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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Honorable R. Ferrell Cothran, Jr. Judge, Third Judicial Circuit

Civil Action 2019-CP-07-00554

Nicholas Sanfilippo..... Appellants,

v.

Estate at Westbury Horizontal Property Regime aka Respondents.

Estate at Westbury Owners Association High Tide Associates

INITIAL BRIEF OF APPELLANT

Dated: May 17, 2023
Hilton Head Island, SC 29938

Gary Coggin
Coggin Law Office
P.O. Box 7092
Hilton head Island, SC 29938

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Beaufort, SC 29907-0040

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
NICHOLAS SANFILIPPO,)
)
Plaintiff,)
)
v.)
)
ESTATE AT WESTBURY &)
HIGH TIDE ASSOCIATES,)
)
Defendants.)

COURT OF COMMON PLEAS
CASE NO.: 2019-CP-07-00554

Plaintiff's Motion to File Out of Time
Appellate Case No. 2022-001554

TO: The Honorable Jenny Abbott Kitchens, Clerk of the South Carolina Court of Appeals:

COMES NOW the Plaintiff Nicholas Sanfilippo and by and through his undersigned Attorney Motions this Court of Appeals for an ORDER TO FILE OUT OF TIME the Appeal of Nicholas Sanfilippo v. Estate at Westbury & High Tide Associates, Appellate Case No. 2022-001554.

Plaintiff further states that on May 17, 2023 at 15:23 he emailed said APPEAL OF ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT. Unfortunately, the email was sent to CTAPPFILING@SCCOURTS not CGTAPPFILINGS@SCCOURTS. (I am enclosing the Scan TX Report wherein No. 970 is marked. Strangely the submission result was marked OK and there was no return.)

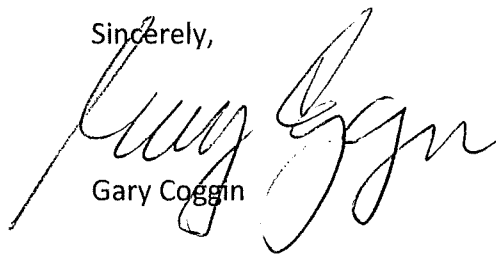
In any case, I request that you accept this Plaintiff's MOTION TO FILE OUT OF TIME.

Enclosed is the following:

1. Plaintiff's Motion to File Out of Time,
2. Plaintiff's Appeal of the Order Granting Summary Judgment (initial brief),
3. Footnotes and Certificates of Service,
4. Copy of Scan Report of May 17, 2023 email to the Appellate Court
5. Certificate of Service to Honorable Jenny Abbott Kitchings
6. Cover letter to the Honorable Jenny Abbott Kitchens
7. Certificate of Service to opposite Attorney Akers,
8. Cover Letter to Akers

Thank you for your help and consideration in this matter. By copy of this Motion, I am serving a copy of th enclosures upon opposite Counsel of record.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Coggin", written over the printed name.

Gary Coggin

Enclosures
Via email and US Mail

Copy: Attorney Nathan Akers

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
)
 NICHOLAS SANFILIPPO,)
)
 Plaintiff,)
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)
 v.)
)
)
 ESTATE AT WESTBURY &)
 HIGH TIDE ASSOCIATES,)
)
)
 Defendants.)

COURT OF COMMON PLEAS
 CASE NO.: 2019-CP-07-00554

Plaintiff's Appeal of Order
 Granting Summary Judgment
 to Defendant

COMES NOW the Plaintiff Nicholas Sanfilippo and by and through his undersigned counsel and pursuant to Rule 59(e) of the South Carolina Rules of Civil procedure and the Common Law of South Carolina, appeals to this Court to reconsider, amend and alter the Order of the Court of Common Please entered on August 16, 2022 granting the Defendant's Motion for Summary Judgment against the Plaintiff Nicholas Sanfilippo.

Background of the Complaint

During mid-morning of October 26, 2017 Mr. Nicholas Sanfilippo, a seventy-five year old septegenarian, was taking a walk on the common area sidewalk near his leased apartment in the 1000 building in the Estate a Westbury in Bluffton, South Carolina. The day was clear and bright and Sanfilippo was walking at an easy pace. Suddenly, the Plaintiff's left toe hit an elevation in a segment of concrete upon which he was walking and he pitched heavily forward onto the concrete on his face, arms, hands and knees. As he has testified in deposition, Sanfilippo knew his left knee was injured because of the immediate and excruciating pain that

he experienced in the aftermath of the fall.

Shortly thereafter, Mr. Sanfilippo was taken to the emergency room at the Hilton Head Hospital. There, he was examined by an emergency physician who diagnosed that he had suffered a fracture of his left patella. This diagnosis was confirmed by a radiologist who, after x-rays and scans, said that Mr. Sanfilippo had suffered a three piece, "Y" shaped, comminuted fracture of his left patella.

Following diagnosis, his left knee was bound and cast and Mr. Sanfilippo was discharged from the hospital into the custody of his wife the same day as his accident. Afterwards, there was intensive rehabilitation and physical therapy for several months. In addition, he was in a wheel chair for four months. This was followed by the use of a walker for three months and crutches for two months. Thereafter, Mr. Sanfilippo then graduated to the use of a cane which he still carries to this day.

In addition, Nicholas has experienced other related problems. First, there has been the bouts of depression and a sense of hopelessness which he began to experience shortly after his fall. Fortunately, these experiences have lessened with the healing of his knee and today are, more-or-less bi-weekly events.

Of more concern to Mr. Sanfilippo is the physical aftermath of his injury. He has, for example, had to undergo two rounds of dialysis. Mr. Sanfilippo states that these "blood" problems somehow came about as a reaction to the drugs he was administered to alleviate the pain he experienced in his knees. Nicholas is assured that this matter is being closely watched and should not present any difficulty in the future. Finally, Mr. Sanfilippo reports of creaking and rubbing noises coming from his knees when he walks.

Appeal

This appeal, filed on behalf of the Plaintiff Nicholas Sanfilippo pursuant to Rule 52(b) South Carolina Rules of Civil Procedure (SCRCP), seeks an Order altering or amending the ruling of the Court below. It is based on the pleadings, submissions, documents, depositions of the case, case law, hearings and errors and omissions in the factual finding and conclusions of law upon which this Court relied in granting this herein complained of ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

1. **In the complaint Sanfilippo v. Estate at Westbury and High Tide Associates, the Plaintiff was mischaracterized by the Defendants as a licensee. To the contrary, at all times during this claim the Plaintiff had a status analogous to that of an invitee while in the common area of the Estate at Westbury.**

Throughout the lengthy litigation of Sanfilippo v. the Estate at Westbury and High Tide Associates, Defendants' numerous counsels have consistently and perhaps deliberately mischaracterized Plaintiff Nicholas Sanfilippo as a "licensee" while he was within the curtilage of the Estate at Westbury. With the labeling of Sanfilippo as a licensee, the Defendants have made much of the fact that, in their view, the Plaintiff was on the land by virtue of the possessor's consent and, accordingly, the Defendants' only duty to the Plaintiff was to,

- (a) To use reasonable care to discover him and avoid injury to him In his activities upon the land;
- (b) To use reasonable care to warn him of concealed dangerous conditions and or dangerous activities on the property 1

In classifying the Plaintiff as a licensee, the Defendants have conveniently ignored the fact that the Plaintiff, as a lessee of unit 1001 of the Estate at Westbury was, under the settled law of this jurisdiction, entitled to and should have been able to enjoy all the possessory rights,

common area rights, privileges and protections of the lessor/property owner Angelo Pinto from whom he had leased unit 1001 in the Estate for six years. In support of this, please look to Section 27-31-120 of the S.C. Code of the Horizontal Property Act which requires that “[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements both general and limited to the apartment.”²

Moreover, in addition to the above and perhaps overlooked by the Defendant, is the fact that the Plaintiff also had the status of a tenant on the property under the statutory protections of the South Carolina Residential Land Lord and Tenant Act (RLTA), particularly Section 27-40-440(a) of the Act which requires that the Defendants to keep all common areas of the premises in a fit and habitable condition for lessors/tenants like the Plaintiff.³ (Also important to this claim is that pursuant Code 27-40-610(b)(4) of the Act the tenant may recover actual damages for any noncompliance by the landlord of his statutory duties).⁴

With the above said, and given his lessee/tenant/invitee status at the Estate, it should be obvious to the Court that the Plaintiff should not have been saddled with the status of a licensee. Rather, according to Professor Robert Felix who obviously agrees with this analysis, Mr. Sanfilippo’s status in the community of the Estate at Westbury was equivalent of an invitee and, as such, he should be afforded the rights and privileges of an invitee by this Court. 5, 6

If, following Professor Felix’ directive, the Plaintiff’s status herein is most likely of an invitee, then the Estate at Westbury and High Tide Associates had a duty of due care to the Plaintiff to discover risks and take safety precautions to warn of and eliminate unreasonable risks.⁷

2. The Plaintiff’s status in the common area of the Estate at Westbury was that of an Invitee.

Defendant's labeling of Plaintiff Sanfilippo as a licensee is clearly wrong. It follows for the purposes of the claim herein, that the Plaintiff must be afforded the status of an invitee when he was in on or about the common areas of the Estate at Westbury.

In support of this argument, please be aware that, traditionally, regarding the condition of a leased premises, the lessor / landlord did not have a duty of due care to ensure that the premises was safe.⁸ As such, according to the common law, a lessor of land was not liable to his lessee or to anyone else on the land for physical harm caused by any dangerous condition(s) which existed when the lessee took possession of the property (or that may even have occurred after the lessee took possession).⁹

Under the South Carolina Residential Landlord and Tenant Act (SCRLTA), there are exceptions to this rule. One of these exceptions exists where, such as herein, the lessor maintains control over the common area of the property. For example, pursuant to the SCRLTA, Section 27-40-440(a)(2), the landlord is required to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition."¹⁰ Further to this, Section 27-40-440(a)(3) of the Act admonishes the landlord to "keep all common areas of the premises in a reasonably safe condition"¹¹ Also worth noting is the fact that, under the act, either the EAS and/or HTA can be liable for breach of duty of care even if the duty has been delegated to a third party.¹²

South Carolina courts recognize this common area exception as articulated in Section 27-40-440 et al and hold that lessors have a duty to use due care to maintain common areas when, such as here at hand, they retain control of the outside common area—thereby

classifying tenants as invitees when the tenant is in a common area. Landowners' Duty to Guests of Invitees and Tenants: Vogt Murraywood Swim & Racquet Club and Goode v. St. Stephens United Methodist Church, South Carolina Law Review. V. 57:387.

In consideration of all of the above, it should be obvious that, as a leaseholder at the Estate at Westbury, the Plaintiff enjoyed all the rights and privileges of the owner of condominium unit 1001.¹³ This included the owner's possessory interest in having clean and safe common areas of the estate.¹⁴ Similarly, the landlord had the duty of due care to discover risks and take safety precautions to warn or and eliminate any unreasonable risks.¹⁵

Also, where, as herein instantly, the Plaintiff had an age handicap that was known by the Defendants, the degree of care extended to Nicholas Sanfilippo must be commensurate with the circumstances involved, including the age and capacity of the Plaintiff. This is an affirmative duty and includes the refraining from any act that would render the walkway more dangerous and result in injury.¹⁶

Further to this argument that Sanfilippo's status at the Estate at Westbury was that of an invitee rather than that a licensee, a comparison of a lease and license may be instructive. A lease, by statute and settled law, is an agreement between the lessor (owner) and lessee (tenant) whereby the owner's possessory interest in the property including the common area, is transferred to the lessee for a period of time and for an agreed consideration. Section 27-31-120 S.C. Code of Laws, the Horizontal Property Act, further defines this transaction, the most important part of which, for our purposes, is the lessee's entitlement to the lessor's share of the common area, to wit, "Any conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner in the common elements." A party

that acquires an interest in property via a lease is a "lessee." An invitee is on the property for the benefit of the owner/landlord and is entitled to a duty of due care.¹⁷

3. Absent negligence the lessor has no liability to a licensee. A Plaintiff in a negligence action may recover damages if the Plaintiff's negligence is not greater than Defendant's.¹⁸

On the other hand, a licensee is one who must seek permission (license), either express or implied, to enter upon a property owned by another. In addition, the licensee enters the property for his own benefit and at the sufferance of the owner or tenant and/or lessee. In any event, the possessor of the property is under no obligation to make the premises safe for the licensee and only has to use reasonable care to warn him of any dangerous conditions and risks on the premises which are known to the possessor.¹⁹ The licensee must accept the premises as it is presented and, as he is on the property for his own purposes, he is owed a duty of less than due care for the time he is on the property.²⁰

Finally, a license is, by nature and definition, a temporary designation and is given the rights and protections afforded a visitor to the property who is there for his own purposes and for his own benefit.²¹

- 4. Conflicting evidence as to the question of whether one is a licensee or an invitee on the property is a question of fact for the jury.**
- 5. Whether the Defendants breached their duty of care to the Plaintiff under the common law is a question of fact for the jury.**
- 6. Whether the condition of the sidewalk where the Plaintiff tripped and fell was a latent dangerous condition is a question of fact for the jury.**
- 7. The Defendant's argument to the Court that the Plaintiff was a licensee was not supported by affidavits, evidence, deposition testimony, witness testimony or case law and should be denied by the Court.**

8. The Defendant's claim that the condition of the sidewalk where the Plaintiff tripped and fell was "open and obvious" was not supported by photographic evidence, expert testimony, measurements or witness testimony and should be denied by the Court.
9. Whether the condition of the sidewalk where the Plaintiff tripped and fell was an open and obvious condition is question of fact for the jury.

Open and Obvious

The Defendants have claimed that the condition of the sidewalk where the Plaintiff tripped and fell was open and obvious and that liability for the same should be denied. The Plaintiffs deny this assertion and state that in the case at hand there is ample evidence that the landlord and the management company had been warned, as per the "wheel chair accident"²² and the subsequent remedial proposal²³ by MAJ Concrete, that the uneven concrete edges in the walkways in the estate at Westbury posed a dangerous condition to pedestrians. Business and property owners are liable for open and obvious conditions if, whether by notice or previous incidents, they anticipated that the Plaintiff would encounter the condition and be injured. Callander v. Charleston Donut Company, 305 S.C. 123; 406 S.E. 2d 361, 362 (1991). (An owner may be required to warn or take other reasonable steps to protect if the possessor has reason to expect that [Plaintiff's] attention may be distracted, or that he will not discover what is obvious)Id.²⁴ An example of this argument is found in Creech Wildlife and Marine Resources, 328 S.C. 24, 491 S.E.2d 571 (1997). In Creech, the Plaintiff argued that the county had been given written notice of the dock's dangerous condition and that "even assuming the danger was open and obvious, [the] county should have anticipated and prevented the harm despite such knowledge or obviousness."²⁵ Similarly, in Hancock v. Mid-South Management Company, 381 S.C. 326, 673 S.E. 2d 801, 803 (2009), our Supreme Court opined that, despite

the open and obvious disrepair of the public parking lot, a jury could determine that the owner should have anticipated that such a condition could cause someone to fall and injure themselves.²⁶ Even where a defect is “obvious” there may still be a duty to repair or warn if it is foreseeable that the invitee will nevertheless encounter the defective condition.²⁷ Further, be aware that, at the time of the accident, the Plaintiff was in his mid 70’s – a disability according to the ADA.²⁸ (Again, please note the Plaintiff was afforded handicap parking at the Estate). Obviously, the Estates and High Tide Associates were aware of his disability. Also, instructive here is Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E.2d 129; Frankel v Kurtz, 269 F. Supp. 713, 720, 721 (D.S.C. 1965)

Finally, as per the above, it is necessary at this point to draw attention to the fact that the Defendants have not supported their “open and obvious” argument with any evidence in its memo or during oral arguments, i.e. there were no evidence affidavits, case law, deposition testimony witnesses, photographs, expert testimony or evidence whatsoever presented in support of Defendant’s open and obvious claim. Indeed, the only “open and obvious” evidence presented by the Defendants was the Plaintiff’s deposition testimony.

Q.What is the condition of the sidewalk over there. Is it well maintained?

A. Honestly, I don’t think so.

Q. Okay. Have you ever made any complaints to the home owners association or to the owners of the property or anyone about the condition of the sidewalks there?

A. I believe I did. And I think a lot of people at that point – somebody said that they were all complaining about, you know, the way it was being maintained.²⁹

10. Application of the South Carolina Residential Landlord and Tenant Act and the Common Law to Sanfilippo v. Estate at Westbury and High Tide Associates

During oral arguments in support of the Plaintiff's Motion before this Court, the Plaintiff stated that, pursuant to Section 27-40-440 SCRLTA, the Defendants had a duty to use due care to maintain the common areas of the Estate. Further to this, our Court of Appeals in 1989 in Watson v. Sellers, 299 S.C. 426; 285 S.E. 2nd wrote, ".... the RTLA by express words created a cause of action in tort in favor of a tenant of residential property against his landlord for the landlord's failure, after notice, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition ..."30

In Plaintiff's attorney's oral argument before this Court pursuant to his motion for summary judgment, Plaintiff stated that under the common law of this jurisdiction, an action sounding in negligence required three elements: duty of care, breach of duty of care and damages to the Plaintiff. Similarly, while an action for damages under the SCRLTA requires the identical first three elements as common law negligence, case law in this jurisdiction has added the additional element of notice of defective / dangerous condition.³¹

Here, in the case at hand, the element of "notice of a defective dangerous condition" was satisfied by, first, the Plaintiff's complaints and several neighbors' complaints to the Estate at Westbury (EAW) and High Tide Associates (HTA) re the maintenance of the walkways within the complex. Next, in early 2017, an elderly woman in a wheel chair had the unfortunate experience of striking one of the raised edges of concrete in the walkway at the Estate at Westbury (EAW) with her wheelchair and being thrown out of her chair onto the concrete.³²

Shortly after the wheel chair accident, the conditions and safety of the walkways were

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Shortly after the wheel chair accident, the conditions and safety of the walkways were

easily discovered by reasonable and customary inspection.”³⁶

Putting aside for a moment the Defendants’ arguments that the walkways at the Estate at Westbury had many open and dangerous conditions, an argument must be made that the most dangerous conditions in the sidewalks were the abundant (44 initially and 60 last count), not-so-open, concealed and often indiscernable “raised edges” of concrete that proliferated in the walkways of the Estate at Westbury.³⁷

In support of this statement, please note that before and after Plaintiff’s trip and fall injury, for the most part, pedestrians had traversed the Estate sidewalks without incident. This was not because the sidewalks were safe--they weren’t. Indeed, they were badly in need of repair and residents had often complained about their condition, particularly the cracks in the concrete, the widening spaces between the segments, crumbling concrete and the presence of holes in the walkway.³⁸ And while, in fact, these conditions were admittedly dangerous, as stated above, the most trecherous places in the walkways were the raised edges of the segments of concrete which proliferated throughout the walkways of the Estate.³⁹ These “raised edges” (1/2 inch to 1 inch or more) were not as visible as cracks and crumbling concrete and, understandably, were not so easily discernable to a disproportionately elderly population that was residing therein and walking and trying to navigate their way about the walkways of the Estate at Westbury. 40.

At the time of the Plaintiff’s October 27, 2017 trip and fall over a raised section of concrete on the walkway outside the 1000 building at the Estate at Westbury Associates, the governing bodies of the complex (EAW and HTA) were very cognizant of the “raised edge” sidewalk problem. Truth be told, there had been multiple resident complaints, a wheel chair

spill and an April 5, 2017 EAW board meeting wherein a proposal from MAJ Concrete for the correction and repair of the walkways was presented to the board 41. Said proposal named multiple problems in the walkways including cracks, separated segments of concrete and forty-four (44) raised concrete edges (later increased by MAJ to 60) that were elevated anywhere from one quarter (1/4) inch to one inch, all of which required immediate repair and maintenance.42

Regrettably, at least for the Plaintiff, no action was taken on the MAJ Concrete proposal for six months. At the September 2017 meeting of the EAW board, the proposal was finally discussed but no real action was taken.43

Trip and fall

On October 27, 2017, nearly seven months after April 5, 2017 proposal to make repairs on the walkway at the Estate at Westbury, Mr. Sanfilippo decided to take a walk on the walkway at the Estate. It was a nice day and Mr. Sanfilippo had a pleasant walk. Unfortunately, near the end of his walk, in front of the 1000 Building where he lived, the toe of Mr. Sanfilippo's left shoe caught the elevated raised edge of a segment of concrete. Mr. Sanfilippo sprawled forward landing on his knees, face and hands. The force of the fall knocked Mr. Sanfilippo out of his shoes.

Sanfilippo immediately experienced unbearable pain in his left knee and he intuitively knew that his left knee cap was shattered. He crawled off the sidewalk onto the grass and called his wife on his cell phone. A neighbor took Mr. Sanfilippo to the Hilton Head Regional Medical Center in Hilton Head where he was examined and x-rayed. He was diagnosed as having suffered a "Y" shaped, comminuted fracture of his left knee cap (patella).

At the hospital that afternoon, after Mr. Sanfilippo's knee cap was realigned and casted, he was released into the custody of his wife. He spent much of the following year in rehabilitation and recovery. He was in a wheel chair for three months. This was followed by two months with a walker and, after that, crutches and then a cane. At this writing, Mr. Sanfilippo is resigned to life with a cane. He describes his rehabilitation as "excruciating" and he walks with a limp.⁴⁴

Expert Report

At Plaintiff's request, Bryan R. Durig B.S, M.S., Ph.D, Mechanical Engineering from the University of South Carolina and, arguably the pre-eminent slip and fall and trip and fall expert in the Southeast, conducted an engineering investigation of the "trip and fall" accident involving Nicholas Sanfilippo as he was walking on the walkway in front of his residence in the 1000 Building at the Estate at Westbury in Bluffton South Carolina on or about October 26, 2017.⁴⁵ According to Dr. Durig, "[t]he purpose of this investigation was to review ... Information to evaluate if a hazardous condition existed with the sidewalk at the Estate of Westbury that contributed to Mr. Sanfilippo's fall."⁴⁶

Upon examination of said walkway and evidence thereto, Dr. Durig was able to determine that the change in elevation of the abutting sections of walkway where Mr. Sanfilippo was ½ inch to 1 inch along the sidewalk, creating a trip hazard for persons walking on the sidewalk toward the elevation change. Id. at 47

In amplification of this information, Dr. Durig cited the International Property Maintenance Code (IPMC) Section 302.3 as stating, "All sidewalks, walkways, stairs And similar

areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.”

Durig goes on to opine that, “[t]he vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and were not being maintained in accordance with the International Property Maintenance Code.” 48

Similarly, Dr. Durig cites the ASTM, ADA and ANSI as having similar standards for level walking surfaces, i.e. that changes in level of ½ inch must be transitioned with a ramp and that the vertical change in elevation of ½ inch to 1 inch in walkways would be a violation the ASTM F1637, ANSE Aii1.1 and the ADA. 49

In summary, Dr. During stated that “[T]he vertical change in elevation between the sidewalk section adjacent to Building 1000 in the Estate at Westbury created a fall hazard and is considered the cause of Mr Sanfilippo’s fall incident. Id. The change in elevation between the concrete walking surfaces varied between ½ inch and 1 inch, depending on the location along the width of the sidewalk, and was not being maintained in accordance with the ADA, ANSI A117.1, IPMC, ASTM F1637 and industry guidelines. 50

There were feasible and economical alternatives available to the EAW and HTA – grinding out the change in elevation to eliminate the fall hazard which would have prevented Mr. Sanfilippo’s fall accident. The hazards and the repairs costs for the sidewalks in the Estates at were enumerated in the MAJ Concrete proposal. The cost for complete repair of the sidewalks was approximately \$9500.51

15. Defendants’ Estate at Westbury and High Tide Associates had knowledge that the sidewalks at the Estate at Westbury comprised a dangerous condition.

Surprisingly, or perhaps not so surprising, at the time of the Plaintiff’s fall, the Defendants

were very much aware of the dangerous conditions present in Estate at Westbury sidewalks. Eight months before the Plaintiff fell and broke his knee, an elderly woman in a wheel chair hit a similarly raised edge of concrete in the plantation and was knocked out of her wheel chair onto the concrete.⁵² Shortly after that accident, in late March 2017, the Defendants decided to have the sidewalks repaired by a concrete company. Within a week or two, on April 6, 2017, Defendants received a proposal for the walkway repair from the MAJ Concrete Company. The proposal identified the walkway hazards within the complex and had the effect of serving notice to the Defendants that there were nearly ninety conditions in the sidewalk that needed repair. Forty-four of the conditions needing repair were raised edges of concrete segments in the walkways.⁵³ (This estimate was later increased to sixty-six raised segments upon further inspection by MAJ). The proposed repair bill for repair of defects and and raised concrete edges was a reasonable \$9500.⁵⁴

Unfortunately, this proposal was ignored and no warning notices were given to the residents or visitors on the property until after October 26, 2017 – the date that the Plaintiff tripped on an identified raised edge in the walkway and broke his left knee.

Finally, it must be noted here that the Defendants provided no proofs to the Court to buttress its claim that there were no hidden dangerous conditions in the walkways. They have not presented the statement of an expert to the Court and similarly, they have not provided any photographs, measurements, witness statements, affidavits or other evidence regarding their claim that there were no latent dangerous conditions in the walkways of the Estate at Westbury.

16. During the Plaintiff's attorney's oral arguments the Court posed the following threshold question: Whether the lessee of a living unit in a condominium complex bring an action against the condominium complex?

Plaintiff's attorney initially answered that Landry v. Hilton Head Plantation would be an example but recalling that Hilton Head Plantation was "stand alone" and not a condominium, he then said he did not know and he would find the answer and report back to the Court. This colloquy extended the hearing in a limited manner until the Court's query was answered several days later with a memorandum of law to the Court that discussed the Horizontal Property Act, Murphy v. Yacht Cove and Davenport v. Cotton Hope. 55

This material is presented in pertinent part below:

1. Section 27-31-120 of the South Carolina Horizontal property act states that "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements 56

2. In Murphy v. Yacht Cove Homeowners Association, 289 S.C. 367; 345 S.E. 2d 709, 710 (S.C. 1986) our supreme court held that, "[A] member of a condominium association as established pursuant to the horizontal Property act may bring an action in contract or tort against the association."57

3. In Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 714 82 S.E.2d 569 (Ct. App. 1997) the lessee brought an action against the condominium association after he fell down a stairway at night in an area where the lights were not working. Our Appellate Court concluded that a lessee member of a condominium association could, under

the rule of Section 27-40-610 bring an action in tort against the property regime for its failure to maintain its common areas.⁵⁸

The answer to the Court's threshold question is that pursuant to S.C. Code Section 27-31-120 Horizontal Property Act a, lessee assumes all of the rights of his lessor for the duration of the lease. Murphy v. Yacht Cove Homeowners Association Section provides that an owner in the complex can bring an action against the complex ⁵⁹ and Davenport v. Cotton Hope ⁶⁰ for the authority for this Court to hear the case of Nicholas Sanfilippo v. Estate at Westbury and High Tide Associates.⁶¹ Also, the ruling of the Court in Davenport v. Cotton Hope provides the authority for lessee Sanfilippo, who holds all the rights in the complex as his lessor, to bring an action against the condominium complex.

Summation

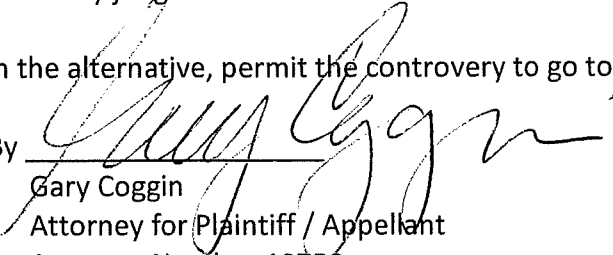
In summation, Plaintiff is of the opinion that, at minimum, this Court should reconsider matter at hand and pursuant to both statutory and the common law, determine that the Plaintiff is entitled to have his complaint heard by a jury of his peers.

Please consider the following: the Estate at Westbury was developed and built under the authority of the Horizontal Property Act which contains Section 27-31-120 that states "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements."⁶² A few years later in Murphy v. Yacht Cove our Appellate Court ruled that "[A] member of a condominium association as established pursuant to the Horizontal Property Act may bring an action in contract or tort against the association."⁶³ Then, in the case instantly, Davenport v. Cotton Hope, our Appellate Court

concluded that a lessee member of a condominium association could, under the rule of Section 27-40-610, bring an action in tort against the property regime for its failure to maintain its common areas.⁶⁴

I believe that this Court should reconsider, amend and reverse its decision to award summary judgment to the Defendants and award summary judgment to the Plaintiff or, in the alternative, permit the controversy to go to trial.

By



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June 6, 2023

Footnotes

1. Neil v. Bynum, 288 S.C. 472, 343 S.E.2d 615, 616 (1986); Frankel v. Kurtz, 239 F. Supp. 713 (D.S.C. 1965). South Carolina Code of Laws, Section 27-31-120 Horizontal Property Act. Page 3 of Appeal.
2. Horizontal Property Act of South Carolina Section 27-31-120 S.C. Code. Page 4 of Appeal.
3. South Carolina Code of Laws Section 27-40-440 (a)(3) South Carolina Residential Landlord and Tenant Act (RLTA).
4. South Carolina Code of Laws 27-40-610(b) RLTA.
5. Id. F. Patrick Hubbard & Robert L. Felix, The South Carolina law of Torts (2nd. Ed.1997) F. Patrick Hubbard & Robert L. Felix, P. 127.
6. Id. Hubbard & Felix
7. Undoubtedly Sanfilippo is considered an invitee rather than a licensee in the Common area of the complex.
8. Historically, a tenants legal status in the common area of a copex such as the Estate at Westbury was that of a licensee. As such, the EAS or a similarly situated association in south Carolina did not have the duty of care to seek out or to warn the tenant/licensee of dangerous or harmful conditions and was not liable for injuries or physical harm experienced by the tenant in the common area. Now, pursuant to Section 27-40-440 of the South Carolina Residential Landlord and Tenant Act, the landlord has a duty to use due care to maintain common areas.
9. Landry v. Hilton Head Plantation Property Owners Association, 317 S.C. 200, 452 S.E. 2d 619, 621 (Ct. App. 1994).
10. See 8 above, see also Lincoln: Land owners' duty to Guests of Invitees and Tenants: Vogt v. Murraywood Swim and Racquet Club and Goode v. St. Stephens United Methodist Church. Here, Lincoln states that South Carolina Courts recognize the common area exception holding that lessor have a duty of due care to maintain common areas and when they retain control of them, there is a classification of tenants as invitees when the tenant is in the common area
11. S.C. Code of Laws Section 27-40-440 (a)(2)
12. S.C. Code of Laws Section 27-40-440 (a)(3)

13. **Collander v. Charleston Donut Corp., 305 S.C. 123, 406 S.E. 2d 361 (1991); Pursuant to Restatement 2nd of Torts 343(a)(1) a possessor of land is not liable to his visitor for physical harm caused by a condition on the land whose danger is known or obvious to the person unless the owner should have anticipated the harm despite such knowledge or obviousness.**
14. **Section 27-31-120 of the South Carolina Horizontal Property Act states that “[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements.**
15. **Supra at 7; Force v. Richland Memorial Hospital, 471 S.E. 2d 714 (Ct. App. 1996). This involved a negligence action where the Hospital was negligent in its duty to inspect and maintain electric sliding dorors in an emergency room.**
16. **Graham v. Whitaker, 321 S.E. 2d 40, 43 (S.C.1984). It was a jury question as to whether the defendant physician had provided a reasonably sale premises for his client.**
17. **Nelson v. Concrete Supply Company, 399 S.E.2d 783, 784 (S.C. 1991). A plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the Defendant.**
18. **Supra at 1; Neil v. Bryum 343 S.E.2d at 616. Possessor’s duty to a licensee.**
19. **Supra. Landry v. Hilton Head Property Owners Association.**
20. **Supra at 1; Neil v. Byrum, 288 S.C. 427 et al (1986) Licensee is owed a duty of less than due care.**
21. **Id. A license is a temporary designation.**
22. **Id. Wheel chair incident.**
23. **Id. Remedial proposal to EAW.**
24. **Creech Wildlife and Marine Resources, 328 S.C 24, 491 S.E.2d 571 (1997). Here, county was given notice of dock’s dangerous condition and county should have taken steps to prevent harm even though the dangerous condition was open and obvious.**
25. **Hancock v. Mid-South Management Company, 381 S.C. 326, 673 S>E. 2d 801, 8903 (2009). Owner shoul anticipate that bad condition would cause someone to fall and injure themselves**

- obvious.
26. **Hancock v. Mid-South Management Company, 381 S.C. 326, 673 S.E. 2d 801, 8903 (2009). Owner should anticipate that bad condition would cause someone to fall and injure themselves.**
 27. **Proposal by MAJ Concrete to repair the concrete walkways within the curtilage of the estate at Westbury, April 6, 2017.**
 28. **There was a second proposal by MAJ Concrete.**
 29. **From deposition of Plaintiff Sanfilippo**
 30. **Watson v. Sellers, 299 S.C. 426, 432, 433; 285 S.E. 2d 369 (1989). The RLTA through 27-40-440, 27-40-20, 26-40-010 and Watspo v. Sellers change the Landlor / tenant Relationship in South Carolina.**
 31. **For a claim of negligence against the Lessors, four elements are required:
 - a. Damages
 - b. Duty of Care
 - c. Breach of Duty of Care
 - d. Notice of defective dangerous condition**
 32. **See Complaint and Deposition of EAW Board member Dunlap.**
 33. **At the board meeting after the wheel chair accident, it was determined to solicit Bids for the repair of the walkways within the complex.**
 34. **That the Plaintiff has the status of a licensee within the EAW has consistently been the Defendant's argument in the instant case.**
 35. **The Plainitff has received no explanation for Deefendant's statement.**
 36. **Merium Webster legal dictionary**
 37. **A trip and fall over concrete causes great harm, particularly among the elder Population.**
 38. **The condition of the walkway in the EAW is garnered from the report from MAJ Concrete Company.**
 39. **MAJ Concrete initially indicated that there were 44 raised concret Conditions in the EAW. This figure was later raised to 60.**

40. The ½ inch to 1 inch rise in the 60 concrete segments within the EAW walkway is from Dr. Durig, the Plaintiff's expert witness.
41. The proposal for the repair of the walkway is with High Tide Associates.
42. Id.
43. The information re the board of directors are available through the board.
44. The information re Plaintiff's accident, hospitalization and recovery is available upon request through the Hilton Head Island Medical Center.
45. The "Expert Report" of Dr. Bryan R. Durig is available through Attorney Coggin.
46. The purpose of Dr. Durig's investigation was to review information (about the accident) so as to determine if a hazardous condition existed with the side walk at the Estate of Westbury that contributed to Mr. Sanfilippo's fall.
47. Upon examination of said walkway and the evidence thereto, Dr. Durig was determine that the change in elevation of the abutting section of walkway where Mr. Sanfilippo was (walking) was ½ inch to 1 inch along the sidewalk, creating a trip hazard for persons walking on the sidewalk toward the elevation change.
48. The vertical change in elevation between the sidewalk sections adjacent to building 1000 in the Estate at Westbury created a fall. Hazard and wre not being maintained in accordance with the International Property Maintenance Code. Hancock v. Mid-South Managment Co., 381 S.C. 326, 330, 676 S.E. 2d, See also Deposition of Robert Dunlop Supra at 17.
49. The ASTM (American Standards of Measures), ADA (American Disability Act) and ANSI (American National Standards Institute) have similar standards tor level walking surfaces. Fro example changes in elvel on walkways, etc. must be transitioned with a ramp.
50. A vertical change in elevation of ½ inch to 1 inch is a violalation the ASTM, ANSI and ADA standards.
51. There were feasible and economical alternative available to the EAW and HTA. A simple solution would have been grind out the changes in elevation between the concrete walking surfaces.
52. The cost to completely renovate the walkways in the Estate at Westbury was approximately \$9500. This included sixty-six (66) raised concret edges.

53. During the Plaintiff's attorney's oral argument, the court pose the following threshold question: Whether the lessee of a unit in a condominium could bring an action against the condominium complex? A few days later the Court's query was answered with a memorandum of law that discussed the Horizontal Property Act, *Murphy v Yacht Cove* and *Davenport v. Cotton Hope*.

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56. Section 27-31-120 of the South Carolina Horizontal Property Act. Pursuant to the S.C. Code Section 27-31-120 (Horizontal Property Act) "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements

57. *Murphy v. Yacht Cove Homeowners Association* held that "[A] member of a condominium association as established pursuant to the Horizontal Property Act may bring an action in contract or tort against the association."

58. *Davenport v. Cotton Hope Plantation Property Regime*. The South Carolina Appellate Court Court concluded that a lessee membdf of a condominium association cpool, un the rule of Section 27-40-610 bring an action in tor against the property regime for its failure to maintain its common areas.

59. _____

60. _____

61. _____

62. Id. at 56.

63. Id. at 57.

64. Id at 58

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RECEIVED
Jun 06 2023
SC Court of Appeals

June 6, 2023

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: Nicholas Sanfilippo v. Estate at Westbury and High Tide Associates
Civil Action: 2019-CP-07-00554

Dear Ms. Kitchings:

Per our conversation last week, I am enclosing herein and sending via U.S. Mail postage Paid and also via email all the documents that attach to my appeal in the matter referenced above. This includes a motion to File Out of Time, a cover page of the appellate brief, the Plaintiff's Appeal of Order Granting Summary Judgment to the Defendant, footnotes to the appellate brief, copy of the May 17, Scan Report recording the initial filing of the Appeal to this Court at CTAPPFILING@SCCOURTS instead of CTAPPFILINGS@SCCOURTS, etc.

All of the above listed documents are also posted and emailed to Attorney Akers along With a copy of this letter.

Sincerely,


Gary Coggin

GPC/cab
Enclosures