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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2023-000146

Koffi Thomas,…………………………………..…………………………...………...Appellant,

v.

The TJX Companies, Inc., d/b/a TJ Maxx # 399, …..……………………...………Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE TRIAL COURT PROPERLY GRANTED RESPONDENT SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO RAISE GENUINE ISSUES OF MATERIAL FACT ON REQUIRED ELEMENTS OF HER PREMISES LIABILITY CLAIM.

STATEMENT OF THE CASE

This appeal arises from a premises liability lawsuit wherein the Appellant, Koffi Thomas ("Thomas"), alleges she was injured while shopping at a TJ Maxx retail store on November 29, 2018. (R. p. 22). Thomas fell off a bench located outside the store dressing rooms. (R. p. 19, line 11-p.20, line 8). TJ Maxx's video surveillance footage captured the entire incident. (R. p. 72, Surveillance Video). In her Complaint, which alleges a single negligence cause of action, Thomas alleges that TJ Maxx created a hazardous condition upon the premises and failed to remedy it. (R. p. 22). During her deposition, Thomas specified that this alleged hazardous condition was the bench sliding out from underneath her as she attempted to sit down. (R. p. 62, lines 3-7; R. p. 64, lines 9-19). However, the surveillance video showed that Thomas attempted to sit on the bench while distracted on her mobile phone and misjudged its position, sitting down half-way off the bench. (R. p. 72, Surveillance Video). As a result, Thomas' bodyweight shifted towards her unsupported area, causing her to fall and land on the floor. (R. p. 60, lines 5-17); R. p. 72, Surveillance Video 11:29:47-48). The video further showed that the bench did not slide, slip, or otherwise move and that Thomas' fall was caused by her own inattentiveness and improper use of the bench. (R. p. 72, Surveillance Video 11:29:38-11:29:49). Consequently, after carefully reviewing the surveillance video, the Circuit Court granted TJ Maxx summary judgment. (R. pp. 2-9).

FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2021, Thomas filed a Summons and Complaint against Respondent, The TJX Companies, Inc., d/b/a TJ Maxx #399 ("TJ Maxx"), alleging negligence as the sole cause of action. (R. pp. 22-24). TJ Maxx timely filed its answer on June 21, 2021 and raised general denials and comparative negligence as an affirmative defense. *See* (R. pp. 25-28).

Thomas alleges she was injured while shopping at a TJ Maxx retail store on November 29, 2018. (R. p. 59, line 11-p. 60, line 8). While shopping for clothes inside the store, Thomas and her companion ventured to the store dressing rooms in order for Ms. Thomas' companion to try on her prospective purchases. (R. p. 59, line 17-p. 60, line 3). While she waited for her companion to exit the dressing room, Thomas – distracted on her mobile phone – attempted to sit down on a bench in the waiting area located outside the dressing rooms and near a customer desk. (R. p. 60, lines 3-8; R. p. 72, Surveillance Video 11:29:41-48). As Thomas maneuvered down towards the bench, she misjudged its position and sat down towards the furthest end of one side – and half-off – the bench. (R. p. 60, lines 5-8; R. p. 72, Surveillance Video 11:29:46-48). Consequently, Thomas' bodyweight shifted towards her unsupported area, causing her to fall and land on the floor. (R. p. 60, lines 5-8; R. p. 72, Video Surveillance 11:29:47-48). TJ Maxx employees immediately came to Thomas' aid and assisted her onto the bench without further incident. (R. p. 62, lines 8-13; R. p. 72, Video Surveillance 11:29:48-50). Soon after, Thomas' companion returned from the dressing room, and both left the dressing room area to walk towards the front of the store. (R. p. 67, lines 5-12).

In her Complaint, Thomas alleges that TJ Maxx created a hazardous condition upon the premises and failed to remedy it. (R. p. 22). During her deposition, Thomas claimed that this alleged hazardous condition was the bench sliding out from underneath her as she attempted to sit on it and that TJ Maxx should have somehow secured the bench. (R. p. 62, lines 3-7; R. p. 64, lines

9-19). Video surveillance footage captured the entire incident as well as the events immediately before and after. Thomas agreed in her deposition that the video surveillance is accurate, complete, and fairly depicts the incident. (R. p. 63, line 15-p. 64, line 4).

On August 12, 2022, TJ Maxx filed a Motion for Summary Judgment. (R. pp. 51-52). On October 19, 2022, the Circuit Court heard TJ Maxx's Motion for Summary Judgment. (R. p. 29). Also before the Circuit Court were memorandums of both parties, Thomas' full deposition transcript, TJ Maxx's video surveillance footage that captured the underlying incident, and TJ Maxx's Health and Safety Guidelines. During the summary judgment hearing, counsel for TJ Maxx played for the court the video surveillance footage of the incident. (R. p. 33, line 18-p. 37, line 24; R. p. 42, line 17-p. 45, line 7). After careful review of the memorandums, deposition transcript, video surveillance footage, and safety guidelines, the Circuit Court granted TJ Maxx's Motion for Summary Judgment. (R. p. 9).

In its Order, the Circuit Court held that Thomas failed to present any genuine issue of material fact regarding her claim against TJ Maxx. (R. p. 9). Specifically, the Circuit Court held that the bench in question was an open and obvious condition and that Thomas failed to present any evidence that the bench constituted a dangerous or hazardous condition that TJ Maxx either created or had knowledge of and failed to remedy. (R. pp. 6-7). Additionally, after carefully reviewing the surveillance footage, the Circuit Court found that the bench did not slide, slip, or otherwise move and that Thomas' fall was caused by her own inattentiveness and improper use of the bench. (R. pp. 7-8).

On November 17, 2022, Thomas filed a Motion to Reconsider, which the Circuit Court subsequently denied without a hearing on December 28, 2022. (R. pp. 53-58; R. pp. 11-20). This appeal followed.

STANDARD OF REVIEW

When reviewing an appeal of a grant of summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. *Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002). The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014); Rule 56(c), SCRCP. "In determining whether a genuine question of fact exists, the court must view all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 85-86, 502 S.E.2d 78, 81 (1998). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 468, 477, 744 S.E.2d 161, 166 (2013).

"When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.'" *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 107 410 S.E.2d 537, 545 (1991)). "[W]hen the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997). "When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008).

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). "In such a situation, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Baughman*, 306 S.C. at 116, 410 S.E.2d at 546; *see also McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 389-390, 684 S.E.2d 566, 570-71 (Ct. App. 2009) (holding a non-moving party may not rely on speculation to defeat a motion for summary judgment).

ARGUMENT

The Circuit Court's grant of summary judgment should be affirmed because Thomas failed to show a genuine issue of material fact on several required elements of her premises liability claim. Specifically, Thomas failed to show a genuine issue of material fact on the duty element of her claim. She failed to show that TJ Maxx created a hazardous condition or was aware of a hazardous condition and failed to address it. Thomas also failed to show that the hazard she alleged caused her alleged injuries. The bench itself was plainly visible to Thomas, and she failed to properly sit on the bench, which resulted in her injuries. Although Thomas *believes* that the bench slid from under her, the objective video surveillance footage indisputably shows, per the Circuit Court, that the bench did not slide or move when Thomas lowered herself to sit partially on the furthest edge of the bench. As such, the fact that Thomas may earnestly *believe* that the bench slid does not, in the face of clear and objective video evidence to the contrary, create a *genuine* issue of fact for a jury's determination on the duty or causation elements of her claim.

I. Thomas failed to raise a genuine issue of material fact on the duty element of her negligence claim.

"An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." *Bishop*, 331 S.C. at 86, 502 S.E.2d at 81. "The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to summary judgment as a matter of law." *Singleton,* 377 S.C. at 200, 659 S.E.2d at 204 (citations omitted).

"A merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in reasonably safe condition." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). In a premises liability case, the plaintiff must show either: (1) that the injury was caused by a specific act of the defendant which created a dangerous condition; or (2) that the defendant had actual or constructive knowledge of a dangerous condition and failed to remedy it. *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988). When a plaintiff alleges a business owner created the condition at issue, the key inquiry is whether the alleged condition is hazardous. *Assa'ad-Faltas v. Wal-Mart Stores East, L.P.*, C/A No.: 03:18-3563-TLWSVH, 2021 WL 2228464, *3 (D.S.C. Jan. 11, 2021) (citing *Shain v. Leiserv, Inc.*, 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct. App. 1997)). "A property owner generally does not have a duty to warn others of open and obvious conditions...." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004).

A. The Circuit Court properly found that Thomas failed to raise a genuine issue of material fact on the duty element of her claim because neither the bench itself nor its placement was a dangerous condition.

After reviewing Thomas' deposition testimony and the video surveillance footage, the Circuit Court correctly determined that Thomas failed to raise any genuine issue of material fact

that TJ Maxx either knew of or created any dangerous or hazardous condition on its premises. During her deposition, Thomas specified that the only hazardous condition she alleged was a sliding bench that TJ Maxx failed to secure:

> Q: All right. We'll get to that in a moment. But let's just talk about the day of the incident, November the 29th, 2018. Can you tell me in your own words sort of the story of how you got to the store, who you were with, you know, what your day was looking like?
>
> A: … So me and her went to the dressing room. She went inside of the dressing room. I stayed out because I didn't want to, you know, I wasn't buying anything and I wasn't, you know, trying on anything. So I sat outside where they had a chair that was sitting outside of the dressing room. I sat in that chair -- when I got ready to -- well, when I was going to sit in the chair and went to the side of the chair, the chair slipped from up under me.
>
> Q: Okay. So as you were sitting down in the chair—
>
> A: I wasn't in the chair yet.
>
> Q: Okay.
>
> A: When she was in the dressing room, that's when I grabbed her pocketbook, got ready to sit down in the chair. As I got ready to sit down in the chair, the chair slipped up under from up under me.
>
> ***
>
> Q: Do you think the chair that you went to sit in, did it slide to the left or did it slide to the right?
>
> A: To the right.
>
> ***
>
> Q: So tell me, in your own words, Ms. Thomas, what you think the store did wrong to cause or contribute to the accident?
>
> A: The chair wasn't secure at all.

(R. p. 59, line 11-p. 60, line 17; R. p. 61, lines 8-11; R. p. 64, lines 9-12). There is no suggestion or argument from Thomas that the bench itself was defective, broken, unstable, or in ill-repair in any way. In fact, the video shows that immediately after the incident, Thomas successfully sat

down on the bench without any issue. (R. p. 72, Video Surveillance 11:29:56 – 11:30:08). Thomas' only claim is that the bench slid and TJ Maxx should have somehow secured the bench to prevent it from sliding. However, other than Plaintiff's self-serving deposition testimony stating that the bench slid – which the objective video footage indisputably refutes – there is no other evidence in the record to support Thomas' claims that the bench slid. Since the video objectively shows that the bench did not slide, which is Thomas' only alleged dangerous condition, the Circuit Court properly granted TJ Maxx summary judgment. Without the bench being a dangerous condition, the duty element of her claim fails as a matter of law.

B. Even if the bench was a dangerous condition, the Circuit Court correctly found that Thomas failed to raise a genuine issue of material fact on the duty element of her claim because the bench was an open and obvious condition.

The Circuit Court determined that the bench was an open and obvious condition that Thomas was in the best position to appreciate. As a general rule, landowners only owe a duty to warn their invitees of latent dangers of which the owner is aware. *Larimore v. Carolina Power & Light*, 340 S.C. 438, 445, 531 S.E.2d 535, 538 (Ct. App. 2000). This duty to warn does not extend to open and obvious conditions. C*allender v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991). Although there is an exception to the "open and obvious" rule when the owner has reason to anticipate the specific harm suffered, the plaintiff bears the burden of showing that the "reasonably anticipated harm" exception applies. *See Garvin*, 343 S.C. at 628-29, 541 S.E.2d at 833. Here, Thomas failed to raise a genuine issue of material fact as to this exception.

Thomas failed to provide any evidence or testimony that TJ Maxx could have anticipated her alleged specific harm – i.e. that the bench would slide out from under patrons who properly used it.[1] There is no evidence or testimony establishing that there were any prior incidents, issues,

[1] As explained below, TJ Maxx disputes that Thomas properly used the bench. As the Circuit Court found, Thomas' fall was caused by her sitting halfway off the end of the bench. Thomas has also

or complaints involving the bench, its placement, or its location in the dressing room area. In fact, Thomas herself testified that she does not have any evidence of prior or subsequent issues with the bench sliding from beneath other customers:

> Q: Are you aware of any evidence that the store had ever had any issues with that particular bench moving or sliding prior to the time of your incident?
>
> A: No.
>
> Q: Are you aware of any evidence to show that the store had had any issues with that bench moving or sliding after the time of your incident?
>
> A: Not to my knowledge.

(R. p. 64, line 23-p. 65, line 6). Thomas' testimony shows that TJ Maxx had no reason to anticipate the specific harm now claimed, and she offers no evidence that anyone had fallen off the bench because of its slipping either before or after the incident at issue. There is no evidence establishing that TJ Maxx had any reason to believe a fall was likely to occur – particularly if the bench was used properly by a customer. Consequently, due to the open and obvious nature of the bench and the lack of any evidence of that TJ Maxx had prior knowledge of the bench being a dangerous condition because it slid out from under customers, the trial court correctly held that Thomas failed to present a genuine issue of material fact on the duty element of her claim. *See Larimore*, 340 S.C. at 447, 531 S.E.2d at 539 ("[Plaintiff] failed to present any evidence that [defendant] had any knowledge of the defect's existence prior to the accident. Because [defendant] had no knowledge of the defect's existence, it would be impossible for him to anticipate any harm that might result from it.").

II. Thomas failed to present a genuine issue of material fact on the causation element of her claim.

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failed to present any evidence that TJ Maxx should have anticipated that its customers would attempt to sit halfway off the bench.

The Circuit Court correctly found that the bench did not move or slide and that such alleged condition did not cause Thomas' injuries. The Circuit Court also correctly found that the cause of Thomas' fall was her own inattention and misjudgment in lowering herself upon the bench. (R. pp. 7-8). The Circuit Court based these findings on the video surveillance footage, which plainly and objectively shows that the bench did not move or slide when Thomas went to sit upon it. The video surveillance footage also shows that Thomas was not paying attention to the location of the bench when she went to sit down and that she sat halfway off the end of the bench, which caused her to fall. (R. p. 72, Surveillance Video 11:29:41-48).

The Circuit Court carefully scrutinized the video and viewed enlarged frames of the video. As Thomas begins to lower herself to sit on the bench and while looking at her phone, she partially sits on the furthest edge of one of the sides of the bench. (R. p. 72, Surveillance Video 11:29:45-49). As she completes her motion, Thomas' left side partially lowers on the bench while the right side of her body remains unsupported. (R. p. 72, Surveillance Video 11:29:45-49). As such, Thomas' weight shifts to her unsupported right side, causing her to fall onto the ground. (R. p. 72, Surveillance Video 11:29:45-49). The trial court determined that at no point during Thomas' distracted attempt to sit on the bench, her falling towards the floor, or upon landing on the floor did the bench move or slide in any direction. (R. p. 8). It is not until after the incident when an employee slides the bench towards the wall that the bench moves. (R. p. 72, Surveillance Video 11:29:52-55).

Thomas contends that her own testimony that the bench slid creates a **genuine** issue of material fact sufficient to survive summary judgment. Nevertheless, Thomas concedes in her own deposition testimony that the video footage fairly, completely, and accurately portrayed the incident:

> Q: So we've watched, in its entirety, the first video segment and then we watched sort of extended clips of the second and third video. They all seem to show the same thing, would you agree?
>
> A. (No response.)
>
> Q. The same view of the accident and the same view of the dressing room area?
>
> A. Yes. The setup is the same.
>
> Q. The setup is the same. And it does capture the accident where you fell, correct?
>
> A. Correct.
>
> Q. Fairly and accurately captures that; is that right?
>
> A. Correct.

(R. p. 63, line 15-p. 64, line 4). Thomas' testimony that the bench slid, while perhaps earnest and sincere, does not change the objective facts as shown on the video, which she concedes to be accurate, complete, and fair. She further contends that the trial court made an improper credibility determination in accepting the video depiction of the incident over her stated testimony and belief of the incident, and that her testimony creates a scintilla of evidence. (Appellant's Br., pp. 8, 10, 13-14). Thomas' belief – in the face of the clear and contradictory video evidence – cannot create a **genuine** issue of fact. To say otherwise would result in a party or witness' ability to simply state that a video does not show what it shows. While parties can question the accuracy and completeness of video recordings, Thomas does not do so here. Thomas concedes the video to be an accurate and fair depiction of the incident. Accordingly, the trial court did not make an improper credibility determination. The trial court simply accepted Thomas' testimony that the video is an accurate and fair depiction of the incident. Thus, the Circuit Court properly granted TJ Maxx summary judgment because Thomas failed to raise a genuine issue of material fact on the causation element of her claim.

Indeed, in cases where the evidence is susceptible to only one reasonable inference, no jury issue is created. *Singleton*, 377 S.C. at 207-08, 659 S.E.2d at 208. Moreover, "[t]estimony that contradicts undisputed physical evidence generally lacks probative value." *Legette v. Piggly Wiggly, Inc.*, 368 S.C. 576, 580, 629 S.E.2d 375, 378 (Ct. App. 2006) (citing *Lail v. South Carolina State Highway Dep't*, 244 S.C. 237, 136 S.E.2d 306 (1964) (stating that testimony relied upon by plaintiff to establish liability was inconsistent with incontrovertible physical facts and therefore lacked probative value)); *see also Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 1776 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record…a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

In *Legette v. Piggly Wiggly*, this Court demonstrated what a court is to do on summary judgment when the plaintiff's own testimony contradicts physical evidence. 368 S.C. at 580, 629 S.E.2d at 377. In *Legette*, a patron entered a grocery store on a rainy day and remained there for approximately twenty-five minutes while the rain outside increased in severity. *Id.* at 578, 629 S.E.2d at 376. As she exited the store, the patron slipped and fell on moisture near the store's doors. *Id.* Store employees immediately came to the patron's aid and took photographs of the scene. *Id.* The patron sued, alleging that the store knew or should have known of the dangerous condition and did nothing to remedy it and that the store failed to provide a safe shopping environment to its invitees. *Id.* at 578-79, 629 S.E.2d at 376.

During her deposition, the patron initially testified that she did not see or notice the water on the floor prior to her fall, and that there were no mats or cones at the door where she fell. *Id.* at 580, 629 S.E.2d at 377. However, photographs taken immediately after the accident showed that there were mats and cones located near the doorway. In affirming the lower court's grant of

summary judgment, this Court held that the patron failed to establish a genuine issue of material fact in light of the objective and "undisputable physical evidence" establishing the presence of the mats and cones. *Id.* at 581, 629 S.E. 2d at 378.

Thomas argues that this case is more like the case of *Padgett v. Colleton County*, 383 S.C. 431, 433, 679 S.E.2d 533, 534 (Ct. App. 2009) because her testimony about the bench sliding has never vacillated.[2] (Appellant's Br., pp. 10, 14). However, that case is distinguishable. In *Padgett*, a patron fell in a hole. *Id.* at 434, 679 S.E.2d at 535. The trial court granted the County's motion for directed verdict, finding that the hole was an open and obvious condition based on a still photograph of the hole. *Id.* However, the photograph showed some leaves covering the hole.

On appeal, this Court disagreed with the trial court's finding that "the photograph conclusively established the defect was open and obvious." *Id.* at 437, 679 S.E.2d at 537. "Although [the patron] submitted the photograph, he also asserted in his brief the photograph showed the hole was partially covered, and we find it significant that County did not respond to

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[2] In her brief, Thomas painstakingly reviews the South Carolina Supreme Court case of *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009), which established the "mere scintilla rule" in South Carolina. Specifically, Thomas strenuously argues the point that *Legette* was decided pre-*Hancock*, whereas *Padgett* was decided post-*Hancock*. This is a distinction without a difference. Neither *Legette* nor *Padgett* reference *Hancock* or the "mere scintilla rule" in its analysis.

Moreover, even under this rule, a jury issue is only "created when there is material evidence tending to establish the issue in the mind of a reasonable juror." *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (decided after *Hancock*). "[T]his rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Id.* "Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." *Id.*; *Holmes v. East Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014) ("Nevertheless, when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted."); *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 576, 757 S.E.2d 399, 404 (2014) (same). Given the indisputable video evidence of the entire incident, this is such a case where there is only one <u>reasonable</u> inference.

this assertion." *Id.* Thus, the physical evidence itself did not negate the possibility that the plaintiff's fall was caused by the hazardous condition he alleged. Here, the physical evidence negated all possibility that Thomas' fall was caused by her alleged hazardous condition – a sliding bench – because it shows conclusively that the bench did not slide prior to or during her fall.

Moreover, as the Circuit Court noted, Thomas does not challenge the accuracy or completeness of the video and concedes that the video surveillance footage accurately captured the incident:

> Q: So we've watched, in its entirety, the first video segment and then we watched sort of extended clips of the second and third video. They all seem to show the same thing, would you agree?
>
> A. (No response.)
>
> Q. The same view of the accident and the same view of the dressing room area?
>
> A. Yes. The setup is the same.
>
> Q. The setup is the same. And it does capture the accident where you fell, correct?
>
> A. Correct.
>
> Q. Fairly and accurately captures that; is that right?
>
> A. Correct.

(R. p. 63, line 15-p. 64, line 4). Here, the Circuit Court did not just consider Thomas' allegations that the bench slipped. It also considered the remainder of Thomas' testimony – specifically her admission of the accuracy of the video surveillance evidence, which clearly showed that the bench did not slide. The trial court also ruled that even if the bench had moved, a viewing of the video showed that Thomas' actions were the determinative contributing factors causing her injuries. (R. pp. 7-8). Unlike the photograph in *Padgett*, the video evidence leaves no room for any subjective interpretation that would support Thomas' allegation of a sliding bench causing her injuries.

Furthermore, the evidence at issue in both *Legette* and *Padgett* consisted of witness testimony and still photographs taken after the incidents at issue. The physical evidence at issue in this case is video surveillance footage that captured the actual incident at issue. Photographs are still-shot, single-frame images that must be accompanied by witness testimony to provide context (explaining when and where the photograph was taken, what the photograph is intended to depict, etc.). Video evidence, like the type at issue in this case, captures the events as they happen with little to no context required.

In the case of *Scott v. Harris*, the United States Supreme Court dealt with the issue of summary judgment when there is clear video evidence and contradictory plaintiff testimony. 550 U.S. 372, 380, 127 S.Ct. 1769, 1776 (2007). In *Scott*, the plaintiff failed to pull over for a county deputy and a high-speed police pursuit ensued . *Id.* at 375-76, 127 S.Ct. at 1772-73. After the pursuit continued for some time, a deputy was granted permission to execute a "push bumper" maneuver against Harris' vehicle to incapacitate it. *Id.* at 375, 127 S.Ct. at 1773. As a result of this maneuver, the plaintiff lost control of his vehicle and crashed, rendering him a quadriplegic. *Id.* The district court denied the deputy's motion for summary judgment, finding there were genuine issues of material fact based on the plaintiff's version of the facts of the pursuit. *Id.* at 376, 127 S.Ct. at 1773.

The United States Supreme Court reversed the denial of the summary judgment. In doing so, the Court took issue with the relevant facts adopted by the district court and Circuit Court of Appeals, which accepted the plaintiff's version of the facts despite the existence of videotape footage to the contrary. *Id.* at 378, 127 S.Ct. at 1774-75. The plaintiff asserted that, during the chase, there was little to no actual threat to pedestrians or other motorists because the roads were mostly empty and that he had remained in control of his vehicle during entirety of the chase. *Id*. at

378, S.Ct. at 1775. The district court accepted as true that plaintiff remained in control of his vehicle, slowed for turns, used his turn indicators, did not run other motorists off the road, was not a threat to pedestrians, and that the roadway had been cleared of motorists. *Id.* at 379, S.Ct. at 1775.

The video footage, however, told a significantly different story. It showed that plaintiff's vehicle raced down narrow, two-lane roads at nighttime at shockingly fast speeds. *Id.* Plaintiff's vehicle swerved around numerous vehicles, crossed double yellow lines, and forced cars off the roadway to avoid collisions. *Id.* It also showed that he ran multiple redlights and traveled down the center left turn only lane for significant periods of time, all while being chased by several police cars. *Id.*

The Supreme Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment" and held that the lower courts should have accepted the facts as objectively depicted from the videotape. *Id.* at 380-81, 127 S.Ct. at 1776. Notably, the plaintiff did not allege that the video was altered in any way or that it did not accurately depict the incident at issue. *Id.* at 378, 127 S.Ct. at 1775.

Like the video in *Scott*, Thomas does not allege that the video surveillance footage that captured her fall was altered in any way or that it does not accurately depict the incident at issue. Instead, Thomas admits that the video footage is a clear and accurate depiction of her fall. (R. p. 63, line 15-p. 64, line 4). Given the clear video footage of the incident, Thomas' testimony that the bench slid from beneath her and caused her fall cannot create a **genuine** issue of material fact on either the hazardous condition or causation elements of her claim. The video plainly shows that

Thomas, due to her inattentiveness and misjudgment, failed to sit properly on the bench which caused her weight to shift to her unsupported side.

Nevertheless, *even if* Thomas' contention that the bench slid is accepted *arguendo*, the video evidence still supports the view that the determinative factor in Thomas' fall was her own inattention and misjudgment in lowering herself to sit on the bench. As shown on the video, the only reason the bench would have slid would be due to Thomas' uneven application of weight to the furthest edge of the bench – i.e. her sitting halfway off the end of the bench. *See Hopson v. Clary*, 321 S.C. 312, 316, 468 S.E.2d 305, 308 (Ct. App. 1996) (barring plaintiff's claim under comparative negligence because even assuming some negligence on the part of defendant, plaintiff's negligence was greater as a matter of law as it was the "determinative factor" in causing auto accident); *Bloom v. Ravoria*, 339 S.C. 417, 423-24, 529 S.E.2d 710, 713 (2000) (affirming trial court's grant of summary judgment to defendant on comparative negligence affirmative defense); *Estate of Haley ex rel. Haley v. Brown*, 370 S.C. 240, 634 S.E.2d 62 (Ct. App. 2006) (affirming trial court's directed verdict for defendant where evidence showed that bicyclist's actions of striking defendant's truck in its side was the "determinative factor in causing the collision"). Thomas' own negligence – her inattention to the location of the bench when sitting and her sitting halfway off the end of the bench – is greater as a matter of law than any hypothesized negligence on the part of TJ Maxx. Consequently, the trial court properly determined that *even if* the bench slid, the determinative factor in the fall was Thomas' own lack of care and attention in lowering herself upon the bench.

III. The Circuit Court properly determined that the TJ Maxx Health and Safety Guidelines do not create a genuine issue of material fact for the required elements of Thomas' claim.

The Circuit Court correctly determined that TJ Maxx's Health and Safety Guidelines do not create a genuine issue of material fact because there is no evidence that the bench itself or its placement was an unsafe condition on the premises. *See Garvin,* 343 S.C. at 629, 541 S.E.2d at 833 (requiring more than an incident occurring to survive summary judgment, specifically requiring showing that store created hazardous condition or was on notice of it). While the TJ Maxx guidelines require store employees to monitor the premises for unsafe conditions or hazards, the obvious prerequisite is that Thomas have demonstrated that there was an unsafe or hazardous condition that caused her injury. As shown above, Thomas failed to demonstrate a genuine issue of material fact as to whether the bench itself or its placement was an unsafe condition. Only if the bench was such a hazardous condition would TJ Maxx employees then be required to identify, fix, or report it under the guidelines. Moreover, Thomas' own actions demonstrated that the bench was not a hazardous condition when properly used. After her fall, Thomas paid attention to the placement and location of the bench and safely sat on it without incident. (R. p. 72, Surveillance Video 11:29:59-11:30:05).

Furthermore, Thomas conceded that she has no evidence showing that TJ Maxx knew or should have known of any alleged issues with the bench moving or sliding before or after this incident:

> Q: Are you aware of any evidence that the store had ever had any issues with that particular bench moving or sliding prior to the time of your incident?
>
> A: No.
>
> Q: Are you aware of any evidence to show that the store had had any issues with that bench moving or sliding after the time of your incident?
>
> A: Not to my knowledge

(R. p. 64, line 23-p. 65, line 6). Thomas' testimony supports the view that TJ Maxx could not have reasonably anticipated the specific harm she sustained. She offers no evidence of the bench sliding or moving as patrons attempted to sit on the bench either before or after the incident. Under South Carolina law, individuals must use reasonable care to safeguard their own interests. This includes using reasonable care when sitting down on a piece of furniture. As explained above, under South Carolina law, merchants are not the insurers of their customers' safety while on the premises, particularly when open and obvious conditions are involved. The location of the bench was an open and obvious condition. Thomas' safe use of the bench was dependent on her being attentive to the location of the bench and properly sitting upon it.

At its core, Thomas' argument is that *all* benches, stools, chairs, ottomans, or other pieces of furniture are *conceivably* dangerous conditions if an incident occurs, and the store has a policy to identify and correct "unsafe conditions." This argument gets the proverbial cart before the horse and flies in the face of longstanding South Carolina law and public policy, which clearly provides that merchants are not insurers of its customers. *See Garvin*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001); *Easterling v. Burger King Corp.*, 416 S.C. 437, 451, 786 S.E.2d 443, 451 (Ct. App. 2016); *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 406 675 S.E.2d, 783, 788 (Ct. App. 2009). South Carolina courts have repeatedly rejected this argument. Thus, the Circuit Court correctly found that the mere existence of TJ Maxx's Health and Safety Guidelines does not create a genuine issue of material fact on the required elements of Thomas' claim.

CONCLUSION

For the foregoing reasons, the Circuit Court's grant of summary judgment in favor of TJ Maxx should be affirmed. Thomas failed to raise genuine issues of material fact on two required

elements of her negligence claim – duty and causation. Failure as to one element alone entitles TJ Maxx to summary judgment.

Thomas' testimony that the bench slid is not sufficient to raise a **genuine** issue of material fact on to the duty or causation elements of her claim. The objective video surveillance footage shows that the bench did not slide prior to or when Thomas fell. Moreover, the bench is an open and obvious condition, which Thomas was in the best position to observe and appreciate. Thomas presented no evidence that TJ Maxx "reasonably anticipated" her alleged harm – i.e., the bench sliding out from someone who properly sits upon it.

Moreover, *even if* Thomas' contention of the bench sliding is accepted, Thomas' own inattentiveness and misjudgment as she lowered herself to sit upon the bench were the determinative factors that caused her fall. Thus, the Circuit Court properly granted TJ Maxx summary judgment, and TJ Maxx respectfully requests that the Court affirm that grant of summary judgment.

Respectfully submitted,

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September 21, 2023

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Murphy & Grantland, P.A., counsel for the Respondent, does hereby certify that service of the Final Brief of Respondent in the above-captioned matter was made upon all counsel of record by email only this the 20th day of September 2023 as follows:

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September 21, 2023

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Via Email Only (ctappfiling@sccourts.org)
The Honorable Jenny Abbott Kitchings
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Re: Koffi Thomas vs. The TJX Companies, Inc. d/b/a TJ Maxx #339
Appellate Case No.: 2023-000146
Civil Action No.: 2021-CP-40-02555

Dear Mrs. Kitchings:

Pursuant to Section (b)(2) of the South Carolina Supreme Court's Order regarding Methods of Electronic Filing and Service Under Rule 262 of South Carolina Appellate Court Rules (as amended May 6, 2022), please find enclosed for electronic filing and service the following:

1. Final Brief of Respondent The TJX Companies, Inc. d/b/a TJ Maxx #339
2. Certificate of Compliance
3. Certificate of Service

By electronic copy of this letter, I am serving all counsel of record as stated below. If you have any questions or need any further information from me, please do not hesitate to call.

Sincerely yours,

s/ Ronald B. Diegel

Ronald B. Diegel

RBD/zbr
Enclosures

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