THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 04 2024
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Appellate Case No. N2022-001554

Nicholas Sanfilippo .....Appellant

v.

Estate at Westbury .....Respondent
Horizontal Property
Regime and High Tide
Associates

APPELLANT'S FIRST ANSWER TO RESPONDENT'S INITIAL BRIEF

Gary Coggin
SC BAR No.10758
Post Office Box 7092
Hilton Head Island, SC 29928
(843) 689-7777

Nathan Akers
Attorney at Law
SC BAR No. 103415
Howell Gibson and Hughes
25 Rue DuBois
Beaufort, Sc 29907
Attorney for Respondents EAW & HTA

March 4, 2002

TABLE OF CONTENTS and CASES
(Brief of Appellant)

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

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

2. Watson v. Sellers, 229 S.C. 426; 285 S.E. 2d creates a tort in favor of the tenant against his landlord for failure, after notice, to make necessary repairs to keep the premises in a habitable condition.

3. Plaintiff has a negligence action against the Defendant.

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

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

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

7. Absent proper maintenance and repair, the only protection the predominantly elderly population at the EAW from the conditions of the sidewalk in was a notice by the EAW and HTA warning regarding conditions, There was never a warning given to the residents of the EAW re sidewalk conditions.

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

9. While in regard to this incident with the woman in the wheel chair described in no. 8 above, an immediate request was made for sidewalk repair estimates by the EAW and High Tide directors; however no warning of the dangerous conditions in the sidewalk was ever given to the EAW residents or visitors to the complex

10. A short time later an estimate made by MAJ concrete company to

repair nearly 100 defective conditions in the walkway for approximately $9800. Nothing was done for over seven months..

J. That the Expert Witness Opinion of Dr. Durig stated that the vertical change in elevation in the sidewalk section was the cause of Plaintiff Sanfilippo's accident.

1. Change in elevation was between 1/2 and 1 inch. "The vertical change in elevation (measured to range between 1/2 inch and 1 inch) between the sidewalk sections adjacent to Building 1000 in the East of Westbury created a fall hazard and was not being maintained in accordance with ASTM F1637

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

Exhibit _____, Expert Opinion letter of Bryan Durig, Ph.D. P.E., June 7, 2021

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

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

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

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

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

1. Statement/Discussion of Issues on Appeal

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

Section 27-31-120 (1991) of the South Carolina Code of Laws (Horizontal Property Act) states that [a]ny conveyor lease of an individual apartment is deemed to convey

or lease the undivided interest of the owner of the common elements both general and limited [of] the apartment [to the lessor]. S.C. Code Ann. Section 27-31-120 (1991)

This question herein was raised in a hearing re Section 27-31-120 of the South Carolina Code of Laws (Horizontal Property Act) concerning the rights of Plaintiff Sanfilippo to be upon or present on the walkway within the area of his (Sanfilippo's) residence at 1001 Main within the curtilage of the the Estate at Westbury on the date of his trip and fall accident. A strict, careful reading of Section 27-31-120 of the Horizontal Property Act is essential to a reasonable understanding of that the Plaintiff was where he had a right be when he tripped and fell on October 26, 2017.

Further to this question in the case of Davenport v. Cotton Hope, Davenport was Injured in a fall in an unlighted stairwell where the management was aware of the lighting problem. Davenport brought a suit against defendant Cotton Hope sounding in negligence. Cotton Hope defended on the basis of assumption of risk. A directed verdict was awarded the Defendant and Davenport appealed on the basis that assumption of risk was not an absolute bar if the Plaintiff's negligence did not exceed the Defendant's negligence. The verdict was reversed and the controversy was remanded for a new trial.

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

Section 27-40-440 of the SCRLTA requires that Defendants keep the common areas of buildings in reasonably safe condition, comply with applicable building codes, and to make all necessary repairs and to keep the building in reasonably safe and clean condition. As a tenant at the Estate at Westbury, the Plaintiff came under Section 27-40-440 of the SCRLTA and, while in the common area, the Plaintiff assumed the protections an invitee because the landlord under the statutes, particularly the SCRLTA, had a duty of care to keep all common areas of the premises in a fit and habitable condition. Any breach of this duty would trigger the negligence tort as applicable herein to the Plaintiff. *(See answer to d. below).*

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

Res Ipsa Loquiter.

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

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

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

According to Patrick Hubbard and Robert L. Felix, South Carolina Law of Torts, page 110, "A licensee has either the consent of the owner/occupier or some other privilege to visit the premises, but he is there for his own purpose rather than the benefit of the owner / occupier." He is owed something less than a duty of due care. This includes the use [of] reasonable care to discover him and avoid injury to him while [he is on the land] and the warning of the licensee of a concealed dangerous condition .... which he may be expected to discover. Neil v. Byrum, 288 S. 472, 343 S.E.2d, 615 (1986). Also, according to Hubbard and Felix, where conditions re the premises are involved, any "risk must be considered in terms of the known infirmities of a particular victim." (In the case at hand, the Plaintiff was seventy-five years of age.) The owner is required to to use due care to discover licensees and to warn them of unreasonable risks on the premise. Frankel v. Kurtz, 269 F.Supp 713, 720, 721 (D.S.C.1965).

As such, In the matter instantly at hand, the land owner owes a licensee a duty of reasonable care to discover him and to warn him of the risks and to take precaution to warn or to eliminate unreasonable risks. Restatement Section 342 of Torts states that a possessor of land is subject to liability for bodily harm caused to a gratuitous licensee by a material or artificial condition thereon but only if,

(i) the condition .... involves an unreasonable risk to them and he has reason to believe they will to discern the condition or realize the risk, and

(ii) ————————

(iii) invites or permits them to enter or remain on the land without exercising reasonable care to (i) to make condition reasonably safe, or (ii) to warn them of

the condition and risk involved therein.

It is evident in Sanfilippo v. EAW & HTA that the Defendants were aware that the Plaintiff, a resident of the Estate, along with the majority of the residents at the Estate were of advanced years and, on a daily basis, used the walkways of the Estate.

(f) The problem with the case at hand was that the EAW walkways were in a dangerous and decrepit condition and while, unfortunately, Defendants EAW and HTA were aware of the situation, nothing was done and, indeed, at least in regard to the walkways, the EAW board appeared to be mired in a state of paralysis. Consider the following: at least six months previous to Sanfilippo's trip and fall accident, an elderly woman in a wheelchair hit an uneven section of concrete walkway and flipped over onto the sidewalk.

At the September 26, 2017 EAW monthly board meeting attended by four EAW members, "[a] discussion ended regarding the concrete work needed around the property for safety' reasons. Work will begin after board approval." There was a unanimous approval, but nothing was done about the dangerous conditions of the common area walkways after the EWA and HTA September 26, 2017 Board of Directors' meeting (In addition, during the month following the meeting, no notices or warnings of the dangerous uneven conditions of the concrete segments in the common area of the EAW were given to the residents or visitors to the complex. (Again, MAJ Concrete had identified eighty-six work locations which Included over sixty (60) dangerous uneven segments of concrete within the walkways of the Estate at Westbury—all which would be done for $9,800).

On October 26, 2017 at 10:00 A.M. the Plaintiff tripped over an uneven segment of

sidewalk in the common area of the EAW. As a result of his fall, according the radiology results of Nicholas Maranino, M.D., the Plaintiff sustained a comminuted, split, y-shaped fracture of his left patella (the knee cap) Sanfilippo also sustained damage and swelling to his right knee which required care and draining for several months after his fall.

Since the time of his fall on October 26, 2017, the Plaintiff has not been able to walk without artificial assistance. Incrementally, he has used a wheelchair, a walker, crutches, and present he says that he can around with the help of a cane. Unfortunately, he can only walk comfortably for only sixty feet at a time before he must stop to rest. Finally, the plaintiff has developed kidney problems due to the anti-inflammatories he has been taking for the pain in his knee. He has recently completed a round of dialysis, Also, for quite some time, Mr. Sanfilippo has been on antidepressants, primarily Citalopram for depression.

In the case at hand, Sanfilippo v. Estates at Westbury and High Tide Associates, the plaintiff was undoubtedly an invitee in the common area of estate for the following reasons. First, as a tenant for six years, he paid all his owner's rents, POA fees and common area use fees. Next, as per the language of the Horizontal Property Act, the lessor / owner (Pinto) of property unit 1001 EAW transferred his ownership, not only for the living space but also the common areas to lessee Sanfilippo for the period of the lease. Pursuant to the SCRLTA, Section 27-40-440(a)(b), the Act imposes legal duties on landlords to comply with health and safety codes and to maintain the premises in a habitable condition which should be enforceable herein under the SCRLTA. Therefore, under the Act, the landlord can be held liable for breach of warranty and for lack of due

care. S.C. Code, Section 27-40-400 (a) & (b), ie. warranty of habitability. South Carolina Law of Torts, L. Patrick Hubbard & Robert L. Felix, pgs. 118, 119.

In a thoughtful and articulate examination of the legal status of invitees, licensees and tenants in private living complexes, Attorney Matthew D. Lincoln states that, historically, a tenant's legal status in the common area of a complex such as the Estate at Westbury was that of a licensee. As such, the EAW or a similarly situated associate in South Carolina did not have the duty of care to seek out or to warn the tenant (or licensee) of dangerous conditions and was not liable for injury or harm experienced by the tenant in the common area.

However, according to Lincoln, Hubbard, Felix and other legal commentators, there are exceptions to this rule where, as here, the Estates at Westbury (landlord) maintains control over the common area of the complex. In this instance, when the landlord controls the common area, the South Carolina Courts recognize a common area exception to the common law. This exception holds that, under Section 27-40-440 of the South Carolina Residential landlord and Tenant Act, the landlord has a duty to use due care to maintain common areas.

Consequently, this exception, according to Lincoln, thereby classifies tenants as invitees when the tenant is in a common area. Vogt v. Murraywood Swim and Racquet Club and Good v Stephens United Methodist Church, South Carolina Law Review, v. 57 Issue 2 2006, Page 387 to 391. Matthew D. Lincoln; Cramer v. Balcor Property Management, Inc. 848 F. Supp. 1222 (D.S.C. 1990); Cooke v. Allstate Management Corp., 741 F. Supp. 1205 (D.S.C. 1990); Restatement 2nd of Torts, Sections 355, 356, 360. Therefore, as an invitee herein, Sanfilippo was owed a duty of care by the lessor/

landord. Accordingly, then, the landlord was in negligent breach of his duty when he failed to take due care to discover risks and to take safety precautions to warn of or to eliminate unreasonable risks, Shippes v. Piggly Wiggly St. Andrews, Inc. 269 S.C. 479, 238 S.E. 2d 167 (1977); Landry v. Hilton Head Property Lawyers Association 317 S.C. 200, 452 S.E. 2d 619 (Ct. App. 1994); Force v. Richland Memorial Hospital, 471 S.E. 2d 714 (Ct. App. 1996).

With this said, it is obvious that the Estate at Westbury and High Tide Associates, both of whom were in attendance at the Board of Directors meetings on August 22, 2017 and September 26, 2017, also had the statutory duty to Sanfilippo to repair the dangerous condition of the common area. Further, under the law, the landlord not only owed Sanfilippo the duty of due care to discover risks, it also had the duty to warn Sanfilippo of dangerous risks such as the uneven concrete segments and to eliminate these risks.

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

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

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

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

Similarly, in Padgett, a courthouse visitor was walking across the Colleton County courthouse parking lot after personal business in the courthouse. As he was walking outside the courthouse, he stepped into a hole on the property and fell and badly injured his leg. As with Creech above, Mr. Padgett's suit was for damages for negligence against Collation County. Similarly to Creech, Colleton County defended on the basis that the hole in which the Plaintiff fell was "open and obvious" to the Plaintiff and, as such, the County was not subject to liability based on the evidence that Plaintiff could have anticipated the harm could have avoided the defect. While the Court found for the Defendant, Padgett appealed on the basis that even if the [condition] was open and obvious, the county was still subject to liability based on evidence that the injury could be caused by the defect.

The Court found for Padgett on the rule of Callender v. Charleston Doughnut

Corporation 305 S.C. 123, 406 S.E. 2d 361 (1991). Here, in its ruling, the Court noted that "The traditional "no duty to warn of the obvious" rule has been modified in many jurisdictions to hold that an owner is liable for injuries to an invitee despite an open and obvious defect if the owner should anticipate that the invitee will nevertheless encounter the condition or that the invitee is likely to be be distracted." Id. at 128, 406 S.E. 2d at 362. (The status of a licensee was not mentioned herein, but this attorney believes that "negligence" is controlling).

Most Interesting in the case at hand, is the fact that approximately six months before the Plaintiff was injured, an elderly lady in a wheel chair hit an uneven section of concrete within the curtilage of the EAW and was flipped out of her wheel chair onto the concrete pathway. Shortly afterwards, this accident was discussed later at an EAW Board of Director's meeting in April. At that time, plans were made to obtain bids to repair the nearly one hundred side walk deficiencies which included as many as sixty-seven dangerously raised sidewalk segment edges. Sometime thereafter, less than a month after receiving a request to quote a EAW job site, MAJ Concrete of Bluffton, South Carolina tendered a sidewalk repair estimate for $9800 to High Tide Associates.

Unfortunately, for Sanfilippo, despite the celerity of the presentation of the MAJ concrete bid, the subject of the dangerous walkways was not revisited by the EAW Board of Directors until September 26, 2017 — a period of over six months after the wheelchair accident. Perhaps even more distressing than the failure of the EAW and HTA to begin work on the walkways, was the failure of the EAW and HTA to provide any warning or notice re the dangerous conditions of the walkways to the hundreds of residents, mostly elderly, who populated the Estates at Westbury and, who, on a daily

basis, used the walkways of the Estate.

Probably the best known of the "open and obvious" cases is the above cited Callender v. Charleston Donut Corporation 305 S.C. 1223, 406 S.E. 2d 361,1991. In Callender, an elderly gentleman attempted to sit on a stool at a donut shop. Unfortunately, the seat to the stool had been removed and the gentleman was badly injured. In this matter the Court adopted the reasoning of Restatement 2d of Torts, Section 343(A) 1968. "A possessor of land is not liable to invitees for physical harm caused by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge.

Determining a question of fact is the job by a trier of fact (jury or judge in a bench trial). A question of law is always considered by a judge. For our purposes, an "open and obvious" question is a mixed law and fact question and should be put before a trier of fact or a jury.

(h) Whether the Defendants were aware of the dangerous conditions in the walkways at the Estate at Westbury?

The Defendants were very much aware of the dangerous conditions present in the Estate at Westbury walkways. As stated above, eight months before the Plaintiff fell and broke his left knee, an elderly woman in a wheel chair hit a similarly raised edge of concrete in the area and was knocked out of her wheel chair onto the concrete. Shortly after that accident, in late March 2017, the Defendant's board of directors voted to have the walkways repaired by a concrete company. Accordingly, a concrete repair company, MAJ Enterprises, was contacted to assess the "hard scape" problem within the EAW and to provide a quote for repairs. Within a week or two, on April 5, 2017, MAJ Concrete

provided the Defendants with a written proposal for walkway repair. Said proposal identified eighty walkway hazards. A large portion of the work involved thirty-seven locations where it was necessary to remove and replace cracked and damaged Concrete. This included included the digging up and hauling away of sixteen feet of sunken concrete. The largest job was the grinding of forty-four raised edges of concrete slabs, later raised to sixty slabs, so as to achieve level transitions between segments of concrete in the walkway.

This proposal not only identified identified the walkway hazards within the EAW complex, it also had the effect of serving notice to the Defendants that there were nearly one hundred dangerous defects in the sidewalk that needed repair. The proposed repair bill for repair was a reasonable $9800.00.

Unfortunately, this proposal was not acted upon and no warning notices were given to the residents or visitors on the property until after October 26, 2017, the date that the Plaintiff tripped on a raised edge in the walkway and broke his left knee.

(i). Respondent gained a second summary judgment hearing by arguing that new evidence had become available since the first summary judgment. However, in the second hearing, the Respondent did not argue any new evidence given by the Plaintiff's expert and, instead, used the hearing to reprise the arguments he made (Respondent) in the first summary judgment hearing and, in effect, secured a reversal of the denial of his first Summary Judgment Motion?

The Respondent motioned the Court for a second hearing for Summary Judgment on the basis that, in the period since the Court's denial of the Respondent's Motion for summary judgment, the Plaintiff (Appellant) had secured the services of an expert witness (Dr. Doug Durig) who presented new issues and claims to the case that would bring a favorable outcome to the Respondent.

In its second hearing for summary judgment, the Appellant made the same arguments as were made several months before in his First Motion for Summary Judgment. Here, as luck would have it (some would call it judicial shopping), the Defendant secured a more receptive judicial audience and, on the second time around secured a favorable ruling.

Here, Appellant argues that the application(s) of any of the legal doctrines of res judicata, collateral estoppel and / or stare decises, be they made collectively or individually, will act to bar the re-litigation of issues that were argued and necessary to the outcome of the the second summary judgment by the attorneys before the Honorable Judge Cothern.

Under the doctrine of res judicata, a final judgment on the merits in a prior action will foreclose the same parties in a second litigation on the same claim as to issues litigated in the initial action. Similarly, pursuant to the doctrine of collateral estoppel, where there is a second action based on a different claim, a judgment in the first action will foreclose a second litigation of those issues determined in the first suit. Stewart, Res Judicata and Collateral Estoppel in South Carolina, 28 S.C.L. Rev 451, 452 (1977); Beall v. Doe, S.C. 315 S.E. 2d 186, 189n.1 (S.C. App.1984 RESTATEMENT 2d of JUDGMENTS SECTION 27 AT 250).

Likewise, collateral estoppel will bar the re-litigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit. In re Harborview Dev. 1986 Ltd. Partnership, 149 B.R. 378 (Bankr. D.S. 1993); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 LEd.2d 552 (1979).

(j) Whether as lessors of property unit 1001 for six years, the lessee made

all association related fee payments to the lessor which included fixed costs such as insurance payments and HOA /POA related payment that would confer a benefit qualify him as an invitee within the common areas of the Estate at Westbury? Id.

Depends on the language of the lease.

(k) Whether the sidewalk where the Plaintiff tripped and fell was an open and obvious condition is question of fact for the jury?

A question of fact is an issue of fact not law. A question of fact is resolved by a trier of facts, i.e. either a jury or at a bench trial where a judge weighs the strength of evidence.

(l.) Whether where the Respondent's claims of "open and obvious" and conditions of the walkways are not supported by photographic evidence, expert testimony, measurements or evidence on any sort, should "open and obvious" testimony be denied by the Court?

Proof of "open and obvious" is a question of fact for a jury. It can also be a question of law.

(m.) Whether the HTA and the EAW had notice prior to the time of Plaintiff's trip and fall accident of the dangerous conditions of the walkways within the cartilage of the Estate at Westbury?

Yes. There was the wheel chair accident and the estimate for repairs that was presented to the EAW Board of Directors.

(n.) Whether, if prior to the Plaintiff's "trip and fall" accident at the EAW, the EAW had notice of the "raised lip, dangerous conditions of the walkways, did the EAW have a duty to repair or warn of the condition in the sidewalk?

Pursuant to Section 27-40-440 et. seq. RLTA, the landlord has a "duty of care" to keep the common areas of the complex in a clean and safe condition. If this was not done, the EAW and HTA was in violation of its "duty of care" under 27-40-440 of the SCRLTA.

(o.) Whether where the Plaintiff's claims of "open and obvious" conditions of the walkways are not supported by photographic evidence, expert testimony, measurements or evidence on any sort, should they be denied by the Court?

More than likely this is a question of law and or fact.

(p.) Whether the HTA and the EAW had notice prior to the time of Plaintiff's trip and fall accident of the dangerous conditions of the walkways within the cartilage of the Estate at Westbury?

Yes.

(q.) Whether, if prior to the Plaintiff's "trip and fall" accident at the EAW, the EAW had notice of the raised lip and dangerous conditions of the walkways, did the EAW have a duty to repair or warn of the condition in the sidewalk?

The problem here was that the EAW walkways were in a dangerous and decrepit condition and while, unfortunately, Defendants EAW and HTA were aware of the situation, nothing was done and, indeed, at least in regard to the walkways, the EAW board appeared to be mired in a state of paralysis. Consider the following: at least six months previous to Sanfilippo's trip and fall accident, an elderly woman in a wheelchair hit an uneven section of concrete walkway and flipped over onto the sidewalk. On April 5, 2017, at the request for a proposal for concrete repair, MAJ Concrete visited the Estate at Westbury and, shortly thereafter, on April 5, 2017, sent a PROPOSAL for repair which listed over seventy dangerous conditions, later changed to over ninety dangerous conditions to be repaired for $9800.

However, nothing was done and MAJ Concrete did not receive a response from the EAW until six months later, when the subject was revisited at an EAW Board of Directors meeting on September 26, 2017. At that time, plans were made to obtain bids to repair the ninety plus side walk deficiencies which included as many as sixty-seven dangerously raised segment edges.

Less than a month after receiving the request to quote a EAW job site, MAJ Concrete of Bluffton, South Carolina tendered a sidewalk repair estimate for $9800 to High Tide Associates.

Unfortunately for Sanfilippo, the concrete repair bid was tabled and not revisited for some time by the EAW Board of Directors. Finally, then, on August 17, the April 7, was resurrected and a request for a requote was made to MAJ Concrete on or about August 17, 2017. (Please note that a quote was made and then memorialized on on the upper right hand corner of the original April 5, 2017 proposal where it is hand written, "Requoted 8/17/17").

On September 25, 2017, nearly seven months after the elderly lady's wheelchair accident, the Estate at Westbury Board of Directors had its monthly meeting. According to the minutes of said meeting, at the tail end the Old Business segment of the meeting, "[a] discussion ensued regarding the concrete work needed around the property for safety reasons. Work will begin after board approval. Rocky Dunlop (VP of the Board) motioned for approval. Roger Paine seconded. Unanimous."

In paragraph 4d of Estates at Westbury Park Management Agreement, High Tide Associates, as Agent of the Estates at Westbury was charged (sic.), "subject to available funding, [to] cause the grounds of the common elements and limited common elements to be kept in conformity with good landscaping practices. Further, the Agent will cause to be performed any repairs, replacements, refurbishment or maintenance brought to the Agent's attention by the Association." Estates at Westbury Management Agreement Section 4, Paragraph 4. Similarly, in the "Hold Harmless" provision of Management Agreement, "[t]he "Association (Estate at Westbury), agrees to save (sic.)

the Agent, (HTA) harmless from all damage suits in connection with the administration of the herein described property and from liability from injury suffered by any employee or other person whomsoever, and to carry or cause to be carried, necessary public liability of not less than one million dollars per occurrence.

2. Statement of the Case

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

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

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

material fact and the moving party is entitled to judgment as a matter of law.

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

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

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

3. Standard of Review

a. Factual Background

On October 26, 2017, Nicholas Sanfilippo, a septuagenarian and long time lessee/resident at the Estate of Westbury in Bluffton, South Carolina, tripped and fell on the raised edge of a concrete segment within the walkway of the Estate while he was taking a morning walk. As a result of this accident, Plaintiff sustained a comminuted displaced "Y" fracture of the patella of his his left knee. After treatment at the Hilton Head Medical Center where the fractures were reduced and re-approximated, Sanfilippo's lower left leg and knee was placed in a hard cast to prevent migration of the bones and to facilitate healing. Plaintiff Sanfilippo then began a lengthy rehabilitation that continues through this writing. A few months later, after some dissatisfaction

with his his initial legal representation, Mr. Sanfilippo contracted with the Coggin Law Firm (Coggin) to pursue his claim for damages against the Estate at Westbury and High Tide Associates (the Defendants).

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

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

Plaintiff responded with the rule of Calendar, Creech, Padgett and Hancock which argued that owners of properties with dangerous and open and obvious conditions must be aware of the danger therein and anticipate that for various reasons, accidents will take place. He further noted that Plaintiff had statutory protections (Horizontal Property Act and SCRLTA) that made him equivalent to an invitee in the common area and that defendant had, for several months prior to Plaintiff's accident, been on notice re the dangerous conditions in the complex's common area (long before the fall, the EAW had

quotation in hand from MAJ Concrete to correct to correct the dangerous conditions but did nothing to correct the same nor give notice of the conditions to a predominately older population.

b. Standard of Review of Trial Court's Order Granting Summary Judgment

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

A court should grant summary judgment when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the fact are undisputed. Etheridge v. Richland School District One, 341 S.C. 311, 534 S.E. 2d 275, 277 (2000). The plain language of Rule 56(c) of SCRCP mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element to the party's case and on which the party will bear the burden of proof at trial." Carolina Alliance for Fair Employ-ment et.al. 337 S.C. 476, 485, 523 S.F. 2d 795 800 (Ct. App.1999). In a situation such as above in Carolina Alliance, there can be no genuine issues as to any material fact

since a failure of proof concerning an essential element of the nonmoving party's case will render the fact immaterial. Baughman v. American Tel & Tel Co. 306 S.C. 101,116, 410 S.E.2d 537, 546 (1991).

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

c. Standard for Summary Judgment

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

d. Order in Response to Motion to Reconsider

Please see responses b. and c. above. Court's order was also based on the argument that a. the condition where Plaintiff fell was "open and obvious" and that b. Plaintiff had the status of a "Licensee" while in the common area of the EAW Appellant includes the following in the Record on Appeal.

In sum, in consideration of the issues and the law applicable herein, it is apparent that the landlord had an obligation to the tenant to keep the common area safe and clean. That the landlord was less than circumspect in fulfilling this duty as is obvious. Please witness the accident of the elderly wheelchair in February of 2017 followed by rush to get repair estimates and, then after receipt of the same for only $9800 in late March, an interminable and excruciating six months was spent foot dragging until the repair bid was unanimously approved "for safety sake" on September 26, 2017 by the

Complaints and Answers

The Complaints and Answers for this controversy are attached as exhibits.

Summary Judgment Motions and Answers

Summary Judgment Motions and Answers are attached as exhibits.

Deposition and Hearing

Deposition and Hearing Transcripts attached herein as exhibits. I certify that this designation contains no matter which is irrelevant to this appeal.

Statement of Authorities

1. South Carolina Horizontal Property Act, Section 27-31-120.

2. Murphy v. Yacht Cove Homeowners Association, 289 S.C. 367, 345 S.E. 2d 709, 710(S.C. 1986).

3. Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 714, 82 S.E. 2d 709, 589 (Ct. app. 1997)714(Ct. app. 1997

4. Watson v. Sellers, 229 S.C. 426; 285 S.E. 2d (1983).

5. South.Carolina Code of Laws, 27-40-610(b).

6. South Carolina Residential Landlord and Tenant Act, S.C. Code of Laws, Section 27-20-440(3), et al.

7. Bass v. Farr, 315 S.C. 400, 1134 S.E. 2d, 615 (1986).

8. Robert Felix & Patrick Hubbard, South Carolina Law of Torts, et al.

9. Neil v. Byrum, 288 S.E. 472; 343 S.E. 2d, 615 (1986).

10. Frankel v. Kurtz, 269 F.Supp. 713, 720,721 (D.S.C. 1965).

11. Restatement 2d of Torts, Section 342, 343(A)

12. SCRLTA (See 6 above).

13. Vogt v. Marrywood Swim and Racquet Club and Good v. Stephens Methodist

Church, South Carolina Law Review, Issue 2, 20056, Pages 387-391, Matthew B. Lincoln.

14. Cramer v Balcor Property Management Inc. 848 F. Supp. 1122 (D.S.C. 1990).

16 Wok v. Allstate Management Corporation, 741 F, Supp. 1205 (D.S.C.1990).

17. Rocky Dunlap Deposition, Augusrt 6, 2020.

18. Cooke v. Allstate Management Corp, 741 F. Supp. 1205 (D.S.C. 1990)

19. Shippes v. Piggly Wiggly St. Andrews, Inc. 269 S.C. 479, 238 S.E. 2d 167 (1977)

20. Landry v. Hilton Head Property Lawyers Association 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994)

21. Force v. Richland Memorial Hospital 471 S.E. 2d 714 (Ct. App. 1996).

22. Creech v. S.C. Wildlife and Marine

23. Padgett v. Colleton County

24 Callender v. Charleston Donut, etc., 305 S.C. 123, 406 S,E.2d361 (1991).

25. Res Judicta and Collateral Estoppel in South Carolina, 28 S.C.L Rev 451, 452 (1977).

26. Ball v. Doe, S.C. 315 S.E. 2d 186, 189 n.1.

27. S,C, App. 1984, Restatement 2d of Judgments, Section at 250.

28. In re Harborview Dev. 1986 LTD. Partnership, 149 B.R. 378 (Bankr. D.S. 1993.

29. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed. 2d 552(1979).

30. Flemming v. Rose, 350 S.C. 488, 567 S.C. 2d 857, (2002).

31. Baril v. Aiken Regional Medical, 352 S.C. 271, 573 S.E> 2d, 830 (Ct. App. S.E. 2d 757 (2002).

32. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E. 2d 187 (1997).

33. Etheredge v. Richland School District One, 341 S.C. 311, 534 S.E. 2d 275, 277 (2000).

34. Carolina Alliance for Fair Employment, et. al. 337 S.C. 476, 485, 523 S.F. 2d 795, 800 (Ct. App. 1999).

35. Baughman v. American Tel & Tel Co. 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

36. Durkin v. Hansen, 313 S.C. 343, 437 S.E. 2d 550 (Ct. App.1993).

37. Beyerly. v. Connor, 307 S.C.441, 415 S.E.2d 796 (1992)., 164 S.C 361, 371, 372, 162 S.E. 329 (1932).

38. Hancock v. Mid-South Management Company, 381 S.C. 326, 330; 673S.E. 2d 801, 803 (2009)

39. Creech v. South Carolina Wildlife and Marine Rescue Department, 328 S.C. 24, 31, 491 S.E. 2d 571, 574 (1997)

Exhibits

Exhibit 1, Affidavit of Kathleen Davey Sanfilippo, page 12, 2 pages.

Exhibit 2, Estate at Westbury Homeowners Association, Board of Directors Meeting Minutes, September 26, 2017.

Exhibit 3, MAJ ENTERPRISES PROPOSAL, statement and Affidavit of M.A. Jukovsky, page 18, 2 pages.

Exhibit 4, Affidavit of Diane Lewis, page 12, 2 pages.

Exhibit 3, please look to the upper right hand corner of Exhibit 3.

Exhibit 5, Please look to Estate at Westbury Homeowners Association, Board of Directors Meeting Minutes, September 26, 2017, Old business section.

Exhibit 6, opinion letters of Expert Witness Bryan Durig, Ph.D., P.E. regarding differences In levels of concrete walkway slabs and maintenance of the walkway and expert opinion of contribution to trip and fall of the Plaintiff.

Exhibit 7, Affidavit of Expert Witness Bryan Durig, Ph.D, P.E. re the vertical change sidewalk sections as per the IPMC Code, ASTM F1637, the ADA and ANJSI A117.1 and Expert's opinion as to the Plaintiff's trip and fall.

Exhibit 8, Diagnostic Radiology report of Peter Britt, MD, diagnosis of X-rays of Mr. Sanfillipo's left patella.

Exhibit 9, Physicians Note, Admission of Sanfilippo into Hilton Head Hospital 10/26/2017.

Exhibit 10, Deposition of Rocky Dunlap, EAW Board Vice Presdent for period of time in question re Mr Sanfilippo. P. 24 L. 25 Lady in a wheel chair; Page 38 L 1-10 meeting discussion re concrete; P. 39 Uneven walkways concern because of the lady in the wheel chair; grinder; building 1000. PP. 13-52.

Exhibit 11, Management agreement between Estates at Westbury and High Tide Associates. HTA agrees that it will comply with all the legal requirements of the Horizontal Property Act as to number 17 in the management agreement.

Exhibit 12, Summary Judgment before Judge Carmen Mullen. Plaintiff defending Summary Judgment Motion against Ledbetter. Judge instructed the Plaintiff to bring An expert into the action. Per Court instructions, Plaintiff hired Dr. Durig.

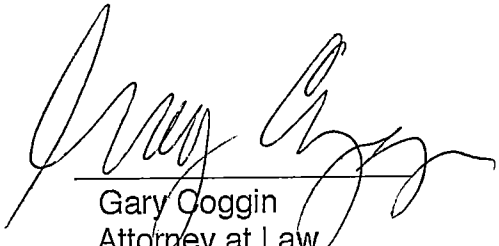
Exhibit 13, Estate at Westbury Board of Directors Meeting Minutes. No. 6, Old Business.

Exhibit 14, Invoice for concrete work at The Estate at Westbury Park POA.

Exhibit 15, Estates at Westbury Park Management Agreement, see 4(d) Upkeep and 10 Hold Harmless (4 Pages).

Exhibit 16, Summons and Second Amended Complaint.

South Carolina Code of Laws, Section 27-40-440.



Gary Coggin
Attorney at Law
#10758
P.O. Box 7092
Hilton Head Island, SC 29928
843.785.7442

March 2, 2024

RECEIVED
MAR 04 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPELLANT' S RESPONSE TO THE RESPONDENTS' INTIAL BRIEF IN ANSWER TO THE APPELLATE COURT'S DECISION FAVORABLE TO SANFILIPPO'S APPEAL

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

Nicholas Sanfilippo .....Appellant

v.

Estate at Westbury Horizontal
Property Respondents Regime
(a multifamily real estate community)
and High Tide Associates (a property
and HOA Management company).....Respondents

APPELLANT'S PROOF OF SERVICE

The undersigned counsel hereby certifies that by attachment herein, he has served the APPELLANT'S INITIAL BRIEF IN RESPONSE TO THE RESPONDENT'S INITIAL BRIEF to counsel of record 2 addressed as follows:

Nathan E. Akers
South Carolina Bar No. 103415
Post Office Box 40
Beaufort, South Carolina 29901-0040
(843) 522-2400
Nakers@hghpa.com

Coggin Law Office
South Carolina Bar No. 10758
Post Office Box No. 7092
Hilton Head Island, SC 29938
(843) 689 7777
Gcitylaw@aol.com