

1 STATE OF SOUTH CAROLINA
2 COUNTY OF BEAUFORT

COURT OF COMMON PLEAS

3 NICHOLAS SANFILIPPO,
4
5 Plaintiffs,

6 vs. CASE NO. 2019-CP-07-00554

7 ESTATE AT WESTBURY HORIZONTAL PROPERTY
8 REGIME, AKA ESTATE AT WESTBURY OWNERS
9 ASSOCIATION (A MULTIFAMILY REAL ESTATE
10 COMMUNITY); HIGH TIDE ASSOCIATES (A
11 PROPERTY AND MANAGEMENT COMPANY,
12 Defendants.

13 V I D E O C O N F E R E N C E
14 D E P O S I T I O N

15 WITNESS: NICHOLAS SANFILIPPO
16 DATE: Thursday, August 6, 2020
17 TIME: 11:40 a.m.
18 LOCATION: 130 La Bonne Vie Dr. W. Apt D
19 Patchogue, NY 11772
20 TAKEN BY: Attorneys for Defendants
21 REPORTED BY: CAROLL ANNE BOUTAHAR
22 Certified Verbatim Reporter
23 (Appearing by videoconference)

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APPEARANCES:

ATTORNEYS FOR THE PLAINTIFF:

GARY P. COGGIN, ESQUIRE
P.O. Box 7092
Hilton Head, South Carolina 29938
843.689.7777
gcitylaw@aol.com
(Appearing by videoconference)

ATTORNEYS FOR THE DEFENDANTS:

GOWER, WOOTEN & DARNEILLE, LLC
BY: DOUGLAS E. LEADBITTER, ESQUIRE
4200 Northside Parkway NW, Building 12
Atlanta, Georgia 30327
404.662.2333
Doug@GWDlawfirm.com
(Appearing by videoconference)

ALSO PRESENT:

NICOLE SANFILIPPO
PETER TOBIN

(INDEX AT REAR OF TRANSCRIPT)

1 A. No.

2 Q. When you were at The Estate at Westbury back
3 on the date of the -- when you fell over there, what was
4 the -- what was your address? It was this Kensington
5 address?

6 A. The Kensington address, 100 Kensington
7 Boulevard.

8 Q. Okay. And what was your purpose of being at
9 The Estate at Westbury on the day that you fell?

10 A. I lived there.

11 Q. Okay. I thought you said a second ago that
12 you weren't living there at The Estate at Westbury.
13 Sorry about that. I may have misunderstood you.

14 A. No. I don't believe I said that.

15 Q. Okay. I'm sorry.

16 How long did you live in there?

17 A. About six years.

18 Q. Okay.

19 This area in front of the -- where you fell
20 there in front of the 1000 building, had you been in
21 that area before? Had you walked on that part of the
22 property before?

23 A. Yes.

24 Q. How often did you walk on that part of the
25 property?

1 A. It just varied. When I went that way, I
2 walked there. It's hard for me to say because I guess I
3 didn't walk there every day but I walked there often.

4 Q. That's fair enough. All right. And I want to
5 get a little bit more information about your background
6 just real quickly.

7 Are you married?

8 A. Yes.

9 Q. Does your wife live with you there at -- in
10 Bluffton?

11 A. No. She's at her sister's right now.

12 Q. Okay.

13 Do you have any relatives down in the Beaufort
14 County area?

15 A. No.

16 Q. I see you're wearing glasses today.

17 Do you wear your glasses all the time?

18 A. No. They are really reading glasses.

19 Q. Okay.

20 Have you ever been in the military?

21 A. Yes.

22 Q. Tell me which one, what branch you were in and
23 when you served.

24 A. New York Air National Guard. I'd say it was
25 about '64.

1 Q. Exactly. Got you.

2 Do you remember what the weather was like that
3 day when you slipped at the -- or tripped at The Estate
4 at Westbury?

5 A. Yeah. I don't think there was any rain or
6 anything. It was clear -- you know, a clear day, and
7 that's about it, no weather concerns on my part.

8 Q. Right. Was it -- a clear day.

9 What was the lighting like at the time of day
10 when you fell? Was it pretty -- were you able to see
11 everything?

12 A. Yes.

13 Q. Now, that day, I think you said you had been
14 out walking and everything.

15 Where had you been immediately before and
16 where were you going on that sidewalk that day?

17 A. Just taking a walk. And I was going to go
18 take a ride.

19 Q. Okay.

20 So you'd left your house and you were walking.

21 A. Yes.

22 Q. How long had it been since you'd been in your
23 house before you -- when you were out walking, how far
24 had you gone?

25 A. Whatever the distance was from my apartment to

1 Q. Any treatment that you got as a result of the
2 slip and fall.

3 A. I believe they might have.

4 Q. Okay.

5 You're not on any kind of social networking
6 site like Facebook or --

7 A. No.

8 Q. -- any of that, are you?

9 A. Absolutely not.

10 Q. Me either.

11 A. I'm sorry. I just find those things so
12 annoying.

13 Q. I'm right there with you.

14 A. My kids and my grandkids are on it all day
15 long, and I'd like some face-to-face time, never mind
16 Facebook.

17 Q. I totally agree with you on that.

18 THE WITNESS: Right?

19 BY MR. LEADBITTER:

20 Q. In terms of the area around the sidewalk, if
21 you would, just try to explain to me the area or the
22 spot where you said your toe got in there.

23 What is the condition of the sidewalk over
24 there? Is it well maintained?

25 A. Honestly, I didn't think so.

1 Q. Okay.

2 A. There were a lot of areas were was cracked
3 and, you know, it just didn't blend together.

4 Q. Okay.

5 Have you ever made any complaints to the
6 homeowners association or to the owners of the property
7 or anyone about the condition of the sidewalks there?

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

12 Q. Do you have any specifics, anybody -- any
13 individual that you're aware of that made any kind of
14 complaint, specific names?

15 A. No.

16 Q. Were you actively involved in your homeowners
17 association --

18 A. No.

19 Q. -- like going to meetings and stuff like that?

20 A. No. That was just for the owners. I was a
21 renter.

22 Q. Who were you renting from?

23 A. I'm trying to recall the fellow's name. I
24 can't. Frank Piza, Penza, something like that.

25 Q. Okay.

AFFIDAVIT OF RALPH PAINE

I, Ralph Paine, personally appeared before the undersigned officer duly authorized to administer oaths in the State of South Carolina, and, after first being duly sworn, depose and say the following:

1. I am over the age of eighteen (18) years and am not laboring under any disabilities.
2. I have personal knowledge of the facts set forth in this affidavit.
3. I am a property owner at Estate at Westbury and was treasurer of the Estate at Westbury Homeowners Association ("HOA") on October 26, 2017.
4. It is my understanding that on October 26, 2017, Nicholas Sanflippo was renting a condominium at Estate at Westbury and contends he tripped and fell on a sidewalk at Estate at Westbury.
5. Estate at Westbury had a maintenance agreement with High Tide Associates to maintain the common property at Estate a Westbury.
6. Attached hereto as Exhibit "1" is a true and correct copy of the Management Agreement between Estate at Westbury and High Tide Associates.
7. High Tide Associates managed the common property at Estate at Westbury on October 26, 2017.
8. The Estate at Westbury HOA was not involved with daily operations or management of the common property at Estate at Westbury on October 26, 2017.
9. The Estate at Westbury HOA and High Tide Associates terminated their Management Agreement effective August 31, 2018.
10. A review of property ownership record indicates Mr. Sanflippo leased his condominium from unit owner Frank Pinto at the time Plaintiff alleges he fell.

- 11. Mr. Sanflippo never paid his rent to Estate at Westbury HOA or High Tide Associates.
- 12. Mr. Sanflippo never paid HOA dues to Estate at Westbury HOA or High Tide Associates.
- 13. Mr. Sanflippo never was a condominium owner at Estate at Westbury.
- 14. Mr. Sanflippo was not a member of the Estate at Westbury HOA.

FURTHER AFFIANT SAYETH NOT.

This the 13 day of June, 2021.

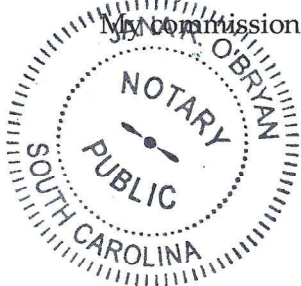

Ralph Paine

Sworn to and subscribed before me
this 14th day of June, 2021.



Notary Public 12/23/2029

My commission expires:



A P P E A R A N C E S

Appearing for the Plaintiff
Nathan E. Akers, Esquire

**

P.O. Box 2450
Beaufort, South Carolina 29810

Gary Coggins, Esquire

State of South Carolina

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PROCEEDINGS

THE COURT: All right, here's that. All right, the next one on my list that I have would be Mr. Coggins. You all ready to go on that?

MR. COGGINS: Yeah.

THE COURT: The San Filippo versus the Estate at Westbury, personal property *.

MR. FERGUSON: At the risk of sounding like a whiner, my - I have been told the Plaintiff is not here.

THE COURT: Oh, yes, sir, I apologize, I should have got you up here. Tell me which one it is again.

MR. FERGUSON: Leroy Jenkins.

THE COURT: I'm sorry, and, Mr. Jenkins, did you hear from Mr. Jenkins? Do you want to just forward me, Mr. Ferguson, a proposed Order granting your Motion, and can we give Mr. Jenkins - I'm not gonna dismiss - well, I'm sorry, you want the case dismissed, don't you?

MR. FERGUSON: We want it dismissed, Your Honor, but, you know, we want to give Mr. Jenkins 30, 60 days to respond.

THE COURT: Let's do this, I'm gonna give

1 him - I'm gonna go ahead and give him 30 days to
2 respond to discovery, but I want you to write in
3 this order his failure to do so will result in
4 the dismissal. And do you represent - is it -
5 is there more than one Walmart there? Do you
6 represent all the Walmart Defendants?

7 MR. FERGUSON: All the Walmart Defendants.

8 THE COURT: Okay, so you can go ahead and
9 dismiss all the Walmart Defendants, if he does
10 not answer discovery within the 30 days, or ask
11 the leave of the Court to do it, okay?

12 MR. FERGSUON: I will

13 THE COURT: All right.

14 MR. FERGSON: Thank you, Your Honor.

15 THE COURT: All right, absolutely, sir.

16 All right.

17 MR. *: A squeaky wheel, right?

18 THE COURT: Pardon?

19 MR. *: A squeaky wheel, right?

20 THE COURT: You got it. All right, here we
21 are, okay. All right, so these are - correct me
22 if I'm wrong, these are cross-motions - oh, no,
23 I'm sorry, no, these are both the Defendants'
24 motions for summary judgment against the
25 Plaintiff, correct?

1 MR. LEDBETTER: Yes, Your Honor.

2 THE COURT: And you represent the Horizon
3 Property Regime and the -

4 MR. LEDBETTER: High Tide Associates.

5 THE COURT: High Tide.

6 MR. LEDBETTER: Yes.

7 THE COURT: All right, sir.

8 MR. LEDBETTER: They're the property
9 manager.

10 THE COURT: I appreciate it, okay.

11 MR. LEDBETTER: Thank you, Your Honor, I'm
12 Doug Ledbetter, I'm here on behalf of the Estate
13 of Westbury, Homeowners' Association, again,
14 High Tide Associates, may it please the Court.
15 We filed these Motions for Summary Judgment,
16 based on the fact that Westbury is the - as the
17 Horizontal Property Association has turned over
18 at the time this slip and fall accident. They
19 had turned over the maintenance and
20 responsibility for that, for the neighborhood,
21 the common areas, and everything, and that had
22 already been turned over, at the time when this
23 accident occurred. To give you a little bit of
24 background, just so that you'll -

25 THE COURT: Just so I understand, Westbury

1 still owns the common elements, correct?

2 MR. LEDBETTER: Yes, Your Honor.

3 THE COURT: Okay, so the real question
4 becomes - I understand when you say they turned
5 over the maintenance. They hired a maintenance
6 company to do maintenance, correct?

7 MR. LEDBETTER: Yes, Your Honor.

8 THE COURT: All right. And then on top of
9 that, in any way, did Westbury Horizontal
10 Property Regime undertake to maintain it in any
11 way, any of the common areas, in addition to
12 having hired High Point, or High Tide, sorry.

13 MR. LEDBETTER: Your Honor, they would make
14 recommendations from time to time to High Tide,
15 which was then under the contractual obligation
16 to comply with any issues that they had.

17 THE COURT: Okay.

18 MR. LEDBETTER: They - they did have some
19 Board meetings, where different aspects were
20 presented to them; nevertheless, the - the -
21 High Tide Associates is - is the property
22 manager, is the - we've asserted would be the -
23 the proper entity, if someone was going to be
24 charged with negligence for *.

25 THE COURT: Okay. I apologize, so High

1 Tide Associates is the property manager company?

2 MR. LEDBETTER: Yes.

3 THE COURT: Okay.

4 MR. LEDBETTER: Yes, Your Honor.

5 THE COURT: So it's not like - I thought
6 they were landscaper, but, obviously, I was
7 wrong, or a, you know, cleaning company.

8 MR. LEDBETTER: Right, they're - they're -

9 THE COURT: Okay.

10 MR. LEDBETTER: -- *.

11 THE COURT: I understand now.

12 MR. LEDBETTER: Okay.

13 THE COURT: Okay.

14 MR. LEDBETTER: Thank you.

15 THE COURT: Okay.

16 MR. LEDBETTER: This was a slip and fall
17 that occurred on October the 26th of 2017. The
18 Plaintiff was actually renting his condominium
19 in this Homeowners' Association, in this
20 neighborhood, he was an individual - from an
21 individual, either Frank Peza or Penza, and so
22 we're not sure exactly who that - that person
23 was at the time.

24 THE COURT: Uh-huh.

25 MR. LEDBETTER: But the Plaintiff for sure

1 was simply leasing this condominium. He was not
2 a - a member of the Homeowners' Association. He
3 had no ties whatsoever to the Homeowners'
4 Association. Based on that, Your Honor, we
5 assert, as to the relationship between the - the
6 Plaintiff and the - the Defendants here, that
7 there is - he was - for premises liability
8 purposes and responsibility, that he be
9 qualified as a licensee only, instead of an
10 invitee, which is the issue that is kind of -
11 kind of driving the whole thing; because it
12 meant that now we're talking about what the duty
13 is for the -

14 THE COURT: Right.

15 MR. LEDBETTER: - the Defendants. And our
16 position, as a - as a licensee, that we would
17 be, or High Tide Associates actually would be
18 responsible for - to warn him of any dangerous
19 conditions on the property. It's our position
20 that the Plaintiff has not presented any
21 information, through any evidence whatsoever.
22 It's admissible, that there is a dangerous
23 condition on this property. He was asked in his
24 deposition, you know, about the sidewalk. He
25 doesn't know exactly where he fell, he just

1 said, "On the sidewalk." We've had pictures
2 that were taken by opposing counsel at the
3 location. We can't tell exactly what - where
4 these pictures are. He wasn't there when the -
5 when the fall happened, they weren't. They were
6 taken by the Plaintiff's attorney, and I don't
7 think he was even in South Carolina, at the
8 time, I'm not sure.

9 THE COURT: Was the Plaintiff able to
10 identify that, yes, in fact, that was where he
11 fell -

12 MR. LEDBETTER: No, Your Honor.

13 THE COURT: - in his deposition?

14 MR. LEDBETTER: No, Your Honor, these -
15 these are pictures on the sidewalk, and
16 they're -

17 THE COURT: I'm seeing them, I'm guessing,
18 on *Mr. Coggins' desk right there -

19 MR. LEDBETTER: Yes, Your Honor.

20 THE COURT: - is that correct? Are those
21 the same things that we saw?

22 MR. LEDBETTER: Yes.

23 THE COURT: All right, let me see them. Is
24 there any issue? Are we - are we convinced, or
25 do we know -

1 MR. *: Thank you *.

2 THE COURT: - that that is how the sidewalk
3 he fell on is a whole other issue, but that's
4 how it presented at the time he fell? Has there
5 been any work done out there? Any - I don't
6 know, new concrete, or I'm assuming -

7 MR. LEDBETTER: I mean these pictures, from
8 my understanding, were taken in either 2000 -
9 late 2019, or 2020, so the accident occurred on
10 October 26th of 2017, so - so, obviously, things
11 could have - anything could have happened to the
12 - to the sidewalk; but, again, these pictures
13 are - are not - I mean they're pictures, but
14 they're - they're not proof that there's
15 anything - that there's any dangerous detail,
16 defect. This would be - would qualify as an
17 open obvious condition, as a matter of law. I
18 mean there - we don't - we don't even have to
19 have any testimony or evidence that this was a
20 violation of any -

21 THE COURT: Codes?

22 MR. LEDBETTER: Code.

23 THE COURT: Anything.

24 MR. LEDBETTER: You know, exactly, we're
25 just -

1 THE COURT: Got it.

2 MR. LEDBETTER: They're just the pictures.
3 And based on that, after this long a time, all
4 the chance to do discovery and everything else,
5 that - that there - it's just a failure to - to
6 establish a dangerous condition on this
7 property; and, therefore, we would ask that the
8 entire case be dismissed, or granted on summary
9 judgment.

10 THE COURT: Mr. Coggins?

11 MR. LEDBETTER: Thank you.

12 MR. COGGINS: Thank you, Mr. Ledbetter.
13 Your Honor, for the record, my name is Gary
14 Coggins, I'm an attorney from right here in
15 Hilton - or, excuse me, Beaufort County, and I
16 am here on behalf of Mr. *Nicholas San Filippo,
17 who is the Plaintiff in the case of San Filippo
18 versus High Tide Associates and San Filippo
19 versus the Estate at Westbury. And we are here
20 today to answer the Defendant's Motion for
21 Summary Judgment. The facts of the case, Your
22 Honor, are rather simple, and Mr. Ledbetter's
23 right about that. On October the 26th, 2017,
24 Mr. San Filippo, who was a long-time lessee
25 resident of the Estate at Westbury, went out for

1 a walk. He would walk on the sidewalk, or the
2 walkways, approximately, every - two to three
3 times a week. He did this not so much for
4 exercise, he just liked to be outside. And on
5 the day - on October the 26th of 2017, he was
6 walking, the day was clear, it was a very
7 pleasant day. He was walking at a - just a fair
8 pace. Suddenly, his left foot hit an elevated
9 portion of the segment of the concrete block on
10 the concrete that he was walking on, and he
11 pitched heavily over onto the concrete, landing
12 on his hands, his arms, his face and his left
13 knee. Now, Mr. - Mr. San Filippo said later in
14 deposition, he knew immediately that he was
15 badly hurt, because of the excruciating pain he
16 felt in his left knee. Now, the short of all
17 this is, that Mr. San Filippo was taken to
18 Hilton Head Memorial Hospital, rushed into
19 emergency, and then taken to Radiology. The
20 Radiology physician took four shots of his left
21 knee, and that was enough for him to say that
22 the x-rays and scans said that he had suffered a
23 comminuted fracture, a Y-shape comminuted
24 fracture on his left *. Comminuted, as you
25 probably know means the bone was broken

1 completely through, so there were three segments
2 in - in his knee. I'm going to hand up - first,
3 let me put them in here, in the exhibit basket.
4 So, Karen, do you want it?

5 THE COURT: Just give it to Karen, yeah,
6 that's fine.

7 MR. COGGINS: Okay, thank you, Karen. That
8 is the report from the hospital, and you can see
9 the date on it is October the 26th, 2017, and
10 you can see the doctor was *, *Nicholas *, the
11 technique was x-rays, four - four views, and it
12 says that he had a nondisplaced Y-shaped midline
13 fracture of the patella, with a small hematosis.
14 Now, what followed continues to this day with
15 Mr. San Fillipo. First, he went into intensive
16 rehabilitation, and this -

17 THE COURT: Mr. Coggins, I'm not concerned
18 *raking out about his damages. I take it on
19 your word that he was damaged, as a result of
20 this.

21 MR. COGGINS: Okay, that's fine.

22 THE COURT: What I want to know is this.
23 Number one, was his status as a licensee or
24 invitee, in your opinion?

25 MR. COGGINS: I was right - just getting to

1 that.

2 THE COURT: Let's get to it then.

3 MR. COGGINS: I'll just jump right to that.

4 THE COURT: Everyone behind you will
5 appreciate it.

6 MR. COGGINS: Okay. There's two areas of
7 controversy, thank you, in this case. The first
8 is a legal question. Was he a licensee, as said
9 by Mr. Ledbetter, or was he an invitee? And, in
10 fact, it doesn't matter. The second thing is,
11 is that - a fact question. The fact question -

12 THE COURT: Well, what's your position? Is
13 he an invitee or a licensee?

14 MR. COGGINS: Well, I could - I think under
15 common law, he is a licensee; however, there has
16 been a lot of changes said to this, as you're
17 probably well aware, and you've probably heard
18 it in your Court. Premises liability simply
19 means negligent - negligently taking care of
20 property. And what happened here is, in 1986
21 there was the South Carolina Residential
22 Landlord and Tenant Act, 2740440A1 says that the
23 plantation - the condominium complex, the
24 Association, the manager of the property must
25 keep the property safe and clean. Now, what's

1 happened in a number of cases in South Carolina,
2 is that these cases -

3 THE COURT: Well, did you - did you sue the
4 landlord? 'Cause I understand that he was
5 leasing this property, correct? Did you sue -

6 MR. COGGINS: He's -

7 THE COURT: Did you sue the landlord?

8 MR. COGGINS: No, he did not sue his
9 landlord, no.

10 THE COURT: Okay.

11 MR. COGGINS: He sued the E - the Estate of
12 Westbury -

13 THE COURT: Uh-huh.

14 MR. COGGINS: - and High Tide Associates.
15 We feel that if we sue the landlord under the
16 theory of negligence, that was it, there's no
17 liability without negligence. But in any case,
18 there have been a number of cases in South
19 Carolina now, that say that there is an
20 exception to the common law, and that exception
21 is called the common - the common yard, or
22 common place exception. And that means if - if
23 the Estate of Westbury owns and controls - the
24 Estate of Westbury, the Association owns the
25 common area, the material - or excuse me, the

1 property manager manages this property, and they
2 have control over it; but right now, because of
3 the - the HTA, excuse me, right now, because of
4 the South Carolina Residential Landlord and
5 Tenant Act, says that if you own this property,
6 then you have that obligation to keep it in a
7 safe condition. Everybody that's on that
8 property, that lives at this place, be they
9 owners, long-time renters, or whatever, assume
10 the status of a invitee. In any case, even if
11 he was a licensee, the licensee - the rule with
12 licensees is, that he has to be permitted onto
13 the property, and, number two, the - the
14 Association or the property manager must take -
15 seek him out and show him any conditions on the
16 property that are dangerous.

17 THE COURT: Any hidden conditions that are
18 dangerous.

19 MR. COGGINS: Pardon me?

20 THE COURT: Any hidden conditions that are
21 dangerous.

22 MR. COGGINS: That's concealed. That's
23 concealed. That's exactly right, concealed,
24 hidden conditions on the property that are -

25 THE COURT: This is a crack on a sidewalk.

1 MR. COGGINS: Huh?

2 THE COURT: I mean this is a - let - let me
3 ask you this, have you hired anyone to show that
4 there is any kind of code violation -

5 MR. COGGINS: Yeah.

6 THE COURT: - as a result of this?

7 MR. COGGINS: Just getting to that, thank
8 you. You're -

9 THE COURT: So - and if you have, where's
10 the affidavit, or the deposition where they said
11 this is a significant -

12 MR. COGGINS: You've actually read my
13 brief.

14 THE COURT: - violation?

15 MR. COGGINS: I can tell, yeah. What -
16 what it is, Your Honor, is - what happened is
17 that on September the 26th, 2017, in a meeting,
18 and I think this is number two in my - it's
19 number two in my hand-ups, there was a meeting
20 between the Board of Directors and the minutes
21 from that is what I got. I had to get the
22 minutes from the Defendants. They gave me 17
23 months of minutes. On this minutes, the 17th,
24 or, excuse me, the 26th of September, 2017, they
25 had a meeting. Number six on that list of

1 things to talk about was to hire MAG, M-A-G,
2 which is an acronym for Martin-Adam-*Gerkowski,
3 MAG Concrete in Blufton, to come out and give a
4 - a - come out and give a - a bid on fixing the
5 property. Now, I talked to Mr. *Dunlop, who's
6 the Vice-President of the Board in deposition,
7 and I asked him, "What prompted you to have
8 somebody come out and look at the - and look at
9 the property?" And he said, "Prior to -
10 sometime prior to Mr. San Filippo being injured,
11 in almost the same spot an elderly lady in a
12 wheelchair hit an uneven level between the
13 concrete, the segments, and the wheelchair
14 flipped over." And he said as soon as he heard
15 that, the next meeting he went into, he said,
16 "We have to get this thing fixed." Now, I
17 talked to him at length, and I asked him, "When
18 was this?" He couldn't remember. I said, "What
19 was the lady's name?" He couldn't remember
20 that. I asked if she lived on the property, or
21 if she was a tenant? He couldn't remember that.
22 But what I did then was, I subpoenaed all the
23 records from MAG Concrete, and if you look at
24 number three from MAG Concrete, is a proposal
25 sent to the Estates at Westbury, excuse me, High

1 Tide Associates on April the 5th, 2017.
2 THE COURT: Uh-huh.
3 MR. COGGINS: In which they talk about
4 repairing almost the entire walkway within the
5 common area. They say, for example, they're
6 gonna replace - and I sent these, by the way, I
7 sent these things to - to opposing counsel,
8 they're going to replace and refinish concrete,
9 match existing as close as possible, and they
10 were gonna put rebars under adjacent concrete to
11 prevent settling. They were going to clean up
12 the site. They were gonna install - work has
13 been estimated at 37 locations. And then what
14 they said that really interested me, at the
15 bottom it says, "Grind for smooth transition
16 between sections of walk, and cut roots outside
17 the walkway, where present. Work has been
18 estimated at 44 locations." This was April -
19 Your Honor, this was April the 5th, 2017. This
20 was almost eight months before he fell. If you
21 look further on this, you'll see there's notes
22 on this. These were probably done by Teresa
23 Childress, who is the onsite manager for High
24 Tide Associates, the property manager, and she
25 wrote down, requoted 8/17/17. And the reason

1 she did that was there's a note by Mr.
2 *Gerkowski saying, "That, if, in fact, the
3 proposal is not answered in 60 days, it'll be
4 withdrawn." And then there's also a note of
5 9/14/17. Now, Mr. Dunlop, the Vice-President
6 brought up on the 26th of September the fact
7 that they had to take care of these problems for
8 safety reasons. One month later nothing had
9 been done. This is eight months after the
10 original bid was given to - given to High Tide
11 Associates, and by association, the Estates at
12 Westbury, and nothing had been done. There
13 wasn't a thing done. The other part of this is,
14 that whether he is a licensee or an invitee,
15 there is negligence, if, in fact, the manager,
16 the property owner knows of this condition, but
17 does not tell the - the Plaintiff, the licensee,
18 or - the licensee, or the invitee. I frankly
19 think, Your Honor, that he was an invitee on
20 this, under the rule of - geez, there are a
21 bunch of cases that talk about that, and I can
22 give them to you. *Kramer v. Bell *Core
23 Management, *Coke v. Allstate. These are South
24 Carolina cases. One - well, excuse me, both of
25 those are *, so they're DSC cases. There's also

1 another case in here that indicates the same
2 thing, but the rule is the same. They knew
3 about this dangerous condition, indeed, a woman
4 in a wheelchair had flipped over some months
5 before, causing them to get serious about this.

6 THE COURT: Do you have deposition
7 testimony from her? Do you have deposition
8 testimony from her, or an affidavit saying that
9 she fell, and where she fell?

10 MR. COGGINS: I have -

11 THE COURT: Because pretty much everything
12 you've just said is hearsay, including the -

13 MR. COGGINS: Oh, no, you're - you're
14 not -

15 THE COURT: - notes written on what's right
16 there. So - and, again -

17 MR. COGGINS: You're absolutely right.

18 THE COURT: - I'm trying to figure out what
19 it is you're going to use as evidence to get
20 past summary judgment; and I can tell you, you
21 keep calling it a dangerous condition, but just
22 because you call it a dangerous condition,
23 doesn't make it a dangerous condition. I need
24 someone to tell me, some expert that can tell me
25 that it is a dangerous condition, or it's a code

1 violation, or something is wrong. So I can't
2 just take your word for it. Just because a
3 person fell at one crack, doesn't mean that
4 there's anything wrong with it, necessarily.

5 MR. COGGINS: Okay, well -

6 THE COURT: So, again, so my question to
7 you is, who do you have that says, this specific
8 spot has a problem, and what it is?

9 MR. COGGINS: Mr. Dunlop told me in
10 deposition, that's the Vice-President, there was
11 an old lady - and elderly lady, who fell out of
12 a wheel - hit the wheelchair, and the wheelchair
13 and her flipped over onto the concrete. I asked
14 him several questions about this, and he became
15 very forgetful. He didn't know her name.

16 THE COURT: He probably didn't know where
17 it happened either, right?

18 MR. COGGINS: No, it was outside the 1000
19 building, which is, essentially, in the same
20 area that Mr. San Filippo had his problem.

21 THE COURT: So you're saying essentially,
22 the problem is, *. So I think you need more
23 specifics. Let me tell you what I'm going to
24 do.

25 MR. COGGINS: Okay.

1 THE COURT: I'm *, but I'm going to do
2 this. I'm going to give you 30 days to go find
3 an expert witness, who's going to testify that
4 there is something wrong with this portion of
5 it. Now, I don't even know if you know where it
6 occurred, so I'm not sure what your expert - if
7 you're going to be able to find one; but if you
8 do not have an affidavit to me within 30 days
9 from an expert saying that there is either a
10 code violation, or there is something
11 specifically wrong, you're not going to survive
12 summary judgment.

13 MR. COGGINS: Okay.

14 THE COURT: Okay?

15 MR. COGGINS: That's fair, yeah.

16 THE COURT: It's that - that simple, and
17 when you send it, you need to send it over to
18 him, okay, as well.

19 MR. COGGINS: That's right.

20 THE COURT: And what I would suggest,
21 gentlemen, other than that, let's not do
22 anything. Don't spend anymore money on this
23 case. You just go find your expert, and I need
24 an affidavit, or I need deposition testimony
25 stating that, and then I'll consider it. We're

1 not going to come back and reargue. I've heard
2 everything I need to know on this issue. Your
3 problem is, is that you need someone to say that
4 it occurred here, and that there is a problem
5 with the concrete, and what it is.

6 MR. COGGINS: Well, there were 44 different
7 problems, 'cause they were going to shave 44
8 different sections.

9 THE COURT: I mean - let me ask you, did
10 your client fall in 44 different places on the
11 property?

12 MR. COGGINS: No. I think two people fell
13 on the same place.

14 THE COURT: Okay. Well, you think, but we
15 need to know.

16 MR. COGGINS: No, you're right.

17 THE COURT: So we need to figure it out,
18 okay?

19 MR. COGGINS: Thank you, Your Honor.

20 THE COURT: All right, absolutely.

21 MR. COGGINS: Appreciate it.

22 THE COURT: I'm gonna give you your
23 pictures back. I'm gonna go ahead and diary
24 this for 30 days. If for some reason you don't
25 hear from me, Mr. Ledbetter, if there is nothing

1 that comes across to you -

2 MR. COGGINS: Thank you, Karen.

3 THE COURT: - I need you to reach out to my
4 office, okay?

5 MR. LEDBETTER: Yes, ma'am.

6 THE COURT: I'll also tell you, I - for
7 those of you that are left, I'm in between Law
8 Clerks right now, so my new one does not come on
9 until August, so Jamie is doing everything, so
10 if you are sending anything, don't send it to *,
11 send it to *, which is my administrative
12 assistant, if you want me to see anything, all
13 right? So that's just letting you all know.

14 MR. COGGINS: 30 days starts tomorrow or
15 today?

16 THE COURT: 30 days start tomorrow, Mr.
17 Coggins.

18 MR. COGGINS: Okay.

19 THE COURT: That's fine.

20 MR. COGGINS: Thank you very much, Your
21 Honor.

22 THE COURT: Okay, all right, y'all.

23

24 At 11:21 a.m. the hearing was concluded.

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CERTIFICATE OF REPORTER

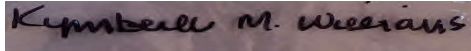
I, Kymberlee M. Williams, Certified Shorthand Reporter/Registered Professional Reporter for the 14th Circuit of the State of South Carolina do hereby certify that the foregoing is a true, accurate and

1 complete transcript of the proceedings held in this
2 case, relative to appeal, in the Court of Common
3 Pleas for Beaufort County, South Carolina on the 7th
4 Day of June, 2021.

5
6 I do further certify that I am neither of kin,
7 counsel, or interest to any party hereto.

8
9 This, the **th day of June, 2022.

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Kimberlee M. Williams, CSR/RPR

Exhibit D

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Nicholas Sanfilippo

Plaintiff,

v.

Estate of Westbury Horizontal Property Regime aka Estate at Westbury Owners Association (a multifamily real estate community) and Hugh Tide Associates

Defendants.

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2019-CP-07-0554

) Affidavit of Bryan R. Durig Ph.D., P.E.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

PERSONALLY APPEARED BEFORE ME, Bryan R. Durig, Ph.D., P.E., who, first being duly sworn deposes and says:

1) My name is Bryan R. Durig. I am fifty-seven (57) years old and reside in Lexington County in South Carolina. I have obtained a B.S., M.S., and Ph.D. in mechanical engineering from the University of South Carolina. I also have obtained a Masters degree in Business Administration from the University of South Carolina. A copy of my CV is attached hereto. I am a licensed engineer in the state of South Carolina as well as numerous other states.

2) I am a consulting engineer with Summit Engineering, L.L.P. in Columbia, South Carolina. I specialize in the area of engineering analysis of accidents. Over the last 30 years, I have conducted numerous fall incidents dealing with changes in elevation along sidewalks and parking lots. I am familiar with applicable building codes and industry

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depending on the location the measurement was taken on the left side of the sidewalk. The sidewalk was measured to be 48 inches wide. The change in elevation was between two sections of concrete – essentially at a joint in the concrete sidewalk. The change in elevation I measured is consistent with the measurements obtained by analyzing the photographs taken after Mr. Sanfilippo’s incident with the US quarter present. This change in elevation (1/2 inch to 1 inch along the sidewalk) created a trip hazard for patrons walking on the sidewalk adjacent to Building 1000.

6) In the photographs taken after Mr. Sanfilippo’s, one can see a blue paint mark at the subject change in elevation. It is unclear at this time if that paint mark was there to signify a repair was needed before Mr. Sanfilippo’s fall incident or if the paint mark was placed there after his fall incident to mark an area that needed repaired. Deposition testimony of HOA members and/or employees of High Tide Associates may provide details of when, who and why the blue paint mark was placed on the trip hazard.

7) The International Property Maintenance Codes states: “The owner of the premises shall maintain the structures and exterior property in compliance with the requirements...” The IPMC also states in Section 302.3 Sidewalks and driveways “All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.” The vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and was not being maintained in accordance with the International Property Maintenance Code.

8) The ASTM F1637 discusses numerous safe practices and “minimum maintenance criteria” concerning walking surfaces. Section 5.1 states “Walkways shall be stable, planar, flush, and even to the extent possible. Where walkways cannot be made flush and even, they shall conform to the requirements of 5.2 and 5.3.” Section 5.2.4 states “Changes in levels greater than ½ in. (12 mm) shall be transitioned by means of a ramp or stairway that complies with applicable building codes, regulations, standards, or ordinances, or all of these.” Section 5.7.1 states “Exterior walkways shall be maintained

so as to provide safe walking conditions.” Section 5.7.1.2 states “Exterior walkway conditions that may be considered substandard and in need of repair include conditions in which the pavement is broken, depressed, raised, undermined, slippery, uneven or cracked to the extent that pieces may be readily removed.” Section 5.7.2 states “Exterior walkways shall be repaired or replaced where there is an abrupt variation in elevation between surfaces. Vertical displacements in exterior walkways shall be transitioned in accordance with 5.2.” The vertical change in elevation (measured to range between ½ inch and 1 inch) between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and was not being maintained in accordance with ASTM F1637.


9) The ADA and ANSI A117.1 have similar requirements for level walking surfaces. Both standards require that changes in level over ½ inch must be transitioned with a ramp or curb ramp (for accessible sidewalk). The vertical change in elevation of 1/2 inch to 1 inch in the subject sidewalk adjacent to Building 1000 would be a violation of the ADA and ANSI A117.1.

10) H. Harvey Cohen and Jake Pauls wrote a chapter in The Handbook of Warnings (Edited by Michael S. Wolgalter in 2006) that states “When walking, pedestrians generally expect the walking surface to remain uniform (Cohen & LaRue, 2005). If a hazard exists in the walking surface, it must be perceived or recognized as a hazard by the pedestrian to decrease the likelihood of a fall incident occurring.” In addition, their chapter states “Generally, the fall is initiated when the condition violates a pedestrian’s normal expectations or when sufficient sensory cues (usually visual or tactile) are not available” Furthermore, the chapter states “Given no other visual cues, a pedestrian expects a level walking surface to remain level. Pedestrian missteps occur when there is some form of change in level of the walking surface that catches the pedestrian unaware.” The change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and should have been repaired to eliminate the hazardous condition which would have prevented Mr. Sanfilippo’s fall incident.

10) In summary, the vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and is considered the cause of Mr. Sanfilippo's fall incident. The change in elevation between the concrete walking surfaces varied between 1/2 inch and 1 inch, depending on the location along the width of the sidewalk, and was not being maintained in accordance with the ADA, ANSI A117.1, IPMC, ASTM F1637 and industry guidelines. There were feasible and economical 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.

UNDER PENALTY OF PERJURY, I DECLARE THAT THIS STATEMENT CONSISTING OF FIVE PAGES IS TRUE AND CORRECT:

FURTHER AFFIANT SAITH NOT


Bryan R. Durig, Ph.D., P.E.
Summit Engineering, L.L.P.

SWORN TO BEFORE ME THIS
7 day of July, 2021


Notary Public for South Carolina
My Commission Expires: 4.8.2025

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NICHOLAS SANFILIPPO vs WESTBURY HORIZONTAL PROPERTY
JULY 8, 2022 - B. DURIG, PHD, PE

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IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

NICHOLAS SANFILIPPO,
Plaintiff,

vs. CIVIL ACTION NUMBER
2019-CP-07-00554

ESTATE AT WESTBURY HORIZONTAL PROPERTY REGIME
aka ESTATE AT WESTBURY OWNERS ASSOCIATION
(a multifamily real estate community)
And HIGH TIDE ASSOCIATES (a property
and HOA management company),
Defendants.

-----/

The videoconferenced deposition of BRYAN
R. DURIG, Ph.D, P.E., a witness in the
above-entitled cause, taken pursuant to Notice
and agreement, before Ceil Weser, Certified
Court Reporter and Notary Public, by
videoconference, on the 8th day of July, 2022,
commencing at or about the hour of 10:00 a.m.

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1 APPEARANCES OF COUNSEL:

2

3 FOR THE PLAINTIFF:

4

VIA VIDEOCONFERENCE

5

GARY COGGIN, ESQUIRE

6

4 Dunmore Court

7

Suite 202

Post Office Box 7092

8

Hilton Head Island, South Carolina 29928

843-689-7777

gcitylaw@aol.com

9

10

FOR THE DEFENDANTS:

11

VIA VIDEOCONFERENCE

12

NATHAN AKERS, ESQUIRE

13

Howell, Gibson & Hughes

14

25 Rue Du Bois

Lady's Island, South Carolina 29901

15

843-522-2401

nakers@hgpha.com

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1 Now this is in this heading the
2 subheading of "Expectation" on the left. Do you
3 see that?

4 A Yes.

5 Q Could you please read the third
6 paragraph down for the record, please?

7 A The first category, it starts off with
8 the first category?

9 Q Yes, sir.

10 A "The first category of expectation is a
11 priori. A priori expectations similar to top
12 down processing are ultimately driven by habits
13 and prior experiences. These are expectations
14 that are brought into the tasks by the user.
15 For example, if a user is familiar with a
16 certain walkway, they may have a priori
17 expectation that the walkway surface contains
18 hazard such as vertical perturbations, uneven or
19 cracked surfaces or so forth.

20 Q Thank you, Dr. Durig. So if somebody
21 has a priority knowledge of a certain area, you
22 really couldn't say in that prior familiarity
23 with the area and any sort of hazard that might
24 be there, you really couldn't say that it would
25 be unexpected if they encountered it, correct?

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1 MR. COGGIN: Object to the form.

2 THE WITNESS: It would be based on
3 the person's knowledge and
4 understanding of whether that was a
5 hazard or not. If they don't know it
6 is a hazard, they might not be on alert
7 to it as much as somebody else who
8 would be -- so that would be somebody
9 like me or somebody doing an
10 inspection, looking for safety hazard,
11 they would have a different perspective
12 on a like condition.

13 BY MR. AKERS:

14 Q I understand. But suppose somebody had
15 complained about the hazard before, would you
16 say they understand it was a hazard?

17 A Yes, if they complained of the hazard
18 before they would understand it is a hazard, it
19 is hard to disagree with that. It is pretty
20 straightforward if I say it is a hazard, I will
21 understand it to be a hazard.

22 Q So I think that is all of that.

23 In your developing your opinions, I am
24 going back to the ADA the ANSI and the ASTM --
25 and is it the IPM?



1 tree was. You could get some --

2 Q Can sidewalk slabs also settle into the
3 ground, and I guess for lack of a better word
4 sink down?

5 A They can. One side can sink and the
6 other side stays level.

7 Q And this doesn't happen -- you
8 testified that this sort of thing doesn't happen
9 overnight, correct?

10 A Typically not, no. This is a long
11 term, I would say a long term process, months,
12 years.

13 Q And so if I were living at this place
14 and walked to this sidewalk frequently, and I
15 had been living there for let's say five or six
16 years, then I would also be aware of this
17 condition, is that correct?

18 MR. COGGIN: Object to the form.

19 THE WITNESS: Yes, if you walked
20 over the sidewalk after five or six
21 years you would probably recognize that
22 there is a change, but it is going to
23 change over those five or six years. I
24 don't think it would be static and be
25 the same as it was five years ago.

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1 here because I haven't been there yet.

2 If he is leaving his apartment towards
3 the area where you took pictures of the alleged
4 defect, would he be walking towards those
5 stairs?

6 A Not to get to that location you would
7 not. That would lead you to, and I will say the
8 right side of the building if I am in the
9 parking lot looking at it. So part of it would
10 depend on where you parked, if you parked on the
11 right side of that building, because there is
12 parking spaces down on that end you would
13 probably walk down that side of the sidewalk to
14 get to your apartment.

15 So it really kind of depends on where
16 you are in the parking lot, but that leads to
17 the opposite side of the building from where the
18 subject sidewalk change in elevation was
19 located.

20 Q So it is a breezeway? You can get to
21 the subject area from his doorway depending on
22 where you go?

23 A That is my memory of it, yes; because
24 you could go all the way through, yes.

25 Q When you were there, did you measure



1 me use a photograph so I can kind of -- we can
2 just kind of visualize this. Let me look at --
3 I have to go back.

4 I am on your very first photograph of
5 that batch of 81 that you sent me, okay?

6 A Okay.

7 Q And you see the stairs and where the
8 breezeway leading up to his apartment begins,
9 correct?

10 A Well, this is the front entrance. His
11 apartment is on the back of that photograph. So
12 you have the breezeway here in the front and
13 then you have a second breezeway in the back.
14 He is at the back breezeway.

15 Q Okay. So that second column in the
16 back that is more shady back there, that is
17 where he lives?

18 A Correct.

19 Q Okay. Now let me ask you this, if I am
20 leaving -- so he doesn't live in the breezeway
21 where it is this sunny part in number 1, right?

22 A Correct.

23 Q Let me ask you this, if I am walking in
24 this area and I am coming from where you said
25 his breezeway is and I am coming towards the



| | | |
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| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF BEAUFORT |) | CIVIL ACTION NO: 2019-CP-07-00554 |
| | | |
| NICHOLAS SANFILIPPO, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | <u>ORDER GRANTING DEFENDANTS'</u> |
| |) | <u>JOINT MOTION FOR SUMMARY</u> |
| |) | <u>JUDGMENT</u> |
| |) | <u>and</u> |
| ESTATE AT WESTBURY |) | <u>DENYING PLAINTIFF'S MOTION FOR</u> |
| HORIZONTAL PROPERTY REGIME |) | <u>SUMMARY JUDGMENT</u> |
| aka ESTATE AT WESTBURY |) | |
| OWNERS ASSOCIATION (a |) | |
| multifamily real estate community) and |) | |
| HIGH TIDE ASSOCIATES (a property |) | |
| and HOA management company), |) | |
| |) | |
| Defendants. |) | |

This matter came before the Court for hearing on July 21, 2022 upon Defendants' Motion for Summary Judgment, the Honorable Ralph F. Cothran Jr. presiding. Appearance was made on behalf of Defendants Estate at Westbury Owners Association and High Tide Associates by attorney Nathan E. Akers and on behalf of Plaintiff Nicholas SanFilippo by attorney Gary Coggin. After reviewing the motion for summary judgment filed in this matter, along with the supporting brief, responding brief, and oral argument, this court finds that Defendants' Motion for Summary Judgment should be **GRANTED**.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the Plaintiff has failed to carry his burden of proving these Defendants were negligent and Defendants have demonstrated there exists no genuine issue of any material fact and Defendants are entitled to a judgment

as a matter of law. I find as a matter of law there was no breach of the applicable standard of care by these Defendants and because the alleged defect was open and obvious, and the Plaintiff had actual knowledge of the condition. This Order GRANTING Defendants' Motion for Summary Judgment and denying Plaintiff's Motions is supported by the record in this case, including arguments presented by the Defendants through filed pleadings, evidentiary submissions and memoranda, as well as presentations at oral argument.

This is a trip-and-fall case on a sidewalk of a condominium Plaintiff leased at the Estate at Westbury. Plaintiff alleged he was injured on or about October 26, 2017 when he tripped while walking on what he alleged was an uneven sidewalk at the Estate at Westbury. Plaintiff alleged his left foot caught a section of the sidewalk that was "appreciably" higher than the area from which he was stepping. Plaintiff alleged negligence against Defendants.

Plaintiff, prior to the incident on or about October 26, 2017, resided at 100 Kensington Boulevard at Westbury for six years. Plaintiff did not own the residence, but rather leased his residence from its owner, Frank Pinto. The Plaintiff paid rent to a management company that handled the rental for Frank Pinto. Plaintiff never paid rent directly to Defendant Westbury or Defendant High Tide Associates. Plaintiff did not pay HOA dues to Westbury. Plaintiff never was a condominium owner at Westbury or High Tide. Plaintiff was not a member of the Westbury HOA. The Plaintiff testified that he had lived at this address for six years, walked across that specific part of the sidewalk "often", that it was a clear day, that

nothing obstructed his view of the sidewalk, and that he had previously complained about the condition of the sidewalk.

On July 7, 2021, Plaintiff filed an affidavit and expert report of Bryan Durig, Ph.D., P.E. However, neither Durig's affidavit nor his report states the condition was dangerous, hidden, concealed, latent, or any other sort of "dangerous hidden condition" as required. Defendants deposed Dr. Durig on July 8, 2022. Dr. Durig could not testify that the alleged defect constituted a latent, dangerous condition. Instead, Dr. Durig testified that a person in the Plaintiff's position and under similar circumstances would have had actual, *a priori* knowledge of the alleged defective condition and would have understood it as a hazard.

I find that the Defendants are entitled to summary judgment because Plaintiff cannot shoulder his burden of proving that the sidewalks constituted a latent, dangerous condition. Moreover, I find as a matter of law that the Plaintiff was a licensee while on the sidewalk at Estate at Westbury. The standard of care Defendants may have owed a licensee such as Plaintiff was to warn of latent, dangerous conditions. The uncontroverted admissible evidence in the record is that the Plaintiff had traversed the section of sidewalk without incident multiple times before, lived there for six years, and previously complained about the sidewalks. Further admissible evidence in the record is that the day Plaintiff fell was clear and his view was unobstructed. I find that any alleged danger with the sidewalk would have been open and obvious and Plaintiff had actual knowledge of the condition of the sidewalks prior to his fall. I find that the Plaintiff's expert report and affidavit fail to establish the alleged defect as a latent dangerous

condition and his deposition testimony established that Plaintiff had a priori knowledge of the alleged hazard and would have understood it as such. Accordingly, there is no genuine issue of material fact in which a jury could conclude that the Defendant was negligent and therefore these Defendants are entitled to summary judgment as a matter of law.

I. I Find That The Plaintiff, as a matter of law, was a licensee at all times relevant hereto.

In South Carolina,

... A licensee is a person who is privileged to enter upon land by virtue of the possessor's consent. The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty to him except:

(a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land.

(b) To use reasonable care to warn him of *[latent] dangerous conditions* or activities which are known to the possessor, or of any change of the premises which may be dangerous to him, and which he may be reasonably expected to discover.

Neil v. Byrum, 288 S.C. 427, 473 (1986)(emphasis in original), quoting Frankel v. Kurtz, 239 F.Supp. 713, 717 (W.D.S.C. 1965); Lane v. Gilbert Const. Co., 383 S.C. 590, 596 (2009) (“A landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous or activities.”); Singleton v. Sherer, 377 S.C. 185, 201 (Ct. App. 2008)

The Court of Appeals of South Carolina in Vogt v. Murraywood Swim and Racquet Club held that such a person as the Plaintiff in this case is properly considered a licensee and not an invitee as a matter of law. Vogt v. Murraywood Swim and Racquet Club, 357 S.C. 506, 593 S.E.2d 617 (2004). The Court explained that since Vogt was on the premises merely by permission of a dues-

paying member and did not “enter for the purpose directly or indirectly connected with the business dealings of the [Club,]” then Vogt could not be considered an invitee but was instead a licensee. Id. at 511 (quoting RESTATEMENT (SECOND) OF TORTS § 330(h)).

The present case is similar to Vogt. Like Vogt, I find that Mr. Sanfilippo was a licensee at the time of the alleged incident because Plaintiff was merely on Defendant’s premises by the permission of a third party, dues paying member, Frank Pinto, and was on the premises for his own benefit, disconnected from the business of these Defendants. Plaintiff did not own the residence, but rather leased his dwelling from its owner, Frank Pinto. The Plaintiff paid rent to a management company that handled the rental for Frank Pinto. Plaintiff never paid rent directly to Westbury or High Tide. Plaintiff did not pay HOA dues to Westbury. Plaintiff never was a condominium owner at Westbury or High Tide. Plaintiff was not a member of the Westbury HOA. Therefore, like the plaintiff in Vogt, I find that the evidence in the record points to one reasonable conclusion: that the Plaintiff in the present case was a licensee as a matter of law.¹

II. **I find the Defendants breached no applicable duty to Plaintiff because the alleged defect was not a latent and dangerous condition but was open and obvious and Plaintiff had actual knowledge of the alleged condition.**

To prevail on a theory of negligence, a Plaintiff must establish: (1) that defendant owed plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff

¹ The Court held that the undisputed evidence in the record yielded one conclusion finding that Vogt was a licensee; the same is true in the present case.

suffered damage. Estate of Cantrell v. Green, 302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990). The absence of any one of these three elements renders the cause of action insufficient. S.C. Ports Auth. V. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986).

A landowner owes a licensee a duty “to warn the licensee of any concealed, dangerous conditions of activities” of which the owner is aware. Landry v. Hilton Head Plantation Prop. Owners Assn., 317 S.C. 200, 203 (Ct. App. 1994). A “latent” (concealed) defect is one which an owner has, or should have, knowledge of, and of which [a person] is *reasonably unaware*. Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979) (emphasis added). “[A] licensee cannot recover for an injury caused by known dangers or risks inherent to a place.” Neil, 288 S.C. at 474; citing Smiley v. So. R. Co., 184 S.C. 130 (1937).

There is no evidence in the record that these Defendants were aware of any condition that was concealed and dangerous or that the allegedly defective condition was actually concealed or dangerous. See Landry v. Hilton Head Plantation Prop. Owners Assn., 317 S.C. 200, 203 (Ct. App. 1994) (A landowner owes a licensee a duty “to warn the licensee of any concealed, dangerous conditions of activities” of which the owner is aware.).). The Plaintiff himself testified that on the day of the alleged incident it was a clear day and that he was able to see everything. There is no evidence or testimony in the record that at the time of the alleged incident, the alleged defect was in any way covered up or otherwise concealed. I find therefore, as a matter of law, that the allegedly defective condition cannot be considered “latent” because it was a condition that

reasonably careful inspection would have revealed. In other words, it was an open and obvious condition. In fact, by Plaintiff's own admission in his Complaint, he contended the alleged defect was "appreciably" higher than the area from which he was stepping.²

Finally, the evidence and testimony in the record reveals that the Plaintiff had actual knowledge of the alleged condition. Therefore, I find as an additional sustaining ground that the condition cannot be considered concealed or latent because "[a] 'latent' (concealed) defect is one which an owner has, or should have, knowledge of, and of which [a person] is *reasonably unaware*. Wilson v. Duke Power Co., 273 S.C. 610, 258 S.E.2d 101 (1979) (emphasis added). However, the Plaintiff was aware of the allegedly defective condition.

The Plaintiff testified that he had lived at this address for six years, walked across that specific part of the sidewalk "often", that it was a clear day, that nothing obstructed his view of the sidewalk, and that he had previously complained about the condition of the sidewalk.

The Plaintiff's expert testified that someone under the same circumstances as the Plaintiff would have been aware of the alleged hazard and that the alleged hazard would not have been unexpected by the Plaintiff. The Plaintiff's expert did not testify that the allegedly defective condition was either latent or even dangerous, as required under the duty to licensees.

² "appreciable" (adj.): large or important enough to be noticed. <https://www.merriam-webster.com/dictionary/appreciable>

I find that the record establishes that the only reasonable inference to be drawn therefrom is that not only was the alleged condition open and obvious, the Plaintiff had actual knowledge of the condition and encountered it anyway.

The only reasonable inference to be drawn from the admissible evidence in the record is that: (1) The Plaintiff was a licensee at all times relevant hereto; (2) the allegedly defective condition cannot, as a matter of law, be considered a latent, dangerous condition because it was open and obvious; (3) the plaintiff's expert report and testimony failed to identify the alleged defect as a latent, dangerous condition; (3) the Plaintiff had actual knowledge of the condition and made a conscious decision to encounter it anyway. Therefore, I find as a matter of law that the Defendants breached no applicable duty to the Plaintiff and the Plaintiff cannot recover for his injuries. See Neil, 288 S.C. at 474; citing Smiley v. So. R. Co., 184 S.C. 130 (1937) (“[A] licensee cannot recover for an injury caused by known dangers or risks inherent to a place.”). Therefore, there is no genuine issue as to any material fact and these Defendants are entitled to Summary Judgment as a matter of law.

CONCLUSION

Therefore, for the foregoing reasons, I find that the Plaintiff has failed to present evidence to support its claims against these Defendants and, as such, the Court **GRANTS** Defendants' Motion for Summary Judgment.

Manning, South Carolina

August _____, 2022

By: _____
Honorable R. Ferrell Cothran, Jr.
Judge, Third Judicial Circuit



Beaufort Common Pleas

Case Caption: Nicholas Sanfilippo VS Estate At Westbury Homeowners Association , defendant, et al
Case Number: 2019CP0700554
Type: Order/Summary Judgment

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

Exhibit G



Exhibit H



Exhibit I



Exhibit J

