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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-001208
Case No. 2018-CP-10-3286

Karolina Richardson and Krista Richardson, ... Respondents,

v.

Mt. Pleasant Square Associates, II, LLC d/b/a Oyster Park Apartments, Dewberry Capital Corporation, and GREP Southeast, LLC,..... Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

ANDREW F. LINDEMANN
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

JEFFREY A. ROSS #74254
EMILY C. SHEETS #78767
ROSS & CRISTALDI, LLC
863 Coleman Boulevard, Suite B
Mt. Pleasant, South Carolina 29464
(843) 633-3030

Counsel for Appellants

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S.C. Code Ann. § 27-40-630(d).

STATEMENT OF FACTS

In the "Statement of Facts" section of their response brief, the Respondents Karolina Richardson and Krista Richardson have presented the Court with a nine-page recitation of certain of the evidence presented at trial. Critically, however, the Respondents fail to distinguish the evidence that is relevant or material to their negligence claim brought pursuant to the South Carolina Residential Landlord Tenant Act (RLTA) vis-a vis the evidence that was presented in support of the non-RLTA claims.

A careful review of the record clearly reflects that the vast majority of the evidence presented by the Respondents in their case-in-chief was directed at non-RLTA claims, including the SCUPTA claim, the civil conspiracy claim, and the fraud/negligent misrepresentation claims. Those are all claims on which the Respondents did not prevail at trial. As the record reflects, the Respondents voluntarily dismissed the fraud/negligent misrepresentation claims and have not appealed the trial court's dismissal of the SCUPTA and civil conspiracy claims. That left the RLTA claim as the only cause of action submitted to the jury, and it was on that claim alone that the jury awarded a $1 million verdict.

Thus, for purposes of this appeal, the evidentiary record must be examined closely and carefully for evidence that supports the RLTA claim. In their nine-page recitation of certain of the evidence presented at trial, it is obvious that the

Respondents are still trying this case for what it is not – SCUPTA and civil conspiracy claims. The record must be reviewed with a discerning eye – one focused on the evidence that supports the RLTA claim. As discussed in more detail below, the evidence quite simply is not there. A review of the trial record demonstrates why that is: just as the Respondents continue to do on appeal, they are promoting and pursuing a different case with different claims – albeit claims that were dismissed and for which no cross-appeal was filed. Quite simply, when this case was tried, the focus was not on the RLTA claim. In fact, it was an after thought.

In sum, when the evidence of record is reviewed fairly and carefully and with a discerning eye towards analyzing the evidence that is relevant and material to the RLTA claim alone, it is crystal clear that the evidence simply does not address or otherwise support a finding of a breach of any duty of care under the RLTA.

ARGUMENTS

As the Appellants explain in their opening brief, the trial court charged Section 27-40-440(a) of the RLTA as the source of the legal duties of care owed by a landlord to a tenant under the RLTA. In its instructions to the jury, the trial court charged all five subsections of Section 27-40-440(a) as if they were applicable to this case and supported by evidence. The Appellants, however, moved for a directed verdict and later a JNOV on all five subsections. In their response brief, the Respondents have now conceded that the trial court erred in failing to grant judgment as a matter of law as to the claims brought pursuant to Section 27-40-440(a)(1) and (4). In fact, the Respondents write: "Respondents' case is based upon S.C. Code Ann. § 27-40-440(2), (3), and (5)." *See*, Respondents' Brief, p. 14. Thus, the Respondents have conceded either that they never relied on subsections (1) and (4) or that they failed to present any evidence to support a breach of duty under subsections (1) and (4).

Nonetheless, as the Appellants have already shown in their opening brief, the evidence does not support claims under subsections (2), (3), and (5) either. However, before turning to that issue, it appears that the Respondents recognize the fatal flaw in their presentation of evidence. As they concede in their brief, there is no evidence of any *written notice* to the landlord until Karolina Richardson

sent an email to the landlord on July 10, 2017, at 2:31 a.m. To recap, that email states in part:

> For the past couple of weeks we have smelled mold/mildew, but have assumed it was innocent. At the same time my daughter and I have been suffering from severe allergy symptoms. As of yesterday I noticed black mold on the bathroom CEILING – assume to be from upstairs. Today we notice black mold from behind washer. I need this addressed today.

(Tr. 108, 189-191, Def. Ex. 14). Recognizing that the Appellants took appropriate remedial action promptly in response to that written notice, the Respondents argue that Sections 27-40-440(a)(2), (3), and (5) "do not require **written** notice to the landlord." *See*, Respondents' Brief, p. 14. (Emphasis in original). The Respondents then insist that there was earlier notice of defects or deficiencies, just not *written notice*.

Not surprisingly, the Respondents' position is incorrect both legally and factually. In fact, it is quite compelling that the Respondents' own counsel questioned Karolina Richardson about that July 10, 2017 email as follows:

> Q. So on July 10, you actually saw mold and ***called it in as you were supposed to do by notifying, I think by a call and an e-mail,*** to the Oyster Park folks that you discovered mold in your apartment; is that right?
>
> A. Yes, sir.
>
> Q. And so this is another GreyStar document dated 7/10/17, again unit 101, the second unit, "Occupant of apartment 101 ***notified management via e-mail***

her concern with black mold in her apartment that is seriously affecting the health of herself and her daughter." Was that a truthful statement you made at that time?

A. I'm sorry?

Q. Was that true?

A. Yes, sir.

(Tr. 109). (Emphasis added). As the italicized language shows, the Respondents' own counsel recognized that written notice was required and was given on July 10, 2017.

Nonetheless, the testimony aside, the precise language of the relevant sections of the RLTA and the supporting case law establish the requirement that the tenant provide *written notice* of a deficiency requiring correction, and the absence of that written notice is fatal to a RLTA claim. *See*, *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (Ct. App. 2009).

In fact, the Respondents attempt to engage in statutory gymnastics to argue that Sections 27-40-440(2), (3), and (5) somehow do not require written notice. The proper analysis, however, starts and ends with the enabling provisions of the RLTA – the Code sections that allow for a private right of action. Those are codified in Section 27-40-610 and Section 27-40-630. Both of those enabling

sections reference Section 27-40-440, which must also be read *in pari materia*.[1]

Section 27-40-610(b) specifically references Section 27-40-440 and provides that "the tenant may recover actual damages … for any noncompliance by the landlord with … § 27-40-440." S.C. Code Ann. § 27-40-610(b). Section 27-40-610(b) must be read in conjunction with Section 27-40-610(a), which states:

> [I]f there is a material noncompliance by the landlord with the rental agreement or a noncompliance with § 27-40-440 materially affecting health and safety or the physical condition of the property, the tenant may deliver a *written notice* to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen days after receipt of the notice if the breach is not remedied within fourteen days.

S.C. Code Ann. § 27-40-610(a). (Emphasis added). Therefore, Section 27-40-610(a) and (b), as read *in pari materia*, allow for a private right of action for actual damages for a violation of Section 27-40-440 after the tenant delivers "a written notice to the landlord specifying the acts and omissions constituting the breach."

In the same manner, Section 27-40-630(d) provides:

> Rights of the tenant under this section do not arise until he has given notice to the landlord and the landlord fails to act within a reasonable time or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the

[1] As this Court has held, statutes are to be construed *in pari materia* meaning that statutes governing the same subject matter "should be construed together since they constitute one law, one system and are governed by one spirit and policy and that it was the intent of the Legislature that they be harmonized and effect given to each statute unless they are totally inconsistent." *Spoone v. Newsome Chevrolet Buick*, 306 S.C. 438, 412 S.E.2d 434, 438 (Ct. App. 1991).

> premises with the tenant's permission or who is allowed access to the premises by the tenant.

S.C. Code Ann. § 27-40-630(d). While Section 27-40-630(d) does not specifically mention Section 27-40-440, it must be read *in pari materia* with Section 27-40-630(a), which reads: "If the landlord is negligent or wilful in failing to provide essential services as required by the rental agreement or § 27-40-440, the tenant may give written notice to the landlord specifying the breach." S.C. Code Ann. § 27-40-630(a). Read *in pari materia*, those provisions of the same Code section make reference to Section 27-40-440 and the requirement of *written notice* to state a valid claim.

In their response brief, the Respondents seem to argue that their case was brought pursuant to Section 27-40-610 rather than Section 27-40-630. As for the requirement of written notice, it makes no difference – written notice by the tenant is a requirement under both enabling statutes. Yet, to the extent that the Respondents suggest that Section 27-40-440 stands alone as its own enabling statute, that is not supported by the plain language of the RLTA or prevailing case law. There is no provision in Section 27-40-440 allowing for a private right of action. The enabling language giving rise of a private right of action is set forth in Sections 27-40-610 and 27-40-630, both of which expressly reference Section 27-

40-440 and both of which require written notice to state an actionable claim.[2]

To push their premise that some form of non-written notice is sufficient, the Respondents cite to this Court's decision in *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (Ct. App. 2009), suggesting that this Court found mere "notice" – as opposed to written notice -- was sufficient. That is a misreading of the *Robinson* decision. At the close of the opinion, this Court writes: "This court has found the Landlord–Tenant Act requires ***written notice*** to the landlord specifying the acts and omissions constituting the breach and failure of the landlord to make the necessary repairs after notice." 682 S.E.2d at 497-498. (Emphasis added). That case involved the absence of smoke detectors. This Court recognized that the tenant failed to provide written notice of the lack of smoke detectors and, among other reasons, that barred the tenant's RLTA claim. Without question, this Court in *Robinson* applied the written notice requirement to claims brought based on Sections 27-40-440(a)(1) and (2).

Finally, it should be reiterated that in *Watson v. Sellers*, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989), this Court recognized that "the RLTA is in derogation

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[2] Later in their brief, the Respondents accuse the Appellants of "misapplying" Section 27-40-610, which they suggest only "provides a process for a tenant to provide written notice to a landlord spelling out breaches to the lease agreement allowing a 14-day cure period." *See*, Respondent's Brief, p. 18. They then insist that they "did not pursue a breach of lease claim." *Id*. This argument is disingenuous at best. A private right of action is provided not just for a breach of a lease but also for a violation of Section 27-40-440. That is why Section 27-40-610(d) employs the disjunctive "or" and allows for the recovery of actual damages "for any noncompliance by the landlord with the rental agreement *or § 27-40-440*." S.C. Code Ann. § 27-40-610(b).

of common law and, therefore, the statute should be strictly construed." 385 S.E.2d at 373. That strict construction, as required under *Watson*, requires that a tenant provide written notice of a deficiency or defect in order to trigger the remedial provisions of the RLTA. That requirement is clear: it eliminates the uncertainty or guesswork and the swearing contest that would otherwise ensue between landlord and tenant. The notice must be in writing; oral notice or even actual notice is not sufficient. *See*, *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361 (2005) (Supreme Court differentiates between statutes requiring "actual notice" as opposed to "written notice").

It should further be noted that the Respondents' argument that any notice – not written notice – is sufficient to trigger the landlord's remedial duties does not carry the day for them. While the Respondents argue that there is "ample evidence of notice," the evidence they cite does not support that position. The undisputed evidence shows that the Respondents moved into Unit 104 at Oyster Park Apartments on May 17, 2017. (Tr. 102). Unit 104 experienced external flooding from a storm that occurred on or about May 23, 2017. (Tr. 102-103; Pl. Ex. 20). As a result of the flooding, the property manager (Greystar) moved the Respondents from Unit 104 to Unit 101 on May 26, 2017. (Tr. 103-104, 159). Remedial action was taken promptly within three days. Later, after moving to Unit 101, Karolina Richardson reported "black mold" to the landlord by the email dated July 10, 2017, stating that "as of yesterday I noticed black mold." (Tr. 108, 189-

191, Def. Ex. 14). Remedial action was promptly taken. The property manager moved the Respondents on July 12th or 13th to another unit, specifically Unit 102. (Tr. 111, 232). Additionally, the property manager initiated remedial action including mold testing that was performed immediately on July 10, 2017, and contact was made with Belfor for remediation services on that same date. The remediation was begun on July 14th and completed by July 18th. (Baumgartner Dep. pp. 27-30).

Recognizing the insufficiency of their evidence, the Respondents try to shift the burden of proof and criticize the Appellants for failing to call Travis Harmon as a witness. There was nothing that prevented the Respondents from calling Harmon if they thought he was a key witness on the RLTA claim, which he was not for the reasons discussed above. However, seeking an adverse inference based on the unique, controversial, and antiquated case of *Brock v. Carolina Scenic Stages*, 219 S.C. 360, 65 S.E.2d 468 (1951), speaks volumes about the Respondents' desperation to hold that $1 million verdict on a RLTA claim that was an afterthought at trial. In addition to being a 3-2 decision and having last been cited almost forty years ago in 1984, *Brock* is limited to unique circumstances where the "burden of explanation" is shifted to the defendant. This case does not merit such an adverse inference, and certainly no such inference was claimed or argued at trial. It is a proposition raised for the first time on appeal. The reason is clear: the Respondents recognize that, when fairly viewed, the evidentiary record – without

resort to such last minute and desperate gimmicks – simply does not support their RLTA verdict.

As discussed herein and in the Appellants' opening brief, there is no evidence to support a RLTA claim under any provision of Section 27-40-440 given the absence of written notice until the July 10, 2017, and the undisputed and prompt remedial action taken by the Appellants. While conceding claims under Section 27-40-440(a)(1) and (4), the Respondents have remarkably not conceded their claims under Section 27-40-440(a)(3) and (5). To recap, Section 27-40-440(a)(3) requires the landlord to "keep all common areas of the premises in a reasonably safe condition" and to keep all common areas "in a reasonably clean condition." S.C. Code Ann. § 27-40-440(a)(3). As the Appellants pointed out in their opening brief, there is no evidence that this case involved any issues with the common areas. The common areas are never addressed by the allegations or the evidence. In fact, other than quoting Section 27-40-440, the term "common areas" appears nowhere in the Respondents' brief. They made *no attempt* to justify a verdict under Section 27-40-440(a)(3).

The Respondents' analysis as to Section 27-40-440(a)(5) is similarly deficient. In their brief, they write: "There is also sufficient evidence that Appellants failed to maintain the plumbing in reasonably good and safe working order and condition." *See*, Respondent's Brief, p. 17. That is a short, conclusory statement. The Respondents do not describe what that "sufficient evidence" may

be. They do not even include any citation to the evidentiary record. The issue should be deemed abandoned or conceded. *See*, *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993) ("an issue is deemed abandoned on appeal, and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority"); *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (same).

In sum, it is critical that this Court recognize that this appeal involves a $1 million verdict. Of course, a verdict in any amount should be supported by the evidence, but certainly one of that magnitude should be reviewed fairly and carefully. Quite simply, the Respondents *did not present any evidence* to support their RLTA claim. They were obviously pre-occupied with attempting to present evidence as to the other claims that ultimately did not go to the jury. But the RLTA claim is unsupported, and the Appellant were accordingly entitled to a directed verdict or at least a JNOV on that claim. The trial court erred in denying those motions.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants Mt. Pleasant Square Associates, II, LLC d/b/a Oyster Park Apartments, Dewberry Capital Corporation, and GREP Southeast, LLC respectfully renew their request that the Court reverse the jury verdict and the orders entered by Circuit Court Judge Jennifer McCoy denying the Appellants' motions for directed verdict and for judgment notwithstanding the verdict. The Appellants further request that the Court reverse the orders of Judge McCoy granting discovery sanctions in favor to the Respondents. The Appellants request that the Court remand for entry of judgment as a matter of law in favor of the Appellants.

Respectfully submitted,

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

JEFFREY A. ROSS #74254
EMILY C. SHEETS #78767
ROSS & CRISTALDI, LLC
863 Coleman Boulevard, Suite B
Mt. Pleasant, South Carolina 29464
(843) 633-3030

Counsel for Appellants

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