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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 Sr. Circuit Court Judge

Appellate Case No.: 2019-CP-07-00554

Nicholas Sanfilippo .....Appellant

v.

Estate at Westbury Horizontal .....Defendant
Property Respondents Regime
(a multifamily real estate community)
and High Tide Associates

By _____

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July 5, 2023

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(Brief of Appellant)

g. 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.

h. 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 submitted by Defendant and should be denied by the Court

i. Whether the condition of the sidewalk where the Plaintiff tripped and fell was an open and obvious condition is a question of fact for the Jury.

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

1. Pursuant to Section 27-40-440 SCRLTA, the Defendants had to use due care to maintain the common areas of the Estate at Westbury

2. Watson v. Sellers, 2299 S.C. 426; 285 S.E. 2d creates a tort in favor of the tenant against his landlord for failure after notice to make necessary repairs to keep the premises in a habitable condition.

3. Plaintiff had a negligence action against the Defendant.

4. Under Section 27-40-610(b) the Plaintiff also has an action in tort against the Defendant for failing to fulfill it's obligations to the Plaintiff under the act.

5. All the elements necessary for a cause of action against the estate at Westbury and High Tide Associates have been met and are satisfied in the Plaintiff's actions against the Defend -ants.

6. The raised edges of the sidewalk segments comprised a dangerous latent condition in that in their proliferation in the walkway of the EAW, they were not easily discerned particularly by a predominately elder population in different lights at different times of day..

7. Absent proper maintenance and repair, the only protection

the predominantly elderly population at the EAW fromthe conditions of the sidewalk in the EAW was a warning regarding conditions, There was never a warning given to the residents of the EAW.

8. Eight months before Plaintiff broke his knee, an elderly woman in a wheel chair capsized after hitting a raised edge of concrete in the walkway.

9. Although with this incident, there was no warning given to the EAW residents, a request for a repair estimate by the EAW.

10. A short time later an estimate made by MAJ concrete company to repair nearly 100 defective conditions in the walkway for approximately $9800. Nothing was done.

K. **The Expert Witness Opinion stated that the vertical change in elevation in the sidewalk section was the cause of Sanfilippo's fall incident.**

1. Change in elevation was between 1/2 and 1 inch.

2. The walkway was not being maintained in accordance within the Industry guidelines.

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

1. Actions against condominium complexes may be brought in South Carolina under the following:

a. Section 27-31-120 of the South Carolina Horizontal Act, "Any conveyance or lease of a individual apartment is Deemed to also convey or lease the undivided interest of the owner of the owner of the common elements ... .

b. South Carolina of Murphy v. Yacht Cove Homeowners Association, 289 S.C. 367; 345 S.E. 2d 709, 710 (S.C. 1986) and

c. Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 714. 82 S.E. 2d 569 (Ct. App. 1997)

1. Statement of Issues on Appeal

a. Whether Appellant, as a longtime lessee / tenant at the Estate at Westbury, did not enjoy the possessory rights, common area rights, privileges and protections of his lessor under Section 27-31-120 of the South Carolina Code of Laws (Horizontal Property Act)?

Section 27-31-120 (1991) of the South Carolina Code of Laws (Horizontal Property Act) states that, [A]ny conveyance or lease of an an individual apartment is deemed to convey or lease the undivided interest of the owner of the common elements both general and limited [of] the apartment [to the lessor]. S.C. Code Ann. Section 27-31-120 (1991)

This question herein was raised in a hearing re Section 27-31-120 of the South Carolina Code of Laws (Horizontal Property Act) concerning the rights of Plaintiff Sanfilippo to be upon or present on the walkway within the area of his (Sanfilippo's) residence at 1010 Main within the curtilage of the the Estate at Westbury on the date of his trip and fall accident. A strict, careful reading of Section 27-31-120 of the Horizontal Property Act is essential to a reasonable understanding of that the Plaintiff was where he had a right be when he tripped and fell on October 26, 2017.

b. Whether the Appellant as a longtime lessee / tenant at the Estate at Westbury came under the statutory protections of the South Carolina Residential Landlord and Tenant Act, particularly Section 27-40-440(3) which required the Defendants High Tide Associates and the Estates at Westbury to keep all common areas of the premises in a fit and habitable condition for residents such as Plaintiff?

Section 27-40-440 of the SCRLTA requires that Defendants to keep the common areas of buildings in reasonably safe condition, to apply with applicable building codes, to make all necessary repairs and to keep the building in reasonably safe and clean condition. As a tenant at the Estate at Westbury, the Plaintiff came under Section

27-40-440 of the SCRLTA.

c. Whether pursuant to Section 27-40-610(b)(4) of the Act, the Appellant may recover actual damages for the noncompliance of High Tide Associates and the Estate at Westbury due to its failure to maintain the common areas of the premises in a fit, habitable condition? .

Res Ipsa Loquiter.

d. Whether the Defendants owed a duty of care to the Appellant to keep the common area of the Estate of Westbury in a reasonably safe condition for use by all tenants and whether, in this instance that liability attaches where the landlord was negligent in failing to maintain the common areas?

Landlords have a duty to take reasonable precautions to prevent harm to tenants. Bass v. Farr, 315 S.C. 400, 434 SE2d 274. In addition, pursuant to South Carolina Code Section 27-40-440 (A)(1)(2)(3) et seq., landlords are required to keep all the common areas such as walkways, stairwells, hallways, etc. in reasonable safe and clean condition and to comply with applicable building and housing codes materially affecting the tenant's health and safely.

e. Whether the status of the Appellant in the common area of the Estate at Westbury was that of an invitee and not a licensee?

According to Patrick Hubbard and Robert L. Felix, South Carolina Law of Torts, page 110, "A licensee has either the consent of the owner/occupier or some other privilege to visit the premises, but he is there for his own purpose rather than the benefit of the owner / occupier." He is owed something less that a duty of due care.

> This includes the use [of] reasonable care to discover him and avoid injury to him while [he is on the land].
>
> The warning of the licensee of concealed dangerous condition .... Which he may be expected to discover.

On the other hand, according to Hubbard and Felix, an invitee is a person who

comes on the premise with express or implied permission and for the purposes of benefiting the owner/occupier.

A landlord or owner/occupier owes the invitee a duty of due care to discover risks and to take precaution to warn or to eliminate unreasonable risks.

In the case at hand, Sanfilippo v. Estates at Westbury and High Tide Associates, the plaintiff is undoubtedly, an invitee. First, as a long term tenant, he paid all his owner's POA fees (please see attached affidavit of the owner) including common area use fees. Next, under the language of the Horizontal Property Act, the lessor owner of the property unit (Pinto) transferred his ownership, not only for the living space but also the common areas to Mr. Sanfilippo for the period of the lease. Finally, pursuant to the SCRLTA, Section 27-40-440(a)(b) the Act imposes legal duties on landlords to comply with health and safety codes and to maintain the premises in a habitable condition which should be enforceable herein.

f. Whether the uneven section of concrete where the Appellant tripped and fell was a latent condition or an open and obvious condition is a question of fact for a jury?

The "open and obvious" answer is often used to defend "trip and fall" cases throughout this jurisdiction. This question is the subject of several well known cases in this jurisdiction: Creech v. S.C. Wildlife and Marine and Padgett v. Colleton County and Callender v. Charleston Donut. In Creech and Padgett, the defendants defended against any damages suffered by claimants in trip and and fall accidents that took place upon dangerous, negligently maintained County properties by claiming the dangerous conditions were "open and obvious" and that the invitees should have noticed [the deficiency] and either avoided or departed the scene.

In Creech, for example, a woman injured in a fall from a viewing platform brought a torts claim action against the Commission claiming that the County's negligent failure to place a safety rail around the back platform was the cause of Creech's fall and a contributing factor in damages sustained by the Plaintiff.

In response to the suit, the county defender admitted that a missing safety rail on a viewing platform in question was an "open and obvious" condition. Due to this condition, however, the defender argued that Plaintiff who was aware of deficiencies on the platform could have prevented the accident by refusing to get onto the platform. In return, the plaintiff argued was that because the Defendant knew of the "Open and Obvious" condition of the viewing platform, it could have avoided the danger by adding a second rail. (This case was decided on a comparative negligence basis).

Similarly, in Padgett, a courthouse visitor was walking across the Colleton County courthouse parking lot after leaving the courthouse on personal business. As he was walking outside the Courthouse, he stepped into a hole on the property and fell and badly injured his leg. As with Creech above, Mr. Padgett's suit was for damages for negligence against Colleton County. Similar also to Creech, Colleton County defended on the basis that the hole in which the Plaintiff fell was "open and obvious" to the Plaintiff and, as such, the County was not subject to liability based on the evidence that Plaintiff could have anticipated the harm could have avoided the defect. While the Court found for the Defendant, Padgett appealed on the basis that even if the [condition] was open and obvious, the county was still subject to liability based on evidence that the injury could be caused by the defect. The Court found for Padgett on the rule of Callender v. Charleston Doughnut Corporation 305 S.C. 123, 406 S.E. 2d 361 (1991).

In making its ruling, the Court also noted, the "The traditional 'no duty to warn of the obvious rule' has been modified in many jurisdictions to hold that an owner is liable for injuries to an invitee despite an open and obvious defect if the owner should anticipate that the invitee will nevertheless encounter the condition or that the invitee is likely to be distracted." Id at 128, 406 S.E. 2d at 362.

Probably the best known of the "open and obvious" cases is the above cited Callender v. Charleston Donut Corporation 305 S.C. 1223, 406 S.E. 2d 361,1991. In Callender, an elderly gentleman attempted to sit on a stool at a donut shop. Unfortunately, the seat to the stool had been removed and the gentleman was injured.

In this matter the Court adopted the reasoning of Restatement 2d of Torts, Section 343 (A) 1968."A possessor of land is not liable to invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Id.

In determining question of fact is tried by a trier of fact (jury or judge in a bench trial). A question of law is always considered by a judge. An "open and obvious" question is a mixed law and fact question and should be put before the trier of fact or a jury.

g. Whether the Defendants were aware of the dangerous conditions in the walkways at the Estate at Westbury?

The Defendants were very much aware of the dangerous conditions present in the Estate at Westbury walkways. Eight months before the Plaintiff fell and broke his left knee, an elderly woman in a wheel chair hit a similarly raised edge of concrete in the

area and was knocked out of her wheel chair onto the concrete. Shortly after that accident, in late March 2017, the Defendant's board of directors voted to have the walkways repaired by a concrete company. Within a week or two the Defendants received a proposal for the walkways repair from the MAJ Concrete Company. The proposal identified he walkway hazard within the complex and had the effect of serving notice to the Defendants that there were nearly ninety defects in the sidewalk that needed to be repaired. Forty-four of the defects that needed repair were raised edges of concrete segments in the walkways. (This estimate was later increased by MAJ to sixty six raised concrete segments). The proposed repair bill for repair was a reasonable $9800.00.

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 a raised edge inn the walkway and broke his left knee.

2. Statement of the Case

a. Date of commencement of the action: October 26, 2017;

b. Nature of action: This is a complaint in negligence by the Plaintiff, Nick San-filippo against the Defendants Estates at Westbury (EAW) and High Tide Associates (HTA). The action was predicated by a trip and fall experienced by the Plaintiff on a defective section of concrete on the walkway within the curtilage of the Estate at Westbury condominium] complex in Bluffton, South Carolina. The tort of negligence attaches herein at least in part as per the common law and the SCRLTA particularly Section 27-40-440(a) and 27-31-120 of the South Carolina Horizontal Property Act);

c. Nature of Response: The named Defendants, EAW and HTA, have been, respectively represented by two firms, both of which are currently facing procedural problems. However, putting aside for now any procedural problems the Defendant firms may or may not have, Plaintiff is currently defending a summary judgment decision by the Honorable R. Ferrell Cothran Jr. Judge of the Third Judicial Circuit entered on August 16, 2022. The basis of the Court's decision was that summary judgment is appropriate where "the pleadings, depositions answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

d. As stated immediately above, the action of this Court was to award summary judgment to the moving party. According to the decision of Judge Cothran, Summary Judgment was awarded on the basis of the following: the Plaintiff had the status of a licensee within the common area of the Estate at Westbury and the condition in the property where Plaintiff tripped and fell was open and obvious

e. The Plaintiff's response to the action of the Court is the Defendant's Notice and Motion to Reconsider. Here the Court granted summary augment when it was clear to the Court that there was no issue as to any material fact and moving party is entitled to judgment as a matter of law.

f. The date of the Defendant's appeal was made upon this Court on August 5, 2022.

3. Standard of Review

a. Factual Background

On October 26, 2017, Nicholas Sanfilippo, a septuagenarian and long time

lessee/resident at the Estate of Westbury in Bluffton, South Carolina, tripped and fell on the raised edge of a concrete segment within the walkway of the Estate while he was taking a morning stroll. As a result of this Accident, Plaintiff sustained a comminuted displaced "Y" fracture of the patella of his his left knee. After treatment at the Hilton Head Medical Center where the fractures were reduced and re-approximated, Sanfilippo's lower left leg and knee was placed in a hard cast to prevent migration of the bones. Plaintiff Sanfilippo then began a lengthy rehabilitation that continues through this writing. A few months later, after some dissatisfaction with his his initial legal representation, Mr. Sanfilippo contracted with the Coggin Law Firm (Coggin) to pursue his claim for damages against the Estate at Westbury and High Tide Associate (Defendants).

On June 2, 2020, a complaint was filed by Coggin against the Defendants. Said complaint sounded in negligence and stated, among other allegations, that the Defendants failed to maintain the common area of the property at the Estate in a safe condition, inspect the sidewalks for dangerous conditions and or warn the guests and residents of the unsafe sidewalk conditions and carry on other necessary duties to keep the walkways safe.

Procedurally, Defendant's initial law firm withdrew the case and was replaced by a second and then a third law firm. What followed was motion practice with a Motion for Summary Judgment by Defendant which argued that tenant carried the status of a licensee in the common area of the Defendant's complex and was, at such, entitled to minimal protections by the landlord. Said motion also stated that because the dangerous conditions in the common area were so "open and obvious"

that it was the Plaintiff's fault that he tripped and fell and injured himself.

Plaintiff responded with the rule of Callendar, Creech, Padgett and Hancock which argued that owners of properties with dangerous and open and obvious conditions must be aware of the danger therein and anticipate that for various reasons, accidents will take place. He further noted that Plaintiff had statutory protections (Horizantal property Act and SCRLTA) that made him equivalent to an invitee in the common area and that defendant had, for several months prior to Plaintiff's accident, been on notice re the dangerous conditions in the complex's common area [the EAW had a responsible quotation in hand from MAJ Concrete to correct to correct the conditions and did nothing to correct the same nor give notice of the conditions to a predominately older population].

b. Standard of review of trial court's order granting summary judgment

Summary judgment is a drastic remedy and is proper when the court, after reviewing the motions, supplemental affidavits, discovery materials and pleadings finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter law. Flemming v. Rose, 350 S.C. 488, 567 S.CE. 2d 857 (2002); Baril v. Aiken Regional Medical, 352 S.C. 271, 573 S.E. 2d, 830 (Ct. App. S.E. 2d 757 (2002). Summary judgment is appropriate where "the pleadings, depositions answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue and the moving party is entitled to judgment as a matter of law. Rule 56(c) SCRCP, see also Tupper v. Dorchester County 326 S.C. 318, 487 S.E. 2d 187 (1997).

A court should grant summary judgment when it is clear that there is no

genuine issue of material fact and the conclusions and inferences to be drawn from the fact are undisputed. Etheredge v. Richland School District One, 341 S.C. 311, 534 S.E. 2d 275, 277 (2000). The plain language of Rule 56(c) of 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 to the party's case and on which the party will bear the burden of proof at trial." Carolina Alliance for Fair Employment et.al. 337 S.C. 476, 485, 523 S.F. 2d 795 800 (Ct. App.1999). In a situation such as above in Carolina Alliance, there can be no genuine issues as to any material fact since a failure of proof concerning an essential element of the nonmoving party's case will render the fact immaterial. Baughman v. American Tel & Tel Co. 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

It is proper where there is no issue as to any material fact and in determining if summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in a light most familiar to the nonmoving party. Rule 56, South Carolina Rules of Civil Procedure; Id. Baughman

c. Standard for Summary Judgment

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment will attach on a motion where 1) there is no genuine issue of material fact and 2) the moving party is entitled to judgment as a matter of law.

d. Order in Response to Motion to Reconsider

Please see responses b. and c. above. Court's order was also based on the the argument that a. the condition where Plaintiff fell was "open and obvious" and

that b. Plaintiff had the status of a “Licensee” while in the common area of the EAW.

Summary

In the claim Sanfilippo v. Estates and Westbury and High Tide Associates, the Defendants have consistently argued that the Plaintiff's claims must be denied because, at all times pertinent herein, the Plaintiff was a licensee who had little if any rights on the property and that the conditions over which the Plaintiff tripped and fell were "open and obvious."

In response to these defenses, the Plaintiff has made a number of counter arguments. First, pursuant to the Horizontal Property Act, Section 27-31-120 of the South Carolina Code States, the conveyance or lease of an individual unit of property is ".... deemed also to convey or lease the undivided interest of the owner of the common element both general and limited to the property."

Tenant

Next, in addition to the Horizontal Property Act and apparently overlooked by the Defendant is the fact that the Plaintiff, as a lessee of the property, is a tenant and not a licensee As a tenant, then, the Plaintiff is under the statutory protections of the South Carolina Residential Landlord and Tenant Act (SCRLTA), particularly Section 27-40-440(a) of the Act. Section 27-40-440(a) of the act requires the landlord to keep all the common areas of the premises in a fit and habitable condition. 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 fit and habitable condition."

Invitee

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. South Carolina Law Review, V. 57:387

16 Similarly, as a tenant / invitee on the property for six years, Sanfilippo always paid, i

addition to his rent, an amount that was sufficient to cover the lessor's extraordinary expenses. According to Francis D. Pinto, "The monthly rental that I charged the Sanfilippo's to live in Unit 1001 in the Estates included therein a number of fixed costs such as insurance payments, property taxes, HPOA fees and property management charges." (See attached affidavit of Francis D. Pinto, December 10, 2021).

The definition of invitee is a person who comes onto a premises or a business with express or Implied permission and for the purpose of benefitting the owner/occupier. Parker v. Stevenson Oil Co., 245 S.C. 275, 140 S.E. 2d 177 (1965). A premises owner has the duty of due care to an invitee to discover risks and take precautions to warn of or to eliminate any unreasonable risks an invitee might encounter on the premises or in the common area. The duty is a duty of due care and if negligence does not attach to any act, there is no liability.

Licensee

Finally, a licensee is one who has to receive the permission of the owner or occupier to visit the premises. The licensee is on the property for his own benefit. Because the licensee is on the property for his own benefit, he must accept the premises how it is. Consequently, the licensee is owed something less than a duty of due care. The only duty that the owner or occupier has to the Licensee is the following:

a. Use Reasonable care to discover him on the property;

b. Use reasonable care to warn him of concealed dangerous conditions.

Open and Obvious

By claiming that the condition of the sidewalk where the Plaintiff tripped and fell was "open and obvious" and that, as such, liability for the same should be denied. The Plaintiff's deny this assertion and state, first, that the Defendant's had notice of the dangerous conditions of the walkway and did nothing to remediate the situation.

Approximately seven months before the Plaintiff's accident, an elderly woman in a wheel chair hit a raised edge of concrete in the walkway at the EAW. Her chair was knocked over and

she spilled out onto the walkway. Shortly after the accident, the matter was discussed at a monthly board meeting of the EAW. At the meeting it was determined to contact MAJ Concrete, local concrete remediation company for a repair estimate of the of the entire walkway in the EAW complex.

Shortly thereafter, after MAJ Concrete had appeared on site, a repair estimate was presented to the EAW and HTA. The proposal said that there approximately ninety areas that needed repair. Of these ninety defective condition, forty-four of the conditions were raised sections of concrete. The estimate for repair was $9800.

The EAW and HTA sat on the proposal for seven months. On October 27, 2017 Mr. Sanfilippo tripped and fell over a raised section of concrete outside his apartment at 1000 Main Street in the Estate at Westover.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
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COUNTY OF BEAUFORT	)	CASE NO.: 2019-CP-07-00554
	JERRI ANN ROSENEAU BEAUFORT COUNTY, S.C. CLERK OF COURT	
NICHOLAS SANFILIPPO,	)	
Plaintiff,	)	
v.	)	Notice and Motion Pursuant to Rule 59(e) SCRCP to Reconsider and Alter and Amend Judgment of Summary Judgment Against the Plaintiff
ESTATE AT WESTBURY & HIGH TIDE ASSOCIATES,	)	
Defendants.	)	

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, motions this Court to reconsider, amend and alter the Order this Court entered on August 16, 2022 granting the Defendant's Motion for Summary Judgment.

Motion

This motion, filed on behalf of the Plaintiff Nicholas Sanfilippo, seeks an Order altering or amending the Order pursuant to Rule 52(b) 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 had no duty of care to the Plaintiff except 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 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 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 Plainitff.3 (Also important to this claim is that pursuant Code 27-40-610(b)(4) of the Act provides that 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.

Defendants' labelling 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 by settled law, as a leaseholder at the Estate at Westbury, the Plaintiff enjoyed all the rights and privileges of the owner of condominium unit 1001.8 This included the owner's possessory interest in clean and safe common areas of the estate. For example, even where the danger was obvious, the landlord would have had the duty to make repairs if it was foreseeable that the invitee would encounter the dangerous condition.9 Similarly, the landlord had the duty of due care to discover risks and take safety precautions to warn or and eliminate any unreasonable risks.10

Also, where, as herein instantly, the Plaintiff had a 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.11

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, as quoted immediately above, 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. 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.

3. **Absent negligence, the lessor has no liability to the invitee. A plaintiff in a negligence action may recover damages if the plaintiff's negligence is not greater than that of the Defendant.12**

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.13 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.14 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.15

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.16

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 was 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.**

<u>Open and Obvious</u>

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 land-lord and the management company had been warned, as per the "wheel chair accident"17 and the subsequent remedial proposal18 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).19 (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. A salient 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 argues 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."21 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.22 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.23 Further, be aware that, at the time of the accident, the Plaintiff was in his mid 70's – a disability according to the ADA.24 (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 was no evidence affidavits, case law, deposition

testimony witnesses, photographs, expert testimony or evidence presented in support of Defendant's open and obvious claim.

In his proposed "Order Granting Defendants' Joint Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment" the Defendant states the Plaintiff, "walked across that specific part of the sidewalk "often", that it was a clear day and that nothing obstructed his view of the sidewalk. Finally, Defendants pointed out that Mr. Sanfilippo had complained about the condition of the sidewalk in a deposition he gave in August of 2020:

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 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.25

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 stated, ".... the RTLA by express words created a cause of action in tort in favor of a tenant of residential property against his land-lord 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 ..."26

reasonably necessary to keep the premises in a habitable condition ..."26

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 requires that it also requires the additional element of notice of a defective / dangerous condition.27 In the matter at hand, this element of notice was satisfied, first, by virtue of the Plaintiff's complaint and his neighbor's complaints re the maintenance of the walkways and, secondly, by the proposal for repair of the walkways made by the Defendants to MAJ Concrete on in late February, 2017.28

All the elements necessary for a cause of action against the Estate at Westbury and High Tide Associates pursuant to the Common Law and South Carolina Code of Law Section 27-40-400 et al, have been satisfied in the Plaintiff's action against the Defendants.

11. The Defendants did not provide proofs for its assertion that it did not have to warn the plaintiff of latent/hidden dangerous conditions.

Throughout much of the Order presented to this Court, the Defendants have made the argument that, because the Plaintiff was a licensee at the Estate at Westbury, the Defendant only had the duty to warn the Plaintiff of any hidden/latent dangerous conditions in the walk ways.29 Then, without the presentation of any authority in support of this assertion, the Defendants unilaterally adjudged the sidewalk conditions to be open and obvious and because of this "open and obvious"condition, the Defendants had no duty to warn the Plaintiff because he was a mere licensee while in the common area of the complex.30

a latent condition is "[a] hidden or concealed defect. One which could not be discovered by reasonable and customary inspection."31

Putting aside for a moment the Defendants arguments that the walkways at the Estate at Westbury abounded with open and dangerous conditions, an argument must be made that these dangerous conditions in the sidewalks may have been were actually concealed, hidden and dangerous. In support of this statement, please note that before and after Plaintiff's trip and fall injury, thousands of pedestrians had traversed the Estate sidewalks without incident. This was not because the sidewalks were safe--they weren't. Indeed, they were in need of repair and people had complained about their condition, particularly about the cracks.32 While, in fact, the walkway cracks were dangerous, by far the most dangerous places in walkways were the raised edges of the segments of concrete. These raised edges were not easily discernable, particularly by the predominantly elderly population of the Estate. Absent proper maintenance and repair, the only protection the elder population of the Estate at Westbury had from the sidewalk dangers would have been notice and warnings from either the Estate at Westbury or High Tide Associates to be on the lookout for the uneven raised concrete edges while the residents were out walking. These warnings could have taken many forms e-blasts, door to door hand outs, announcements during board meetings, postings in prominent areas throughout the plantation or even formal letter to the residents.

Unfortunately, no warnings were forthcoming.

While the Plaintiff, a man of nearly 75 years at the time of the accident, has stated that, while he was aware the sidewalks had numerous cracks and were in disrepair, he had no idea as to the real danger his tri-weekly walks throughout the Estate posed until the day his left toe

caught onto a raised edge of sidewalk, causing him to pitch forward onto the concrete, striking his head, arms and knees and fracturing his left kneecap.33

Surprisingly, or perhaps not so surprising, at the time of the Plaintiffs 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.34 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.35 (This estimate was later increased to sixty-six raised segments). The proposed repair bill for repair of defects and and raised concrete was a reasonable $9800.36

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.36

Finally, it must be pointed out that the Defendant provided no proofs to the Court to buttress his claim that there were no hidden dangerous conditions in the walkways. He has not presented the statement of an expert to the Court. Similarly, he has not provided any photographs, measurements, witness statements, affidavits or other evidence re his claim that there were no latent dangerous conditions in the walkways of the Estarte at Westbury

11. The Expert Witness Opinion stated that the vertical change in elevation in the sidewalk section was the cause of Mr. Sanfilippo's fall incident.

In summary, the vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate that Westbury created a fall hazard and is considered the cause of Mr. Sanfilippo's fall incident. The change in elevation between ½ inch and 1 inch, depending on the location along the width of the sidewalk, and was not being maintained in accordance with ADA, ANSI, A117.1, IPMC, ASTM F1637 and industry guidelines. There were feasible and econ-onomical alternatives (simply grinding out the change in elevation to eliminate the fall hazard) that should have been performed on this area of the sidewalk to eliminate the fall hazard associated with the change in elevation adjacent to Building 1000 which would have prevented Mr. Sanfilippo's fall incident.37

12. 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 answered that he did not know and asked if the Court knew the answer. When the Judge said he did not know, attorney said he would find the answer and report back to the Court. This colloquy extended the hearing in a limited manner until the query was answered several days later with a memorandum of law to the Court and opposing attorney that discussed the Horizontal Property Act, Murphy v. Yacht Cove and Davenport v. Cotton Hope Horizontal Property Act. 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 . .....

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."

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.

4. 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 and Davenport v. Cotton Owner of the authority for this Court to hear the case of Nicholas Sanfilippo v. Estate at Westbury and High Tide Associates. 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

In summation, Plaintiff is of the opinion that, at minimum, this Court should reconsider, amend and alter its Order of Summary Judgment for the Defendant. While the reasons for this

request are many and have been briefly and hurriedly outlined in this missive, I believe it is sufficient to say that, by both statute and the common law, the Plaintiff in this herein matter is entitled to have his complaint heard by a jury of his peers.

Consider this. 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. 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." Then, in the case 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.

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 pemit the controvery to go to trial.

Notes

1. **Neil v. Bynum, 288 S.C.472, 343nd S.E.2d (1986); Frankel v. Kurtz, 239 F. Supp. 713 (D.S.C. 1965).**
2. **South Carolina Code of Laws, Section 27-31-120 Horizontal Property Act.**
3. **South Carolina Code of Laws Section 27-40-400 (a)(3) South Carolina Residential Landlord and Tenant Act (RLTA)**
4. **South Carolina Code of Laws 27-40-610(b) RLTA**

4. South Carolina Code of Laws 27-40-610(b) RLTA

5. F. Patrick Hubbard & Robert L. Felix, The South Carolina law of Torts (2nd. Ed. 1997) P. 127

6. Id. at 2

7. Landry v. Hilton Head Plantation Property Owners Association, 317 S.C.206, 452 S.E. 2d 619, 389 (CT. App. 1994). See also Lincoln: Land owners duty to Guests of Invites and Tenants: Vogt v. Murraywood Swim and Racquet Club and Goode v. St. Stephens United Methodist Church. Lincoln states that South Carolina Courts recognize the common area exception, holding that lessor have a duty of due care to maintain common areas when they retain control of them, thereby classifying tenants as invitees when the tenant is in the common area.

8. Supra at 2

9. Collender v. Charleston Donut Corp., 305 S.C. 123, 406 S.E. 2d 361 (1991); Meadows c. Heritage Village Church and Missionary Fellowship, 305 S.C. 375, 409 S.E.2d 309.

10. Supra at 7; Force v. Richland Memorial Hospital, 471 S.E. 2d 714 (Ct. App. 1996).

11. Graham v. Whitaker, 321 S.E. 2d 40, 43 (S.D.1984). Defendants were well aware that the Plaintiff had a handicap parking sign on the property close by the accident site.

12. Nelson v. Concrete Supply Company, 399 S.E.2d 783 (S.C. 1991).

13. Supra Neil v. Bryum at 616.

14. Supra. Landry v. Hilton Head Property Owners Association.

15. Supra Bryum.

16. Id.

17. Deposition of Robert Dunlap, pp. 37 to 44, July 1, 2020.

18. Copy of an exhibit of a proposal by MAJ Concrete to repair the concrete walkways within the curtilage of the estate at Westbury, April 6, 2017.

19. Collander v. Charleston Donut Company, 305 S.C. 123, 125; 406 S.E.2d 361 (1991).

20. Id. at 361.

21. Creech Wildlife and Maine Resources, 328 S.C. 24, 491 S.E. 2d 571 (1997).

22. Hancock v. Mid-South Managment Co., 381 S.C. 326, 330, 676 S.E. 2d.

23. Supra Collander at 362.

24. Deposition of Brian Durig re Sanfilippo handicap parking near accident site at the Estate at Westbury.

25. Deposition of Nicholas Sanfilippo, Page 37.

26. South Carolina Code of Laws Sections 27-40-400 and 27-40-610.

27. Watson v. Sellers, 299 S.C. 426, 432; 285 S.E. 2d 369 (1989)

28. Supra at 25.

29. Supra at 1.

30. Id.

31. Supra at Blacks Law dictionary, 5th edition, P. 794.

32. *See* Sanfilippo Deposition, Supra at 24.

33. *See* Plaintiff's Complaint.

34. Supra at 17.

35. *See* Plaintiff's Complaint; see Supra at 18.

36. Id.

37. Plaintiff's Complaint

Respectfully submitted,
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Restatement 2nd of Torts, Section 343(a)

Restatement 2nd Torts, Section 343, ccomment (f) at 220-221 (1965)

Hubbard & Felix, South Carolina Law ii of Torts 2nd Edition at 78

Affidavit of Frank D. Pinto

1. My name is Frank Pinto. I live at 3 Cosden Lane in Wayne, New Jersey. In addition to my home in Wayne, New Jersey, I have several other properties in my investment portfolio.

2. For several years I leased one of my properties in the Estates at Westbury in Bluffton, South Carolina to Nicholas and Kathlyn Sanfilippo.

3. The monthly rental that I charged the Sanfilippo's to live in Unit 1001 in the Estates included therein a number of fixed costs such insurance payments, property taxes, HOA/POA fees and property management charges.

4. I considered the Sanfilippo's to be very good tenants

BY _____
Francis D. Pinto

Sworn to before me on this 10th of December, 2021 by Maria Buffano
Notary Public for the State of New Jersey
My Commission Expires: 4/25/24

MARIA E BUFFANO
Notary Public - State of New Jersey
My Commission Expires Apr 25, 2024

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Jul 18 2023
SC Court of Appeals

July 18, 2023

Jenny Abbott Kitchins
Clerk of Court
South Carolina Court of Appeals
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Columbia, South Carolina

ctappfiling@sccourts.org

Nicholas Sanfilippo v. Estate at Westbury Horizontal Property Respondents Regime and High Tide Associates

Appellate Case Number: 2019-CP-07-00554

Dear Clerk Kitchens:

Please find enclosed Mr. Nicholas Sanfilippo's appeal in Case Number 2019-CP-07-00554. I apologize for the tardiness of this document.

Unfortunately, my wife and I both have recently had serious cerebrovascular accidents that have greatly curtailed our activities and my ability to work. While I consider medical matters to be private, at the Court's request, I will supply medical records and physician's letters to verify.

Sincerely,

Gary Coggin

Copy: Nathan Akers