of competent evidence in the record as to how or why Linda Hooker went to the ground on July 28, 2018 and, therefore, the simplest foundation for liability was not, and cannot, be established as to any Respondent.

II. Assuming *arguendo* that the trial court erred in granting summary judgment on the stated grounds, there are multiple additional sustaining ground, any one of which would be sufficient to affirm the trial court's Order granting summary judgment to JKS & K, Inc. and Pam Hampton.

   A. Appellant did not produce any evidence of any alleged defective or dangerous condition that proximately caused Linda Hooker's accident.

   B. Assuming *arguendo* that a dangerous or defective condition existed in the parking lot at the time of the accident, Appellant failed to produce any evidence that either JKS & K, Inc. or Pam Hampton created the condition or that they knew or should have known about the alleged defective condition of the property and failed to remedy same.

   C. Respondent Pam Hampton was merely an employee of the corporation that owned and operated the restaurant where Appellant's accident occurred and, without more, Hampton was entitled to summary judgment.

STATEMENT OF THE CASE

This is a premises liability case. On July 28, 2018, Linda Hooker ("Plaintiff/Appellant") allegedly slipped and fell on a painted striped line in the crosswalk of a parking lot of a McDonald's restaurant business located at 8940 Old Number Six Highway in Orangeburg County, South Carolina.[1] Appellant initiated the lawsuit against McDonald's Corporation, McDonald's Real Estate Company, JKS & K, Inc., and Pam Hampton on March 30, 2020. On October 23, 2020, Appellant amended her Complaint and added Proline Striping Service, Inc. The parties exchanged written discovery and completed the depositions of Linda Hooker's husband Ralph Hooker; her daughter Michelle Foxworth; Pam Hampton; JKS & K, Inc. employee and shift manager at the time of the accident Sherrie Washington; Proline's corporate representative Jared Marr; and Appellant's retained expert, Bryan Durig. The case first appeared on a jury trial roster in Orangeburg County for the week of January 31, 2022.

Motions for summary judgement were filed by all Defendants: McDonald's Corporation on January 11, 2022; McDonald's Real Estate Company on January 11, 2022; JKS & K, Inc. on January 13, 2022; Pam Hampton on January 14, 2022; and Proline Striping Services, Inc. on January 21, 2022. Supporting and opposition memoranda were filed thereafter.

On February 2, 2022, Circuit Court Judge Edgar Dickson heard arguments on all pending motions and, on June 20, 2022, entered an Order granting summary judgment to all Defendants. While multiple arguments were advanced by Defendants in support of their respective summary judgment motions, Judge Dickson ruled simply that there was not even a scintilla of evidence as

[1] Linda Hooker passed away due to complications from cancer in November 2020. Her husband Ralph Hooker was appointed personal representative of her estate by the Calhoun County Probate Court on January 4, 2021. A Motion to Substitute the Estate as the proper party in interest was filed March 12, 2021. Ralph Hooker was added to the caption by Order of this Court dated November 16, 2022.

to how or why Linda Hooker went to the ground on July 28, 2018 and, therefore, all Defendants were entitled to summary judgment.[2]

On June 20, 2022, Appellant filed a Motion to Reconsider Order Granting Summary Judgment. The trial court denied Appellant's Motion in an Order dated June 24, 2022. Appellant filed a Notice of Appeal on July 15, 2022.

On October 28, 2022, Appellant filed a Motion to Dismiss Respondent Proline Striping Services, Inc. as a result of a confidential settlement with same. Appellant's Motion to Dismiss was granted by this Court on November 16, 2022.

STANDARD OF REVIEW

1. Summary Judgment

When reviewing the grant of a motion for summary judgment, the appellate court applies the same standard that applies to the trial court's consideration under Rule 56(c), SCRCP. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008).

Rule 56, SCRCP, "mandates the entry of summary judgment, after adequate time for discovery . . . , against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Baughman v. Am. Tel. & Tel. Co., 305 S.C. 101, 116, 410 S.E.2d 537, 545–46 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). "In such a situation, there can be no 'genuine issue of material fact,'" because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. (citing

[2] In his Order, Judge Dickson specifically acknowledged that "[t]he various Defendants advanced multiple arguments and defenses in support of their respective summary judgment motions. The various arguments and defenses would entail a larger discussion of the facts, witnesses and evidence. However, the Court's decision here is based on a simple commonality of facts regarding the accident occurrence and the lack of evidence to assess liability against any Defendant." (R. 002).

Celotex, 477 U.S. at 322–23).

The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 305 S.C. at 115, 410 S.E.2d at 545 (citing Celotex, 477 U.S. 317; Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990)). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by showing—that is, point out to the trial court—that there is an absence of evidence to support the nonmoving party's case.'" Id. (quoting Celotex, 477 U.S. at 325). The movant "need not 'support its motion with affidavits or other similar materials negating the opponent's claim.'" Id. (quoting Celotex, 477 U.S. at 323).

Once the moving party carries this initial burden, it is incumbent on the party opposing summary judgment "to set forth specific facts showing there is a genuine issue for trial." Id. (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986)). These specific facts must be proffered "by affidavit or other proof." Shupe v. Settle, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994) (citation omitted). Materials submitted to refute a motion for summary judgment must be "those which would be admissible in evidence." Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct. App. 2002) (citing Baughman, 306 S.C. 101, 410 S.E.2d 537) (other citations omitted); see Rule 56(e), SCRCP. "Rule 56(e) specifically prohibits the nonmoving party from resting upon mere allegations or denials of its pleadings." Baughman, 305 S.C. at 115, 410 S.E.2d at 545 (citing SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990)); Rule 56(e), SCRCP. Furthermore, any "conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Shupe, 315 S.C. at 516–17, 445 S.E.2d at 655 (citation omitted).

2. Additional Sustaining Grounds

Pursuant to Rule 220(c) SCACR, this court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. Indeed, this court may rely on additional sustaining grounds "or any other reason appearing in the record to affirm the lower court's judgment." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

FACTS OF THE CASE

A. The Accident

On July 28, 2018, Linda Hooker, her husband Ralph Hooker, and their daughter Michelle Foxworth, stopped at the McDonald's restaurant business in Santee to grab a bite to eat. Mr. Hooker was quite familiar with the restaurant and the parking lot having been there on many prior occasions. (R. p. 157, lines 2-24). It was raining and the parking lot was wet when they pulled into the parking lot. (R. p. 158, line 20-p. 159, line 4; R. p. 170, line 2-7). It continued to rain as Appellant and her family used the painted crosswalk to access the restaurant. (R. p. 159, lines 5-10). None 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. (R. p. 171, lines 6-25; p. 172, lines 1-6).

During the 30 minutes or so that Appellant and her family were in the restaurant, it continued to rain "hard." (R. p. 159, lines 20-23). Once the rain stopped[3], the family members exited the restaurant and started back across the crosswalk. Neither Mr. Hooker nor Foxworth slipped or lost footing in the crosswalk. (R. p. 162, lines 16-17; p. 164, lines 1-7)(R. p. 173, line

[3] While both Ralph Hooker and Michele Foxworth testified under oath that it had stopped raining when the accident occurred, body cam video from a responding officer to the accident scene clearly, and unequivocally, caught Foxworth say "it was raining" when specifically asked how the accident occurred. Later in the same video, Foxworth stated a second time that "it was still raining" when the accident occurred.

14-p. 174, line 17; p. 175, lines 4-6). Notably, Appellant was the only one wearing flip-flop style shoes. (R. p. 163, lines 3-5). Mr. Hooker and Foxworth made it to the other side of the crosswalk when they heard Appellant "holler" behind them. (R. p. 159, lines 16-21; p. 160, line 8-p. 161, line 1). Neither Mr. Hooker nor Foxworth saw the initiation of the fall (*i.e.* what caused Plaintiff to fall). (R. p. 161, line 20-p. 162, line 8; p. 162, lines 13-15; p. 165, lines 7-14)(R. p. 174, lines 11-24). As a result, there are no witnesses who offered testimony as to how or why Plaintiff went to the ground.[4]

B. The Alleged Dangerous/Defective Condition

While there was not a single witness who provided first-hand testimony or evidence that the accident actually happened as alleged in the Complaint, Appellant's theory was that Appellant slipped on the painted lines of the crosswalk due to an alleged lack of slip/skid-resistance. The question then is whether any evidence existed regarding the painted lines in the parking lot at the time of the accident on July 28, 2018. To that end, Appellant retained Dr. Bryan Durig in 2018, and he was eventually deposed on January 20, 2022.

Dr. Durig testified that the entirety of his physical investigation of the subject parking lot involved two separate site visits; the first was some unidentified date in 2018 and the second was on March 5, 2019.[5] As to the first visit, Dr. Durig testified that he was there for 15-20 minutes "just to familiarize myself and look at the painted lines." (R. p. 179, lines 9-24). Dr. Durig took no photographs and conducted no scientific testing of the painted lines. (R. p. 180, lines 19-23). The

[4] While Linda Hooker was alive at the time of the filing of the lawsuit and for seven or eight months thereafter, she did not write any statement, swear to any affidavit, or sit for a deposition to memorialize her testimony. Importantly, the body cam video of the responding officer also did not include any statements from Appellant as to how or why the accident occurred.

[5] Dr. Durig never spoke to Linda Hooker about the accident while she was alive and never spoke with either Mr. Hooker or Foxworth. (R. p. 240, lines 15-23; p. 256, line 25-p. 266, line 12).

parking lot and the painted lines were dry. (R. p. 179, lines 5-7). Remarkably, at the time of the first visit, Dr. Durig did not know where the accident was alleged to have occurred other than generally in the crosswalk. (R. p. 180, lines 13-16).

The second visit was not much different from the first: it lasted 20 minutes; the parking lot and the painted lines were dry; no photographs were taken; no measurements were taken; and "no formal testing of any kind" was performed.[6] (R. p. 184, lines 8-18; p. 185, lines 3-5 and 12-15). In reality, the only thing Dr. Durig did was to visualize the lines and then touch a small section of the painted lines to confirm that the paint did not include any abrasive material. Importantly, Dr. Durig only touched the painted lines in the area of the parking spaces and never touched the painted lines on which Linda Hooker allegedly fell. (R. p. 186, lines 1-20).

Dr. Durig's investigation did not include anything related to Appellant's footwear at the time of the accident. While Dr. Durig admitted that flip-flops can be slippery on a wet floor, he did not conduct any investigation or inspection of Appellant's flip-flops worn at the time of the accident.[7] (R. p. 239, lines 5-25). Dr. Durig conceded that "flip-flops are more slippery than normal – other shoes. So yes, a flip flop would be a contributing factor to a slip-and-fall." (R. p. 239, lines 5-25).

While it was his opinion that the painted lines in the parking lot should have had abrasive material added to the paint, Dr. Durig readily conceded that not all painted lines in parking lots require abrasive material. Dr. Durig admitted that painted concrete and/or asphalt can retain its

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[6] Proline Striping invoices demonstrate that the parking lot was striped on or about April 4, 2018 (before the accident) and on March 2, 2019 (after the accident). Accordingly, Dr. Durig's first site visit occurred before the parking lot was restriped but his second site visit occurred three (3) days after the lot was restriped.

[7] As a reminder, Dr. Durig was first contacted in 2018, closer in time to the accident, and at a time when Linda Hooker was alive. Neither he nor Appellant's lawyers made any effort to have the flip-flops presented for inspection.

surface texture depending on the amount of paint that is applied to the surface. (R. p. 235, line 24-p. 236, line 6). He testified:

> Q. Because if you had, for example, a single layer that still had the texture of the concrete or the asphalt, whatever it's under or on top of, that could potentially impact the slip resistance?
>
> A. It could potentially do that. Yes.

(R. p. 254, lines 6-10). Remarkably, Dr. Durig conceded that the painted lines in his own office parking lot did not have any abrasive material because: "Don't need to because it's got enough texturing from the surface underneath." (R. p. 260, lines 17-18). Dr. Durig could not point to a single ordinance, code or universal industry standard that required abrasive materials in painted parking lot lines or, more importantly, specified a minimum level of slip resistance of a painted parking lot line. (R. p. 224, lines 4-8; p. 226, lines 3-12).

While the central issue in the case was whether the painted lines were in a dangerous or defective condition at the time of the accident, Dr. Durig admitted that he never conducted any slip/skid resistance testing of any of the painted lines, much less the line(s) on which Linda Hooker allegedly slipped. (R. p. 188, lines 20-23; p. 255, lines 21-23). Dr. Durig admitted that he could not state the amount or thickness of the paint on the parking lot crosswalk at the time of the accident. (R. p. 254, line 18-p. 255, line 5). The significant deficiency of Dr. Durig's alleged "expert" opinion was demonstrated in the following exchange:

> Q. But you would agree with me that if the painted surface had a sufficient coefficient of friction, it would not need abrasive material?
>
> A. Correct. And you would feel that. If you put your hand over brushed concrete with a single layer of paint, you still feel the texturing of the underlying material. When its smooth, that's physically showing you that texturing is not coming through the paint layers.
>
> Q. I understand. But you didn't test that line [the line on which Plaintiff allegedly slipped] to determine whether – or how slippery it was.

A. Correct. I've told you that.

….

Q. And the reason for the abrasive material is…

A. To increase the coefficient of friction because a smooth painted surface is slippery when wet.

Q. Right, But you didn't test to determine whether, in fact, it [the line on which Plaintiff allegedly slipped] was in this circumstance.

A. Correct.

(R. p. 258, lines 6-18; p. 259, lines 17-23). Finally, as for his opinion in the case, Dr. Durig testified quite simply:

Q. What I understand you are offering as an opinion is that whatever paint was used should have included some kind of abrasive material. Is that fair?

A. Yes.

Q. And then, obviously, the person or the entity responsible would be whoever put the paint on the surface of the parking lot, right? Is that fair?

A. Yes.

(R. p. 252, line 19-p. 253, line 2). Dr. Durig did not offer any testimony or opinions that any of the alleged restaurant-related entities would have, or should have, known about any alleged slipperiness of the painted lines at the time of the accident.[8]

C. Ownership, Possession, Control of the Premises

JKS & K, Inc. purchased the restaurant business in 2016 and was the independent owner operator of the restaurant business at the time of the accident operating under a franchise agreement

[8] Additionally, there is absolutely no evidence in the record that any restaurant-related entity or employee had any actual or constructive notice or actual knowledge of any alleged slipperiness of the painted parking lot lines.

with McDonald's USA, LLC. This is uncontradicted in the record.

It is also uncontradicted that JKS & K, Inc. hired Proline to paint the lines in the restaurant parking lot. (R. p. 265, lines 8-17). While JKS & K, Inc. selected the painting contractor, it is uncontradicted that JKS & K, Inc. did not have any input in Proline's selection of paint and did not direct Proline's work at the restaurant. (R. p. 265, lines 1-24). It is uncontradicted that neither McDonald's Corporation nor McDonalds' Real Estate Company selected the painting contractor nor directed when the parking lot would be striped. Indeed, Proline's principal Jared Marr confirmed that Proline had never had any contact with McDonald's Corporation or McDonald's Real Estate Company regarding its work at the restaurant. (R. p. 265, lines 8-12).

While JKS & K, Inc. employed Defendant Pamela Hampton as the general manager/store manager, Hampton was not at the store at the time of the accident. (R. p. 270, lines 14-19; p. 271, lines 2-5). Still, Hampton testified that there had been no incidents or accidents related to the restaurant's striped parking lot lines prior to the date of Plaintiff's accident. (R. p. 268, lines 16-18). Similarly, Sherrie Washington, who was employed by JKS & K as the shift manager on duty at the time of the accident, testified that she was not aware of any other falls in the parking lot area of the restaurant during her time employed there. (R. p. 274, lines 21-24). There simply is no evidence that <u>any</u> Defendant had any notice or knowledge of any alleged defective condition of the painted lines in the parking lot, at any time, prior to Appellant's accident.

Regarding inspections of the exterior of the restaurant prior to the accident, Hampton offered testimony as to how JKS & K, Inc. employees regularly walked around the exterior of the restaurant every 30 minutes to an hour. (R. p. 269, lines 5-21). There is no evidence that any JKS & K, Inc. employee ever found the painted lines in the parking lot to be slippery or in any way hazardous to customers. Appellant did not offer any expert testimony that the manner in which

JKS & K, Inc. inspected and/or maintained its property was deficient in any manner or breached any standard of care.

RESPONDENTS' ARGUMENT

The trial court correctly granted summary judgment to all Respondents because Appellant failed to produce any competent evidence of how or why Linda Hooker went to the ground on July 28, 2018. While the trial court was laser-focused on a singular issue to grant summary judgment, the record is replete with additional; sustaining grounds to affirm the trial court's Order. Perhaps most importantly, Appellant failed to produce any competent evidence that the parking lot was in any defective or dangerous condition at the time of Linda Hooker's accident. Additionally, in the event that a defective or dangerous condition existed, which was and is specifically denied, Appellant failed to produce any competent evidence that any Respondent had any actual or constructive notice or knowledge of the allegedly defective condition. Accordingly, Respondents were entitled to summary judgment and the trial court's Order granting same should be affirmed.[9]

I. The trial court correctly granted summary judgment on the ground that there was not even a scintilla of competent evidence in the record as to how or why Linda Hooker went to the ground on July 28, 2018 and, therefore, the simplest foundation for liability was not, and cannot, be established as to any Respondent.

The trial court's Order granting summary judgment was singularly focused on the accident occurrence and the lack of even a scintilla of evidence of how or why Linda Hooker went to the ground. Since there was neither direct nor circumstantial evidence on the issue, the trial court correctly granted summary judgement and the Order should be affirmed.

A. No direct evidence.

First, there was no direct evidence of how or why Linda Hooker went to the ground. It is

[9] The arguments that follow are equally applicable to all Respondents and would warrant affirmance of the Order granting summary judgment for all.

undisputed that not a single witness saw the initiation of her fall or what she may, or may not, have slipped on, if at all.[10] Of course, the simple fact that Appellant fell to the ground within the crosswalk is not evidence of any dangerous or defective condition or any negligence on the part of anyone. It is axiomatic that South Carolina does not recognize the doctrine of *res ipsa loquitur* and Appellant may not use the simple fact of the fall itself to establish actionable negligence of any Defendant. Hunter v. Dixie Home Stores, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957).

Appellant argues that Ralph Hooker identified a "smear" on the ground that he connected to Appellant's fall. However, Ralph Hooker specifically conceded that he did not see the start of Appellant's fall. In reality, Ralph Hooker did not see any of the fall, just the aftermath:

Q. All right. And so you look, and you look behind you; is that right?

A. That's right.

Q. And what did you see then?

A. I see her on the ground, and she was in a lot of pain. And my daughter was over her.

Q. Okay. So when you look around, your wife is on the ground, correct?

A. Right.

(R. p. 161, line 20-p. 162, line 3).[11] Accordingly, the "smear" cannot possibly be considered direct evidence as not even Ralph Hooker can say that the "smear" came either from Linda Hooker's flip flops or that the "smear" was even part of the fall at all. At best, the testimony is speculative and conjectural, neither of which would be sufficient evidence to support a verdict and certainly not sufficient to withstand summary judgment. Tallon v. Seaboard Coast Line R. Co. 270 S.C. 362,

[10] There is always the possibility that Linda Hooker mis-stepped on, or in, her flip flops or tripped over her own feet.

[11] To the extent that Appellant states or argues that Ralph Hooker saw his wife "in the process of falling", such representation would be incorrect.

365, 242 S.E.2d 418, 420 (1978)("Verdicts are not allowed to rest on conjecture or speculation.").

B. No indirect, or circumstantial evidence.

There is equally no circumstantial or indirect evidence as to how or why Linda Hooker went to the ground. "Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact." Moriarity v. Garden Sanctuary Church of God, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000)(quoting State v. Needs, 333 S.C. 134, 156 n. 13, 508 S.E.2d 857, 868 n. 13 (1998)). Importantly, "[w]here circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). Here, there simply is no circumstantial evidence of how or why Linda Hooker went to the ground.

Appellant's arguments center on essentially three alleged pieces of evidence, none of which provide proof of how or why Linda Hooker went to the ground. The first is the "smear" identified by Ralph Hooker. Importantly, Ralph Hooker never testified that the "smear" was found on an allegedly defective, slippery painted line. Since he did not see any part of Linda Hooker's fall, it was, and will always be, pure speculation as to whether the "smear" was in any way connected to the fall. Absolutely no foundation was, or can be, established to connect the "smear" to Appellant's flip flops. At best, the "smear" evidence is speculative and conjectural and not worthy of defeating summary judgment.

The second and third alleged pieces of evidence are interrelated. Appellant argues that Linda Hooker fell completely within the painted crosswalk and that, after the accident, Michelle Foxworth told responding police officials that she slipped on one section of the crosswalk (while watching EMTs attend to her mother). However, none of this evidence establishes any proof of

how or why Linda Hooker went to the ground in the first instance. At best, the fact that Linda Hooker fell within the crosswalk only establishes where the accident occurred – not how or why. As for the claim that Michelle Foxworth allegedly slipped, after the accident, there is absolutely no evidence that Foxworth slipped on anything that Linda Hooker may have experienced. Perhaps the most contradictory and definitive evidence is the fact that all three walked through the same crosswalk, in rainy and wet conditions, without incident to enter the restaurant. And, thereafter, two of three of the group successfully retraced their path through the same crosswalk without incident. The only one who did not was wearing flip flops which, by Appellant's own expert's testimony, was likely to be more slippery and subject to loss of traction than any other.

The short of the matter is that none of the alleged circumstantial evidence proffered by Appellant arises to anything more than rank speculation or, at best, one of a myriad of possibilities that might have led to Linda Hooker hitting the ground. "If a possibility is no more likely than any of the other endless numbers of possibilities, a jury would be left with nothing more than rank conjecture or speculation on which to base a liability determination." Tallon v. Seaboard Coast Line R. Co. 270 S.C. 362, 365, 242 S.E.2d 418, 420 (1978)("Verdicts are not allowed to rest on conjecture or speculation.") Accordingly, the trial court correctly granted summary judgement and its decision should be affirmed here.

II. Assuming *arguendo* that the trial court erred in granting summary judgment on the stated grounds, there are multiple additional sustaining grounds, any one of which would be sufficient to affirm the trial court's Order granting summary judgment to Respondents.

While the trial court correctly granted summary judgment on the absence of even a scintilla of evidence of how and why Linda Hooker fell, even if the trial court erred in this regard, the simple fact that she fell in or on the painted crosswalk does not establish liability against any of the Respondents here. Indeed, simply establishing evidence that Linda Hooker may have slipped

on a painted line does not establish proof of liability as to any Respondent. While the trial court did not reach the following additional sustaining arguments, it is clear that any one of them would be sufficient to sustain summary judgment.

A. Appellant did not produce any evidence of any alleged defective or dangerous condition that proximately caused Linda Hooker's accident.

This is a premises liability case. It is fundamental that a landowner has a "general duty to warn others of latent hazardous conditions on his land" which "arises from the owner's superior knowledge of conditions on the premises within his control." Byerly v. Connor, 307 S.C. 441, 443, 415 S.E.2d 796, 798 (1992). While a merchant is not an insurer of the safety of its customer, the merchant owes a duty to exercise ordinary care to keep the premises in a reasonably safe condition. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). As to an invitee, the merchant "owes a duty of care to discover risks and to warn of or eliminate foreseeable unreasonable risks." Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994).

To recover damages for injuries caused by a dangerous or defective condition on a merchant's premises, a plaintiff must show either (1) that the injury was caused by a specific act of the merchant which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). At its core, a premises liability case requires proof of a dangerous or defective condition on the property. Here, there simply is no evidence of any dangerous or defective condition existing at the time of Linda Hooker's accident and, therefore, the trial court correctly granted summary judgment to Respondents.

The entirety of Appellant's case rests on whether the painted lines in the crosswalk of the parking lot were slip resistant at the time of Linda Hooker's accident.[12] Stated differently, if the painted lines were slip resistant at the time of the accident, then no defective or dangerous condition would have existed and no liability would attach. Fatal to Appellant's case is the absence of even a scintilla of evidence that the painted lines were in a defective and/or dangerous condition at the time of the accident.

First and foremost, the simple fact that Linda Hooker fell to the ground within the crosswalk is not evidence of any dangerous or defective condition or any negligence on the part of anyone. As discussed hereinabove, South Carolina does not recognize the doctrine of *res ipsa loquitur* and Appellant may not use the fact that a fall occurred to establish the negligence of any Respondent. Hunter v. Dixie Home Stores, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957). To the contrary, there is substantial evidence that others, including Linda Hooker and her family members, experienced the wet painted lines in the crosswalk going into the restaurant in the rain without any difficulty and that both Mr. Hooker and Foxworth crossed over a second time upon departure, also without difficulty. Consequentially, the simple fact that Linda Hooker went to the ground in the crosswalk does not, in and of itself, constitute evidence of any dangerous or defective condition or any negligence on the part of any Respondent.

The question then is what evidence was there that the crosswalk was in a defective or dangerous condition at the time of the accident. There can be no doubt that a walkway's slip resistance is the proper subject of expert testimony. Indeed, Appellant's expert Dr. Durig has been involved in countless numbers of slip-and-fall accidents and has been called upon to conduct formal, scientific slip resistance testing of various floor surfaces. However, for some inexplicable

[12] "Slip resistance" and "skid resistance" are used interchangeably herein.

reason, Dr. Durig did not conduct any coefficient of friction testing of any aspect of the subject parking lot, much less the lines on which Linda Hooker allegedly slipped. He repeatedly admitted that he did not test the coefficient of friction of any of the painted lines in the parking lot and, therefore, cannot state whether they were skid resistant or not. Since Appellant's own retained expert cannot offer an opinion that the painted lines were not skid resistant at the time of the accident, Appellant's case fails as a matter of law and summary judgment was appropriately granted to Respondents.

While there is no evidence of the skid resistance of the painted lines at the time of the accident, Dr. Durig boldly opined that the painted lines should have included an abrasive material. Talk about putting the cart before the horse. Dr. Durig readily admitted that painted parking lot lines are not required to have an abrasive material; in fact, the painted lines in his own office parking lot do not include any abrasive materials. Instead, abrasive materials are only required if the painted lines are not slip resistant. But Dr. Durig cannot, and will not, offer an opinion that the painted lines were not slip resistant at the time of the accident. After all, he did not conduct a single scientifically-accepted coefficient of friction test of any painted line surface, much less the painted line(s) on which Linda Hooker allegedly slipped.[13] The following testimony of Dr. Durig is most instructive here:

> Q. But you would agree with me that if the painted surface had a sufficient coefficient of friction, it would not need abrasive material?
>
> A. Correct. And you would feel that. If you put your hand over brushed concrete with a single layer of paint, you still feel the texturing of the underlying material. When its smooth, that's physically showing you that texturing is not coming through the paint layers.

[13] Perhaps most concerning is that Dr. Durig never visualized or felt the painted lines when wet. Both of his visits to the parking lot occurred in dry conditions. Dr. Durig never applied any water to the lines to get a sense of how they felt to the touch when wet. Even his decidedly unscientific sensual investigation did not replicate the simplest of conditions existing at the time of the accident.

> Q. I understand. But you didn't test that line [the line on which Plaintiff allegedly slipped] to determine whether – or how slippery it was.
>
> A. Correct. I've told you that.
>
> ….
>
> Q. And the reason for the abrasive material is…
>
> A. To increase the coefficient of friction because a smooth painted surface is slippery when wet.
>
> Q. Right, But you didn't test to determine whether, in fact, it [the line on which Plaintiff allegedly slipped] was in this circumstance.
>
> A. Correct.

(R. p. 258, lines 6-18; p. 259, lines 17-23). Simply stated, Appellant failed to produce even a scintilla of evidence that the painted lines were in a defective and/or dangerous condition at the time of the accident and, therefore, Respondents were entitled to summary judgment and the trial court's order granting same should be affirmed.

B. Assuming *arguendo* that a dangerous or defective condition existed in the parking lot at the time of the accident, Appellant failed to produce any evidence that any Respondent created the condition or that any Respondent knew or should have known about the alleged defective condition of the property and failed to remedy same.

While the preceding section outlines the complete absence of evidence of any dangerous or defective condition at the time of the accident, if for some reason the court finds a scintilla of evidence of same, the record is equally clear and uncontradicted that none of the remaining Respondents created the condition and none had any notice or knowledge of the condition prior to Linda Hooker's accident.[14] Consequentially, Respondents would be entitled to summary judgment

[14] Respondent Proline Striping Service, Inc. caused the lines to be placed on the parking lot surface but, following the filing of this appeal, it settled with Appellant and has been dismissed from the case.

on this additional sustaining ground. As stated hereinabove, to recover damages for injuries caused by a dangerous or defective condition on a merchant's premises, a plaintiff must show either (1) that the injury was caused by a specific act of the merchant which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). Thankfully, it will not take long to cover these topics.

It is uncontradicted that outside of selecting the painting contractor, JKS & K, Inc. had absolutely nothing to do with the lines painted in its parking lot. It did not select the paint; it did not apply the paint; and it did not supervise the painting process. There simply is no evidence that JKS & K, Inc. created the allegedly dangerous condition. Of course, none of the other Respondents had anything to do with the painting contractor or the painting of the parking lot.

The record is equally devoid of any evidence that any Respondent had any actual or constructive, notice or knowledge, of any alleged problems with the painted lines prior to Linda Hooker's accident. There is no evidence that any patron ever reported any problems with painted lines in the parking lot, much less any evidence of any other incidents or accidents occurring from an alleged encounter with the painted lines. There is no evidence that any employee ever reported any trouble, difficulty or problem with the painted lines, in dry or wet conditions. Plaintiff has not identified any experts to offer any testimony that the manner in which JKS & K. Inc. inspected and/or maintained its property was deficient in any manner or breached any standard of care. Where is the notice? Where is the knowledge? The evidence is nonexistent and, therefore, not even a scintilla of evidence exists of the notice/knowledge requirement and Respondents would still be entitled to summary judgment on this additional sustaining ground. Accordingly, the trial judge's Order should be affirmed.

C. As an additional sustaining ground, Respondent Pam Hampton was merely an employee of the corporation that owned and operated the restaurant where Appellant's accident occurred and, without more, Hampton was entitled to summary judgment.

Generally speaking, South Carolina law limits the liability of corporate officers or directors for actions of the corporation. Hunt v. Rabon, 275 S.C. 475, 272 S.E.2d 643 (1980). In Rabon, the South Carolina Supreme Court quoted with approval 19 C.J.S. Corporations § 845 – Torts which states:

> A director, officer or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in which he has participated or which he has authorized or directed.

Id. S.C. at 478, S.E.2d at 644. Here, it is undisputed that Hampton was neither a director nor officer of JKS & K, Inc. Accordingly, the trial court's Order granting summary judgment may be affirmed on this additional sustaining ground. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

Even if somehow the rule in Rabon applied to an employee serving as a general manager of a restaurant, there was no evidence that Hampton participated in, authorized or directed the painting of the parking lot lines at the restaurant. Additionally, there was no evidence that she had any actual or constructive notice or knowledge of any alleged dangerous condition of the painted lines in the parking lot. Finally, Appellant offered no expert testimony that Hampton breached any standard of care in her role as general manager of the restaurant business. Accordingly, Hampton would be afforded and entitled to the shield of the corporate structure and, therefore, was entitled to summary judgment. The trial court's Order granting same should be affirmed.

CONCLUSION

Based on the foregoing, JKS & K, Inc. and Pam Hampton respectfully request this Court affirm the trial court's Order granting summary judgment to them.

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Respectfully submitted,

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Dated: March 16, 2023

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable Edgar Warren Dickson
Circuit Court Judge

Court of Appeals Case No. 2022-000981
Trial Court Case No. 2020-CP-38-00428

Linda Hooker, Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(B), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents JKS & K, Inc. and Pam Hampton upon Appellant by way of email and U.S. Mail, stamped First Class delivery, on March 16, 2023, addressed to Appellant's attorneys of record as follows:

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