THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 02 2023
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-001649

Gwendolyn Lockett, ... Appellant,

v.

Barnyard Flea Market of Greer, LLC and Jane Doe, Defendants,
of which Barnyard Flea Market of Greer, LLC is .....Respondent.

RESPONDENT'S FINAL BRIEF

KELSEY J. BRUDVIG
SC Bar Number: 101680
kbrudvig@collinsandlacy.com
HENRY D. MCMASTER, JR.
SC Bar Number: 103232
hmcmaster@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (voice)
803.771.4484 (fax)

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly granted Summary Judgment on Appellants' negligence claim where there was no evidence that Respondent had constructive notice of any alleged dangerous condition.

STATEMENT OF THE CASE

Appellant Gwendolyn Lockett ("Appellant") commenced this action by filing a Summons and Complaint on October 12, 2020, and serving it January 8, 2021, alleging a negligence cause of action against Respondent Barnyard Flea Market of Greer (ROA 17). Respondent filed its Answer on February 5, 2021. (ROA 23).

Following the completion of substantial discovery, Respondent moved for Summary Judgment on June 1, 2022, arguing that Respondent was entitled to Summary Judgment on several grounds: 1. Respondent did not create the dangerous condition or have notice of the dangerous condition; 2. Respondent did not control the area or product where Respondent was injured; and 3. Respondent was not liable through agency principals. (ROA 31-33) The Circuit Court held a virtual hearing via WebEx on September 20, 2022, and issued its Order Granting Summary Judgment on October 4, 2022. (ROA 1-13). The Circuit Court held that Appellant failed to establish that Respondent's created the alleged condition, or had actual or constructive notice of the same; and that Respondent could not be held vicariously liable for the acts of Gypsy's Caravan because Gypsy's Caravan was not an agent of Respondent.[1]

Appellant filed her Motion to Alter or Amend, which was subsequently denied by the Court. (ROA 49-52; ROA 14).

---

[1] Respondent notes that Appellant has only raised the issue of whether the Circuit Court erred in holding that Respondent did not have constructive notice of the purported dangerous condition. Appellant does not address the ruling concerning vicarious liability. Accordingly, this Court can affirm the Circuit Court's Order pursuant to the two issue rule. See Wofford v. City of Spartanburg, 415 S.C. 152, 781 S.E.2d 146 (Ct. App. 2015).

On November 23, 2022, Appellant filed its Notice of Appeal.

STATEMENT OF THE FACTS

This premises liability action arises out of a purported trip and fall on October 15, 2017 by Appellant. Appellant avers that on October 15, 2017, she entered the flea market and shopped at a store called Gypsy's Caravan. (ROA 19, ¶ 10). Appellant alleges that, while she was shopping at Gypsy's Caravan, an unidentified woman in an electric wheelchair backed towards her, causing her to have to back up to avoid being struck. (ROA 19, ¶ 13). Appellant states that she tripped over merchandise that was placed on the floor of Gypsy's Caravan. (ROA 19, ¶ 14). According to Appellant, she then fell backwards onto the concrete floor and lost consciousness for a few seconds. (ROA 19, ¶ 15). As a result, Appellant contends that she suffered severe injuries. (ROA 19, ¶ 16).

Appellant contends that, as an invitee of Respondent's premises, Respondent owed her a duty of care, as Gypsy's Caravan was allegedly controlled by Respondent and the store owner acted as an agent of the Respondent through the principles of actual agency and apparent agency. (ROA 19, ¶ 11). Therefore, according to Appellant, Respondent is vicariously liable for any negligent or reckless acts committed by the operator of Gypsy's Caravan. (ROA 19, ¶ 12).[2]

Appellant commenced this action against Respondent on October 12, 2020, nearly three years after the alleged incident occurred. Appellant asserted a claim of negligence, rooted in premises liability, against the Respondent.

Following the exchange of written discovery in this case, Appellant was deposed on March 30, 2022. During her deposition, Appellant recollected that on the day of October 15, 2017, she

[2] Appellant does not raise arguments contesting the ruling that Gypsy Caravan was not an agent of Respondent and therefore, Respondent is not liable for any acts of Gypsy Caravan.

was a vendor at Barnyard Flea Market in Greer, Sout Carolina, and that she had filled out the vendor agreement. (ROA 94, lines 22-24). She first opened up a stall at the Flea Market on July 16, 2017, and sold items from around her home in her booth. (ROA 95, lines 3-9). She agreed that the vendor contract stated, "The Flea Market is not responsible for the dealer's property. Although security measures are taken, dealers leave their property at their own risk. The Flea Market is not responsible for any liabilities arising out of the negligent acts of dealers or their employees or any injuries sustained by any of their employees." (ROA 96, lines 14-25). When asked if Respondent had any control over how vendors set up their booths, Appellant stated that they had "some control," but averred that the only rules were that they couldn't display their goods outside their booth except for a small area in front of the entrance. (ROA 97, line 17 – p. 29, line 7).

Appellant testified that she had previously visited the Gypsy Caravan vendor area before the day of her fall but could not recall how many times she had shopped there. (ROA 100, lines 19-24). She stated that she went to Gypsy's Caravan to ask the owner a question, and that Appellant was at the Flea Market selling items out of her booth on that date. (ROA 102, lines 5-13). To that end, Appellant agreed that she was not at the Flea Market as a visitor, but rather as a vendor, and only left her booth to visit Gypsy's Caravan briefly. (ROA 102, line 14-18).

Appellant averred that Gypsy's Caravan was on the same hall as her booth. (ROA 102, line 21). She testified that she walked to the front of the stall and waited while the owner was helping a customer before entering. (ROA 103, lines 6-14). She did not recall seeing anything on the floor or around her. (ROA 103, line 17). Appellant testified that, as she was standing outside of Gypsy's Caravan, a woman in an electric wheelchair began to back up towards her, and Appellant backed up to avoid the wheelchair; as she did this, she tripped over items that were

sticking out of a table in front of Gypsy's Caravan and fell. (ROA 104, lines 8-15).

She stated that Respondent supplied a table to every vendor, but that the Respondent's rules stated that the table had to be within each vendor's area. (ROA 105 lines 14-22). She stated that most of the vendors used these table to display items for sale. (ROA 106, line 8). She did not know if the items that she allegedly tripped over belonged to Gypsy's Caravan. (ROA 106, line 17). Appellant testified that, as she stepped back, she fell backwards over these items and landed on her back and hips, briefly losing consciousness. (ROA 108, lines 2-8). Appellant believed that the items that she tripped over belonged to Gypsy's Caravan, not the Respondent. (ROA 109, line 23). She did not know who placed the items under the table, nor how long they had been there. (ROA 110, lines 2-12). Appellant testified that she was helped up by people at the Flea Market, but could not identify who, and then drove herself to the hospital. (ROA 108, line 7 – ROA 109, line 7).

A representative of Respondent was not deposed by Appellant; neither was the owner/vendor at Gypsy's Caravan. However, during written discovery, Respondent produced Appellant's vendor file with the Flea Market. This file includes Appellant's Vendor Agreement with the Defendant that she signed on July 7, 2017. (ROA 140). Attached to this agreement is the "Flea Market Policy for Warehouse Rentals" that lays out the several policies of Defendant for Vendors. (ROA 138-39). In relevant part, the policies state:

> The Flea Market is not responsible for the dealer's property. Although security measures are taken, dealers leave their property at their own risk. The Flea Market is not responsible for any liabilities arising out of the negligent acts of dealers or their employees or *any injuries sustained by any of their employees.*

(Flea Market Policy for Warehouse Rentals). This document was also signed and dated by Appellant on July 16, 2020. (ROA 138).

Furthermore, Respondent publishes a pamphlet for all vendors that states Defendants table rental policies. In relevant part, this pamphlet states that all items must be kept within the white line at each vendor booth. (ROA 139).

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP; Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. The nonmoving party must then "do more than simply show that there is some metaphysical doubt as to the materials facts[,]" but "must come forward with specific facts showing that there is a genuine issue for trial." Id.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be **reasonably** drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997) (emphasis added). Nonetheless, a court, "cannot ignore facts unfavorable to [the non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290,

292 (Ct. App. 1989). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose *as a matter of law.*" Main v. Corley, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (emphasis added); see also Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (standard for summary judgment "mirrors" standard for directed verdict).

LAW/ANALYSIS

I. The Circuit Court Properly Held that Respondent Did Not Have Constructive Notice of the Purportedly Dangerous Condition

It is well-settled in South Carolina that a merchant is not the insurer of the safety of its customers. Rather, a merchant who invites the public to his premises owes them a duty to exercise due care to keep the premises in a reasonably safe condition. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 541 S.E.2d 831 (2001). A merchant is responsible for the consequences of conditions arising from his own negligence, "provided he has actual or constructive notice of an unsafe condition and a reasonable opportunity to correct it." Mullen v. Winn-Dixie Stores, Inc., 252 F.2d 232, 233 (4th Cir. 1958) (applying South Carolina law). Specifically, to establish liability under a premises liability theory, plaintiffs must meet the test established in Wintersteen v. Food Lion, 344 S.C. 32, 542 S.E.2d 728 (2001).

In Wintersteen, the South Carolina Supreme Court again reiterated the elements that must be proven to recover in a negligence action based on a defective condition of the premises:

> In South Carolina, to recover damages for injuries caused by a dangerous condition or defective condition on a landowner's premises, the plaintiff must show either: (1) the injury was caused by a specific act of the landowner that created the dangerous condition; or (2) the landowner had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 371 S.E.2d 530 (1988); Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957).

Id. at 35, 542 S.E.2d at 729. Thus, "[a] plaintiff seeking to recover for injuries sustained in a fall caused by a [defective or dangerous condition] on a storekeeper's [premises] must prove that the storekeeper had actual or constructive notice that the [condition] on the premises." Gosnell v. U.S. Postal Service, 2007 WL 10344997 (D.S.C. 2007) (citing Calvert v. House Beautiful Paint & Decorating Center, 313 S.C. 494, 496, 443 S.E.2d 398, 399 (1994)).

Constructive notice may be established by showing that the dangerous condition was present sufficiently long that the premises operator was negligent in failing to discover and remove it. Pennington, 252 S.C. at 178, 165 S.E.2d at 696 (holding where there was no evidence in the record that the plastic bags were on the floor for any length of time prior to plaintiff's fall, it was mere speculation to hold they should have been discovered by the merchant); see also Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 394 S.E.2d 24 (Ct. App. 1990) (holding storekeeper was not liable to customer who slipped and fell on wet floor near checkout clerk absent evidence that employee knew floor was wet or evidence of how long water had been on the floor).

Appellant relays that the "key question in this case is whether [Respondent] had constructive notice of the dangerous condition that existed …." (App. Brief, p. 4). Appellate goes on to argue that because of the purported control that Respondent exercised over the area, it therefore "knew or should have known about the existence of the dangerous condition." (App. Brief, p. 5). Respondent cites to several provisions of the Flea Market Policy for Warehouse

Rentals as the basis for establishing the control Respondent had over the premises as well as the vendors/tenants. Plaintiff conclusively argues that "[Appellant] would not have been injured if [Respondent] had enforced its rules and regulations regarding keeping aisles clear." (App. Br. P. 6). Appellant contends that the Circuit Court's failure to consider the control Respondent exerted over tenants and the premises, and therefore, erred in granting summary judgment.

As an initial matter, Respondent interprets Appellant's arguments concerning the policies and procedures, and therefore, because a dangerous condition existed, the policies and procedures were either not enforced or not followed, to be akin to a theory of *res ipsa loquitur*, a theory not recognized in South Carolina. See King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961) (dismissing case where plaintiff failed to present evidence that escalator on which she was injured jerked due to defendant's negligence).; see also Howard v. Kmart Discount Store, 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987) ("Testimony that a floor was slick, without evidence that the slickness constituted an unsafe condition, is insufficient to present a jury question on a merchant's conduct in the care of his floors and its causal relationship to plaintiff's fall."); Hunter, 232 S.C. at 144, 101 S.E.2d at 265 (stating "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of res ipsa loquitur does not apply in this State.").

Further, Appellant's arguments appear to miss the mark on the well-established jurisprudence concerning constructive notice. Indeed, Appellant does not even refer to applicable cases citing the standard for constructive notice or knowledge in premises liability matters, only citing to Multimedia Publishing of South Carolina, Inc. v. Mullins, 314 S.C. 551, 556, 431 S.E.2d 569, 572 (1993). Notably, Multimedia Publishing is a case involving a claim for breach of

contract. The notice discussed in Multimedia Publishing, relates to "constructive" notice of the potential for a claim. The cited case fails to address the standard related to constructive notice in a premises liability matter.

Rather, the standard is articulated *supra*. Constructive notice may be established by showing that the dangerous condition was present sufficiently long that the premises operator was negligent in failing to discover and remove it. Pennington, 252 S.C. at 178, 165 S.E.2d at 696. Regardless of the provisions in the Flea Market Policy for Warehouse Rentals, Appellant cannot establish constructive notice solely based on these provisions. Imperative to establishing that Respondent should have been aware of the alleged condition if the policies had been enforced is that the purported condition actually existed at the time any inspection would have taken place. As the circuit court noted, the record is void of any evidence that the purported condition existed for any length of time such that Respondents would have constructive notice when enforcing the policies and procedures.

Specifically, Appellant testified regarding her lack of knowledge of how long the condition purportedly existed:

> Q: Do you know how long those items were under the table in the manner that they were, in the same condition that they were at the time of your fall? Do you know how long those items were under the table like that?
>
> **A: I have no knowledge, no, ma'am.**

(ROA 110, lines 7-12). There is no testimony or evidence in the record to establish that the condition existed for such a period to establish Respondent had constructive notice of the same. The Circuit Court correctly applied the Wintersteen test and the governing cases concerning

constructive notice in holding that Respondent did not have constructive notice of any purportedly dangerous condition.

Further, Appellant cites to the recent opinion of Garrison v. Target Corp. 435 S.C. 566, 869 S.E.2d 797 (2022). Appellant specifically refers to the opinion that references that Target's store manager testified that employees would monitor the parking lot for dangerous conditions when returning carts to the store, but no scheduled existed for monitoring the parking lot; and that Target did not keep records of the maintenance it performed. Appellant, in referring to the opinion, states "The Court held, '[B]ased on this evidence, the jury could reasonably find the syringe had been in the parking lot long enough for Target to discover and remove it in the exercise of due care." (App. In. Br. P. 5, citing Garrison, at 580, 860 S.E.2d at 804). However, the Court not only considered the policies of Target in reaching its conclusion, but made specific reference to the testimony and photographs regarding the damaged, weathers appearance of the syringe at the time the incident. In conjunction with the evidence regarding "Target's troubling lack of cleaning and inspection procedures," the Court held that the Syringe could have been in the parking lot long enough for Target to discover and remove it in the exercise of due care. Id.

Contra to Garrison, the record is void as to Respondent's "troubling lack" of compliance with the policies and procedures articulated in the Flea Market Policy for Warehouse Rentals. There is no evidence of similar nature as articulated in Garrison that a jury could reasonably find that the purported condition was present long enough within Gypsy Caravan's vendor space for Respondent to discover and remove it in the exercise of due care. Indeed, there is no evidence that Respondent did not enforce or comply with the policies and procedures. While Appellant argues that "[Appellant] would not have been injured if [Respondent] had enforced its rules and regulations regarding keeping aisles clear" (App. Br. P. 6), the record is void of any evidence to

support Appellant's contention that Respondent did not enforce or comply with its rules and regulations.

CONCLUSION

The Circuit Court properly held that Respondent did not have constructive notice of any purportedly dangerous condition. While Appellant has cited to several policies and procedures in place at the time of the incident, there is no evidence that Respondent did not comply or enforce the policies and procedures, such that a reasonable jury could find that Respondent had notice of the alleged dangerous condition upon the exercise of due diligence. Accordingly, Respondent's respectfully request the Court affirm the Circuit Court's ruling granting summary judgment in favor of Respondent.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

COLLINS & LACY, P.C.

By: _____

KELSEY J. BRUDVIG
SC Bar Number: 101680
kbrudvig@collinsandlacy.com
HENRY D. MCMASTER, JR.
SC Bar Number: 103232
hmcmaster@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (voice)
803.771.4484 (fax)

ATTORNEYS FOR RESPONDENT

RESPONDENT'S FINAL BRIEF

Columbia, South Carolina
October 2, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 02 2023
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-001649

Gwendolyn Lockett, ... Appellant,

v.

Barnyard Flea Market of Greer, LLC and Jane Doe, Defendants,
of which Barnyard Flea Market of Greer, LLC is .....Respondent.

CERTIFICATE OF COUNSEL

Counsel for Respondent certifies that Respondent's Final Brief complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

COLLINS & LACY, P.C.

By: _____

KELSEY J. BRUDVIG
SC Bar Number: 101680
kbrudvig@collinsandlacy.com
HENRY D. MCMASTER, JR.
SC Bar Number: 103232
hmcmaster@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (voice)
803.771.4484 (fax)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF COUNSEL

October 2, 2023