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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
In the Court of Common Pleas

Honorable R. Ferrell Cothran Sr. Circuit Court Judge

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

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Nicholas Sanfilippo .....Appellant

v.

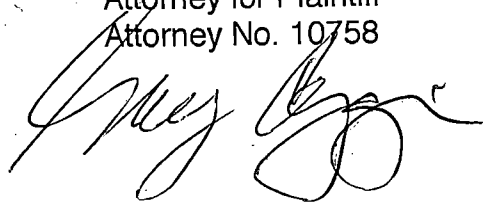
Estate at Westbury Horizontal .....Defendant  
Property Respondents Regime  
(a multifamily real estate community)  
and High Tide Associates

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**DESIGNATION OF MATTER TO BE INCLUDED  
IN THE RECORD ON APPEAL**

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By s/ Gary Coggin  
Gary Coggin  
Attorney for Plaintiff  
Attorney No. 10758



## **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

### **A. Introduction**

This is an action sounding in negligence under the South Carolina Residential Landlord and Tenant Act (SCRLTA). Watson v. Sellers, 299 S.C. 426, 385 S.E. 2d (Ct. App. 1989). As with any common law negligence action, it is incumbent upon the Plaintiff to, first, prove a duty of care on the part of the landlord to the Plaintiff; next a negligent breach of that duty and, finally, damages to the plaintiff as a result of the breach.

Pursuant then to the duty of care under the SCRLTA Section 27-40-(a)(3), a landlord shall keep all common areas of the premises in a reasonably safe condition, and, for premises containing more than four dwelling units keep [it] in a reasonably clean condition.

On October 27, 2019 Mr. Nicholas Sanfilippo, a seventy-five (75) years old retiree went for a stroll on the walkway that ran about the curtilage of the Estate at Westbury in Bluffton, South Carolina. After walking for only a short period of time, the toe of Mr. Sanfilippo's left foot caught on the raised edge of a concrete segment causing him to pitch heavily forward onto his face, hands, forearms and knees. Because of the excruciating pain in his left knee, Sanfilippo knew he had broken his left knee cap. What followed was months of rehabilitation and recuperation and even today, at the time of this writing, Mr. Sanfilippo is in chronic pain and cannot walk without a cane.

This case is unique in that there is no real disagreement as to the facts — only

the interpretation and conclusions thereof. There is, for example, no dispute that the Estate at Westbury and or High Tide Associates failed to either repair the dangerous conditions or even warn the plaintiff that dangerous conditions existed. On the other hand the defendant maintains that, because the plaintiff was presumably a licensee and the dangerous conditions were “open and obvious,” there was no need to warn or repair. With all of the above, there is only one conclusion remaining herein—that while the plaintiff and defendants agree on the facts, they are greatly variant as to the interpretation of the same. Because these fact questions exist, summary judgment is incorrect and the questions herein must be submitted to a jury.

Further to the above, it is important to note here that the Court below has made a fundamental mistake in classifying Plaintiff Sanfilippo as a licensee. In doing so, the Court misunderstood the special status of tenant created by the South Carolina Residential Landlord and Tenant Act (SCRLTA) and the fact that, while at least in common areas, tenants are afforded due care and are “analogous invitees.” Hubbard and Felix, South Carolina Law of Torts, 2d Edition, p. 127. This view is echoed by Matthew Lincoln in “Landowners’ Duty to Guests and Tenants: Vogt v. Murraywood Swim & Racquet Club and Goode v St. Stephens United Methodist Church,” South Carolina Law Review, Vol. 57 Issue 2 [2005] Art.6, Page 387. “South Carolina courts recognize the common area exception holding that lessors have a duty of due care to maintain common areas when they retain control of them — thereby classifying tenants as invitees when the tenant is in a common area.”

With this said, Appellant proposes that the following be included in the Record on Appeal:

## B. Sources

### Text

1. The South Carolina Law of Torts, 2nd Ed., F. Patrick Hubbard and Robert L. Felix, pp. 120, 121 (lessor's duty to maintain common areas); 122 (tenant's safety unmaking improvements); 123 - 124 (tenant's obligation to keep premises in fit and habitable condition); 12 Id. (two federal court opinions take the view that South Carolina limits the landlord's duty in common area to situations where the conditions directly injure the tenant ... .); Cramer v. Balcor Property 848 Fed. Supp. 1222 (D.S.C. Cooke v. Allstate Management Corp., 741 F.Supp 1205 (D.S.C, 1990); Landry v. Hilton Head Plantation Property Property Ass'n. Inc. 317 S.C.200, 452 S.E.2d 619 (Ct. App. 1994)(Here, the property owner had the status of an invitee and was owed a duty of due care by the association paid to maintain the common area). "..... [T]he lessee and others rightfully using the common areas are analogous to invitees and .... that tenants in common area are entitled, like invitees, to reasonable protection from the foreseeable misconduct of others." (my emphasis). South Carolina Courts recognized this common area exception and hold that lessors have a duty to use due care to maintain common areas. In the matter at hand, they retain control of the outside common area."

### Law Review

2. South Carolina Law Review, "Owners Duty to Guests of Invitees and Tenants: Vogt Murraywood Swim & Racquet Club and Goode v. St. Stephens

United Methodist Church.” South Carolina Law Review, Vol. 57 Issue 2, 2005; see also Hoover v. Broome 342 S.C. 531, 537-538, 479 S.E. 2d 62, 66 (S.Ct. App. 1996). In discussing the duty of the landlord, “[w]here there is conflicting evidence as to whether one is a licensee or an invitee, the question is one of fact and is left properly to the jury.

## **Restatement**

3. **Restatement 2nd of Torts, Section 343 (A) 1965.** A property owner is liable to pedestrian invitees for injuries taking place in open and obvious conditions if because of notice or previous incident it is foreseeable someone would encounter the dangerous condition and be injured.

4. **Restatement 2nd of Property: Landlord and Tenant, Section 173 1977.** A landlord who leases a part of his property and retains another part that the Tenant is entitled to use as appurtenant to the part leased to him is subject to liability to his tenant and others lawfully upon the property with the consent of the Tenant for physical harm caused by a dangerous condition on that part of the leased property under the landlord’s control if the landlord by the exercise of reasonable care could have discovered the condition and made the condition safe.

## **Federal Case Law**

### **5. Federal District Opinions**

Two Federal district court opinions take the view that in South Carolina liability attaches to landlord where defective conditions in the common area causes 4

injuries to a tenant Cramer v. Balcor Property Management, Inc., 848 Fed. Supp., 1222 (D.S.C.1994); Cooke v. Allstate Management Corp., 741 Fed. Supp. 1205 (D.S.C. 1990). South Carolina Law of Torts, supra. It appears here, as in Cramer and Cooke, the duty of a landlord is limited to where the conditions in the facility caused harm.

## **Statutes**

6. South Carolina Residential Landlord and Tenant Act; South Carolina Code of Laws, Section 27-40-440 et seq

7. South Carolina Horizontal Property Act; South Carolina Code of Laws, Section 27-31-120

8. Tenant's Right to Recover Damages. South Carolina Code of Laws, Section 27-40-610(b) (Section 27-40-610(b)) Provides for action in Tort after failure to fulfill obligations to lessee by lessor. "A property owner is liable to pedestrian invitees for injuries in open and obvious conditions if, because of notice or previous incidents is .... foreseeable that someone would encounter the dangerous condition and be injured.

## **Relevant Case Law**

9. Neil v. Byrum 288 S.C. 472, 343 S.E. 2d 615, 616 (1986).The standard in South Carolina for differentiating the standards of care for a licensee and an invitee.

10.Cramer v. Balcor Property Management, Inc. 848 Fed. Supp. 1222 (D.S.C.

1990) A female guest at a hotel was killed by a criminal who entered her room. An action was brought against the hotel under the SCRLTA. The Court ruled against the Plaintiff on the basis that the SCRLTA is not a criminal statute.

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

Court found against the Plaintiff on more or less the same basis as Cramer v. Balcor.

12. Connors v. Farmers & Merchants Bank, 243 S.C. 132, 139; 132 S.E. 2d 388

(1963) The landlord has no duty to repair absent an agreement with the tenant. (The remainder touches on other matters).

13. Timmons v. Williams Wood Products Company, 164 S.C. 361, 162 S.E. 2d

329(1932) Personal Injury claim for breaching contract by failure to make repairs were not recoverable unless special circumstances existed that enabled the Court to conclude that such consequential losses were foreseeable because they were within the contemplation of the parties.

14. Pryor v. Northwest Apartments, Ltd. 630 S.E. 469, 469 (Ct. App. 1996)

Woman who fell outside of hotel on a wet and muddy path sued the hotel for negligence in failing to maintain the common area and failure to warn the Plaintiff on a dangerous condition. Court found there was no evidence of a breach of a duty of care.

15. Hancock v. South Management Co., 381 S.C. 326, 673 S.E. 2d 801 (2009)

Our court said that despite the "open and Obvious condition of the public jury could determine that the owner should have anticipated that such a

condition would case someone to fall and injure themselves. Even if the defect is obvious, there may still be a duty to repair if it is foreseeable that the pedestrian would never-the-less encounter the defective condition.

16. Creech v. South Carolina Wildlife and Marine, 328 S.C. 24, 491 S.E. 2d 571, 75 (1997) Action brought under the S.C. Torts Claim Act. Creech fell from a viewing platform and brought an action against the state for negligence for not having a protective rail on a viewing platform. State defended that the condition was open and obvious. The Court determined that the State should have anticipated that the type of accident experienced would take place despite the open and obvious condition. While the State would defend on the open and obvious claim, Sanfilippo as a tenant / invitee on the sidewalk would argue that the HTA and EAW should have anticipated the fall and, in fact did anticipate the fall because of the old lady's fall in the wheel chair and because of the talk of the fall at the board meetings.

17. Durkin v. Hansen, 313 S.C. 343, 437 S.E. 2d 550, 553-544. Where landlord has no duty of repair to tenants, when he undertakes to hire a contractor, he is liable to the Tenant for the actions of the contractor.

18. Young v. Morrissey, 285 S.C. 236, 242; #29 S.E. 2d 426. A person who delegates to an independent contractor has an absolute duty to another person and is liable for negligence as if the independent contractor were an employee

## **Affidavits and Exhibits**

1. Tony Pinto affidavit

2. Management Agreement Estates at Westbury
3. Hospital Radiology
4. The old lady falling on the sidewalk discussion at the EAW meeting;  
note from Dunlap deposition
5. MAJ Estimate
6. The September 26, 2017 meeting of EAW before the injury of Sanfilippo
7. Section 27-40-440 South Carolina Code of Laws
8. Affidavit of Bryan R. Durig

### **Transcript of Summary Judgment Hearing**

June 7, 2021 Transcript of a Summary Judgment Hearing. Sanfilippo vs. Estate at Westbury. Pp. 1-10 Defendant's attorney Mr. Ledbetter makes the argument that High Tide Associates is the successor property manager to Horizon Property Managers and should be the Defendant instead of EAW. The Court moves past this issue and to the question as to whether the plaintiff is a licensee or an invitee. Coggin says that he is a tenant and that under Section 27-40-440 the SCRLTA he is a separate animal and has definite stated rights under the act. Here, Coggin references Lincoln and Felix, and states that when Sanfilippo is in the common area he is analogous to an invitee and "since no individual tenant can control the common area, South Carolina may join the growing number of courts that hold that tenants in a common area are entitled like invitees to reasonable protection from the foreseeable misconduct of others." (Felix and Lincoln Supra at 2) After much back and forth, the Court advised Mr. Coggin to get an expert say that there was a code violation or something to defeat summary judgment.

## **Transcript of Summary Judgment Hearing**

July 21, 2022 Transcript of Hearing for Summary Judgment proceeding: pp. 4-7 tenant standard; 10-12 discussed woman in a wheel chair; 16-17, MAJ Concrete proposal for walkway repair; 17; Estate at Westbury on notice of defective sidewalk conditions 18:L14 - L18; change in elevation in walkway; 19; South Carolina Residential Landlord and Tenant Act; keep the common areas in reasonable safe conditions. The Court said on 19:L 5,6 that the SCRLTA did not apply (to the case at hand)

## **Depositions**

Deposition of Nicholas Sanfilippo

August 6, 2020 Transcript of a video conferenced deposition of Nicholas Sanfilippo: pp. 17 - 29 background and accident; 30-34 recovery, high blood, second fall, Dr. Tobin, medications; 36 - 39 sidewalk conditions, payment of rent, etc.; 40, 41 report fall and Accident; 42, 43 kidney problems, dialysis, dietary changes; 45 can walk 60 feet comfortably today with a cane; 46 moved from Estate at Westbury to independent living on Main Street in Hilton Head;

Deposition of Rocky Dunlop

pp. 1 The population of the Estate at Westbury was approximately 400 people when he served on the Board of Directors, five people were on the board, pp. 11; Whoever got the most votes was on the board; 13 at the time that Mr. Dunlap was on the board the property manager was High Tide Associates; 16 Debbie Shumann took the minutes of the board meetings, she was from off site and would tape the meetings; 20-23

cameras were installed around the complex by HTA for security; 23-25 There were about twenty cameras installed. The one who knew the most about the cameras was Debbie Schumann an HTA Employee from Georgia who is no longer around. 25, 26 Rocky did not think there was a tape re plaintiff's fall. Rocky said that the news of Nick's falling was new to him; 29 Rocky then talked about the lady in the wheel chair falling on the sidewalk; 32 Doug Skelly was the owner of High Tide. 34 The board of High Tide would pay for the camera installation and maintenance fees; 38 MAJ Concrete; 39 Lady In the wheel chair; 42 the use of a grinder on uneven concrete edges; 44 Discussion of Sanfilippo's fall; 50 Talked about the uneven segments of concrete. The Defendants claim that the condition of the sidewalk where the Plaintiff tripped and fell was open and obvious and therefor Defendant's liability should be denied. Plaintiff's deny this assertion for the following;

- a. Defendant had notice of the conditions and failed to act.
- b. Under the rule of Collander v. Charleston Donut, Creech Wildlife and Marine, Hancock v. Mid-South Management and Padgett v. Collation County, if an owner knew of the obvious and dangerous condition of a place and, in addition, ***should have anticipated the condition would cause someone to hurt themselves and a jury could find against the Owner.*** 5 through 8

#### Deposition of Expert

Pp. 6-9 education, work experience and day to day; 10 - 12 Durig is a forensic engineer because he determines what happens. He does about 150 premises cases annually. about 20% of his cases go to trial; 14-17 worked with Coggin law about 10 years before

on a bicycle case. His case load is 75% plaintiff and 25% defendant; 18 he prepared for the deposition by reviewing the material of the case; 18-20 discussion about using quarter to determine depth of cracks; 22 Durig d/n know when the pictures that were provided were taken. 32 He said the fall took place close to plaintiff's residence; 32 Discussed how the accident took place; 33 talked about the scene of the fall; discussed his review of the accident scene. It had been repaired; 34 Durig described the scene; 36, 37 talked about how the scene looked after repair; 38 discussion of possession of The photos; 39 Ms. Lewis saw where he fell. He pointed out to Ms. Lewis where he fell just after he fell.; 40 Durig explained to attorney the dynamics of a trip; 41 Durig said There was a change in elevation at the injury site between a 1/2 inch and 1 inch; 42 Durig said that it was over six months from the time of identification until the time of Repair and Sanfilippo tripped before it was repaired in December of 2017. 43-45 Discussion of various ways of measuring; 52 the slope in the walkway does not comply With ASTM F1637 standard because of the change in elevation. The you have the ADA and the ANSI which do apply and these would violate those standards because the vertical change in elevation is excessive. He is mostly concerned about the change in elevation in the walkway. There is also IPMC, ASTM ADA and ANSI 117. ANSI A 117.1 is the standard in South Carolina. ASTM and ICC. 57 IPMC has been adopted in Beaufort County nor the City of Hilton Head Island; 61 you can have vertical 1/4 inch w/o treatment. 63 The handicapped spot has no. 1001 on it so Sanfilippo may be handicapped. 72 3/4 inch change is a trip hazard. 71 did Sanfilippo ever complain about the hazard where he fell? 71 - 92 more or less review of material.

Complaint and Answer Pleadings

1. Sanfilippo Complaint 03/13/2019
2. Estate at Westbury Answer 05/09/2019
3. Sanfilippo Response to Answer 06/05/2019
4. Estate at Westbury Amended Answer 06/05/2019
5. Sanfilippo Response to Amended Answer 06/17/2019
6. Sanfilippo Amended Summons and Complaint 07/05/2019
7. HighTide Associates Answer to Amended Complaint 09/13/2019
8. Sanfilippo Response to Amended Complaint 09/19/2019
9. Sanfilippo Motion to Amend Complaint 02/14/2020
10. High Tide Associates Brief in Opposition to Motion to Amend Complaint 05/18/2020
11. Sanfilippo Summons and Second Amended Complaint 06/02/2020
12. High Tide Associates Answer to Amended Complaint 06/29/2020
13. Reply to Answer to 2d Amended Complaint 07/02/2020

#### Summary Judgment Pleadings

1. Estate at Westbury Motion for Summary Judgment 03/08/2021
2. High Tide Associates Motion for Summary Judgment 03/08/2021
3. Sanfilippo Response to Motion for Summary Judgment
4. Estate at Westbury Memo in Support of Motion for SJ 06/03/2021
5. Sanfilippo Response to EAW Memo in Support of Motion for Summary Judgment 06/04/2021
6. Sanfilippo Response to High Tide Associates Motion for Summary Judgment 06/04/2021
7. Sanfilippo Exhibits in Response to motion for SJ 06/04/2021
8. Affidavit of Durig 07/07/2021

9. Reply Memo in support of summary judgment 07/09/2021
10. Order denying Motion for summary judgment 11/15/2021
11. Motion for summary judgment 05/17/2022
12. Memo in opposition to motion for summary judgment 07/19/2022
13. Memo of law to Judge Cothorn.
14. Response to addendum.
15. Order Granting Summary judgment.
16. Order denying Plaintiff's Motion to Reconsider.
18. Notice of appeal.

Record on Appeal

Pleading

1. In Sanfilippo's initial Complaint 03/13/2019 and Second Amended Complaint he pleads all the elements of the cause of action of negligence including notice against the Defendants Estate at Westbury and High Tide Associates. (Page 1 - 7 First and Second Amended Complaint)

Plaintiff as a Tenant not a Licensee

2. Pursuant to the Residential Landlord and Tenant Tenant act and the Horizontal Property Act Appellant enjoyed the possessory rights, common area rights, privileges and protections of a tenant and not a licensee at his home at the Estate at Westbury Horizontal Property Regime. For example, pursuant to the Horizontal Property Act, under Section 27-31-120 of the South Carolina Code of Laws, "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided 12

interest of the owner of the common elements both general and limited .... to the apartment.<sup>1</sup> Also, please be aware that during his entire residence at the "Estate," the Plaintiff paid all of the lessor's extraneous costs and charges.<sup>2</sup>

Moreover, in addition to the above and perhaps overlooked by the Defendant, is that fact that the Plaintiff also had the status of a tenant on the property under the statutory protections of the South Carolina Residential Landlord and Tenant Act (RLTA)<sup>7</sup> particularly Section 27-40-440(a) of the Act which requires that the Defendants keep all Common area of the [premises in a fit and habitable conditions for lessors/tenants like the Plaintiff.<sup>3</sup>

Finally, please be aware that no less an expert as Professor Felix has stated that Sanfilippo's status in the community of the estate at Westbury was equivalent of an invitee.<sup>4</sup> *Please look to the Plaintiff's Notice and Motion Pursuant to Rule 59(e) SCRPC to Reconsider and Alter and amend Judgment of Summary Judgment Against the Plaintiff. (Pages 1 - 4)*

#### South Carolina Residential Landlord and Tenant Act

As a longtime lessee/tenant at the Estate at Westbury, Plaintiff Sanfilippo 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 resident such as the Plaintiff. In addition the statute also required that that Defendants comply with all applicable building codes materially affecting tenant's health and safety and to make necessary repairs and to keep the

buildings and common areas in a reasonably safe and clean condition.

### Licensee & Open and Obvious

The Defendants, Estate at Westbury and High Tide Associates have, during the case at hand, been represented by three law firms. The second firm filed a motion for summary judgment which has been continued by the third law firm. Said motion makes two arguments: first, because the Plaintiff is a lessee at the Estates, he carries the designation of a licensee and, as such, has few if any rights. Next, in addition to the licensee misnomer, Defendant argues that the Plaintiff was wholly at fault in his accident because the raised edge of concrete over which he tripped was “open and obvious” and Plaintiff had traversed the spot on numerous occasions.

In classifying the Plaintiff as a licensee, the current defendant as well as his predecessor attorneys and the Court have ignored the fact that Plaintiff, as a lessee of Unit 1001 of the Estate was under the settled law of this jurisdiction entitled to and should have been able to enjoy the possessory rights, common area rights, privileges and protections of the lessor Angelo Pinto.

In support of the same, please look to South Carolina Code Section 27-31-120, the Horizontal Property Act and Section 27-40-440(a) of the South Carolina Residential Landlord and Tenant Act. Both acts offer statutory protections to the Plaintiff. While Section 27-31-120 conveys the undivided interest of the owner of the common elements both general and limited, the RLTA requires that the Defendant keep all the common areas of the premises in a fit and habitable condition for lessors like the Plaintiff. (Page 1 to 3 of Plaintiff’s Notice and Motion pursuant to Rule 59(e) SCRCPL to Reconsider and Alter and Amend Judgment of Summary Judgment Against the Plaintiff.) Please. 14

See Pages 3 through 5 regarding the following:

- a. Plaintiff's status as an invitee in the common area;
- b. That the negligence of the Defendant was greater than Plaintiff's;
- c. That the question of licensee or invitee designation is a jury question;
- d. That breach of duty of care is a fact question for the jury;
- e. If the condition of the sidewalk was a latent dangerous condition was a fact question for the jury;
- f. That Defendant produced no evidence that Plaintiff was a licensee;
- g. That Defendant presented no evidence to the Court that the condition of the side walk was an open and obvious condition;
- h. That whether the condition of the sidewalk was "open and obvious" was a jury question.

The Defendants claim that the condition of the sidewalk where the Plaintiff' tripped and fell was open and obvious and therefor Defendant's liability should be denied. Plaintiff's deny this assertion for the following;

- a. Defendant had notice of the conditions and failed to act.
- b. Under the rule of Collander v. Charleston Donut, Creech Wildlife and Marine, Hancock v. Mid-South Management and Padgett v. Colleton County, if an owner knew of the obvious and dangerous condition of a place and, in addition, ***should have anticipated the condition would cause someone to hurt themselves and a jury could find against the owner.*** 5 through 8

Duty to Warn - A property owner owes a licensee and presumably a tenant a duty to use reasonable care to conduct activities on land so as not harm a licensee and to warn of and concealed and dangerous condition or activity which are known to the Property owner.

Open and obvious- In South Carolina a property owner is not liable for physical harm caused by an open and obvious dangerous condition unless the property owner should anticipate the harm despite such obviousness

Expert Opinion - See Experts opinion with exhibits

Whether a Lessee can sue the condominium complex? See Page 8 -13

### Order

Unfortunately, in the matter at hand, the Court decided a complicated question on the basis of two erroneous conclusions of law. First, it made the determination that because the Plaintiff, Nicholas Sanfilippo, was an elderly, long-time lessee at the Estate at Westbury, he had the status of a licensee — the lowest social rung of apartment dwellers.<sup>1</sup> Second, the Court ruled that because the dangerous conditions of the walkway — the uneven edges of of the sidewalk segments — were open and obvious, Sanfilippo's trip and fall was, in effect, the result of Sanfilippo's failure to watch where he he was walking.

Further, according to the Court, Mr. Sanfilippo was on the property by virtue of the consent of the Estate at Westbury and because Sanfilippo was a licensee on the property, the Estate only had to use reasonable care to warn Sanfilippo of any unreasonable risks or concealed dangerous conditions on the property.<sup>2</sup> According to the Estate, the raised edges of concrete segments did not reach the standard of a a concealed dangerous condition. The Estate, in fact, was of the opinion that because the raised edges of concrete were so "open and obvious" the residents of the Estate did not need to be warned of they were dangerous conditions.

Prior to the October 26, 2017 trip and fall accident, Mr. Sanfilippo had resided at

Unit 1001 on Kensington Boulevard for six years. He leased this unit from Frank Pinto. As part of his monthly lease payments, Mr. Pinto also paid an amount to cover Mr. Pinto's fees and extraneous costs. This had been part of the lease arrangement for the entirety of Mr. Sanfilippo's leasehold.

As a retired businessman and military veteran, Mr. Sanfilippo very much enjoyed living at the Estates at Westbury. One of the activities that he greatly enjoyed, weather permitting was taking a walk three times weekly within the curtilage of the Estate at Westbury. He did not walk fast, he just enjoyed being out and seeing his neighbors and the neighborhood.

Suddenly, as Mr. Sanfilippo was nearing the end of his walk, his left foot caught on a raised segment of concrete and he pitched forward onto his face, hands, arms and Knees. Because of the intense pain in his right knee, he suspected that he had broken his left knee.

What occurred next was a visit to the hospital and a diagnosis of a three part, Y-shaped comminuted fracture. The injury was realigned and cast and the next year was filled with physical therapy and learning how to walk with a walker, crutches and finally a cane.

Mr. Sanfilippo is of the opinion that his injury and subsequent arduous rehabilitation was due wholly to the negligence of the Estate at Westbury and High Tide Associates. He has brought an action against the Estate and High Tide Associates sounding in negligence. The Estate and High Tide has defended on the basis that Sanfilippo was a "licensee" and that the sidewalk defect where he fell was "open and obvious"

In response to the above, it is sufficient to state that the Plaintiff is a tenant, not a

licensee. He is designated a tenant by the South Carolina Residential Landlord and Tenant Act, Section 27-40-10 et. seq. As a tenant, he is entitled to all of the rights and protections under the act. This includes the duties to comply with the safety codes of the South Carolina Residential Landlord and Tenant Act (Section 27-40-440(a)(1) and the Act requires the Estate at Westbury to do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition (Section 27-40-440(a)(2) and to maintain certain facilities and appliances in reasonably good and safe working condition. (27-40-440(a)(5).

As a tenant, Sanfilippo had, when he was in the common areas of the Estate at Westbury, the status “analogous to invitees.” Also, look to Landry v. Hilton Head Plantation Property Ass’n Inc. 317 S.C. 200, 452 S.E. 2d 452 S.E. 619 (Ct. App. 199) which ruled that a property owner had the status of invitee and was owed a duty of due care by Association paid to maintain the common area). Similarly, the SCRLTA, section 27-40-440 et. seq. states that the landlord must keep the premises including the common area in fit and habitable condition.

In support of the same, please look to South Carolina Code Section 27-31-120, the Horizontal Property Act as an adjunct to Section 27-40-440(a) of the South Carolina Residential Landlord and Tenant Act. Both acts offer statutory protections to the Plaintiff. While Section 27-31-120 conveys the undivided interest of the owner of the common elements both general and limited, The RLTA requires that the Defendant keep all the common areas of the premises in a fit and habitable condition for lessors like the Plaintiff.

The Defendants claim that because the condition of the sidewalk where the Plaintiff

tripped and fell was “open and obvious” the Defendant’s Estate at Westbury has taken the position that the trip and fall was Sanfilippo’s fault and that he should have been watching where he was walking.

The Plaintiff’s denies this assertion for the following reasons;

- a. The Defendant had notice of the conditions because an old lady had been Knocked out of her wheel chair when she had hit a raised concrete edge.
- b. That many residents had complained about the condition of the walkways.
- c. The board of directors of the community had requested and received a quote from MAJ Concrete to repair nearly 100 segments of walkway.
- d. That a period of eight months had passed between the the wheel chair accident and Sanfilippo’s fall without any action to repair the walkway.
- e. That a period of seven months had passed from the time of the wheel chair accident and Mr. Sanfilippo’s trip and fall.

There have been many trip and fall accidents in the State of South Carolina. Many of these accidents have similar fact patterns to the Nicholas Sanfilippo’s accident. In several of the accidents, the owner or manager of the facility knew for a long period time that there was an and obvious dangerous condition in his store or facility but did nothing about it. And eventually, in each of the situations, just like in Sanfilippo, where the Owner knew of the dangerous condition and should have anticipated the condition would cause someone to hurt themselves, an accident happened and someone was seriously injured.

Under the rule of Collander v. Charleston Donut, Creech Wildlife and Marine, Hancock v. Mid-South Management, Padgett v. Colleton County, Davenport v. Cotton Hope, if an owner knew of the obvious and dangerous condition of a place and, in addition, ***should have anticipated the condition would cause someone to hurt***

***themselves and a jury could find against the owner.***

Briefly, in Collander an elderly man sat on a stool in a donut shop that did not have a seat; in Creech, a lady fell of a viewing platform that did not have a safety rail; In Hancock a person fell in a hole in the concrete in a parking garage that everyone knew about for weeks and no one repaired; in Padgett a man took a short cut around the Courthouse and fell in a hole beside the building; in Davenport v. Cotton Hope no one repaired a light in a stair well and one night someone fell.

In Sanfilippo, the case at hand, there were many cracks, holes, disintegration and raised edge of concrete in a walkway. An elderly lady in a wheelchair hit a raised edge of concrete in a walkway and her wheel chair flipped over. There was a board meeting shortly thereafter where it was decided to get bids to repair the walkway. A short time later a bid came in From MAJ Concrete to make nearly one hundred repairs in the walkway for a reasonable price. Nothing was done and seven months later Nicholas Sanfilippo tripped and fell on a raised edge of concrete in the walkway and shattered his left knee.

Defendants Estate at Westbury and High Tide Associates have defended on the basis of two erroneous arguments. First, they believe Sanfilippo has the status of a licensee instead of an invitee or a tenant at the Estate at Westbury. The Estate claims That because Sanfilippo is a licensee, he is owed something less than a duty of due care and is only required to be warned of concealed dangerous conditions. Neil v. Byrum 288 S.C. 472, 473; 434 S.E. 2d 615 (1986). The Defendants have maintained that the conditions of the walkways at the Estate at Westbury are not concealed. Not

unreasonable risks or concealed dangerous conditions on the property.<sup>2</sup> According to the Estate, the raised edges of concrete segments did not reach the standard of a concealed dangerous condition. The Estate, in fact, was of the opinion that because the raised edges of concrete were so “open and obvious” the residents of the Estate did not need to be warned of they were dangerous conditions.

Prior to the October 26, 2017 trip and fall accident, Mr. Sanfilippo had resided at Unit 1001 on Kensington Boulevard for six years. He leased this unit from Frank Pinto. As part of his monthly lease payments, Mr. Pinto also paid an amount to cover Mr. Pinto’s fees and extraneous costs. This had been part of the lease arrangement for the entirety of Mr. Sanfilippo’s leasehold.

As a retired businessman and military veteran, Mr. Sanfilippo very much enjoyed living at the Estates at Westbury. One of the activities that he greatly enjoyed, weather permitting was taking a walk two or three times weekly within the curtilage of the Estate at Westbury. He did not walk fast, he just enjoyed being out and seeing his neighbors and the neighborhood.

Suddenly, as Mr. Sanfilippo was nearing the end of his walk, his left foot caught on a raised segment of concrete and he pitched forward onto his face, hands, arms and Knees. Because of the intense pain in his right knee, he suspected that he had broken his left knee.

What occurred next was a visit to the hospital and a diagnosis of a three part, Y-shaped comminuted fracture. The injury was realigned and cast and the next year was filled with physical therapy and learning how to walk with a walker, crutches and finally a cane.

Sanfilippo is of the opinion that his injury and subsequent arduous recovery was due wholly to the negligence of the Estate at Westbury and High Tide Associates. He has brought an action against the Estate and High Tide Associates sounding in negligence. The Estate and High Tide has defended on the basis that Sanfilippo was a "licensee" and that the sidewalk defect where he fell was "open and obvious."

In response to the above, it is sufficient to state that the Plaintiff is a tenant, not a licensee. He is designated a tenant by the South Carolina Residential Landlord and Tenant Act, Section 27-40-10 et. seq. As a tenant, he is entitled to all of the rights and protections under the act. This includes the duties to comply with the safety codes of the South Carolina Residential Landlord and Tenant Act (Section 27-40-440(a)(1) and the Act requires the Estate at Westbury to do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition (Section 27-40-440(a)(2) and to maintain certain facilities and appliances in reasonably good and safe working condition. (27-40-440(a)(5).

As a tenant, Sanfilippo had, when he was in the common areas of the Estate at Westbury, a status "analogous to invitees." Also, look to Landry v. Hilton Head Plantation Property Ass'n Inc. 317 S.C. 200, 452 S.E. 2d 452 S.E. 619 (Ct. App. 199) which ruled that a property owner had the status of invitee and was owed a duty of due care by Association paid to maintain the common area). Similarly, the SCRLTA, section 27-40-440 et. seq. states that the landlord must keep the premises including the common area in fit and habitable condition.

In support of the same, please look to South Carolina Code Section 27-31-120, the Horizontal Property Act as an adjunct to Section 27-40-440(a) of the South Carolina

Residential Landlord and Tenant Act. Both acts offer statutory protections to the Plaintiff. While Section 27-31-120 conveys the undivided interest of the owner of the common elements both general and limited, The RLTA requires that the Defendant keep all the common areas of the premises in a fit and habitable condition for lessors like the Plaintiff.

The Defendants claim that because the condition of the sidewalk where the Plaintiff tripped and fell was “open and obvious” the Defendant’s Estate at Westbury has taken the position that the trip and fall was Sanfilippo’s fault and that he should have been watching where he was walking.

The Plaintiff’s denies this assertion for the following reasons;

- a. The Defendant had notice of the conditions because an old lady had been Knocked out of her wheel chair when she had hit a raised concrete edge.
- b. That many residents had complained about the condition of the walkways.
- c. The board of directors of the community had requested and received a quote from MAJ Concrete to repair nearly 100 segments of walkway.
- d. That a period of eight months had passed between the the wheel chair accident and Sanfilippo’s fall without any action to repair the walkway.
- e. That a period of seven months had passed from the time of the wheel chair accident and Mr. Sanfilippo’s trip and fall.

There have been many trip and fall accidents in the State of South Carolina. Many of these accidents have similar fact patterns to the Nicholas Sanfilippo’s accident. In several of the accidents, the owner or manager of the facility knew for a long period time that there was an and obvious dangerous condition in his store or facility but did nothing about it. And eventually, in each of the situations, just like in Sanfilippo, where the Owner knew of the dangerous condition and should have anticipated the condition

would cause someone to hurt themselves, an accident happened and someone was seriously injured.

Under the rule of Collander v. Charleston Donut, Creech Wildlife and Marine, Hancock v. Mid-South Management, Padgett v. Colleton County, Davenport v. Cotton Hope, if an owner knew of the obvious and dangerous condition of a place and, in addition, ***should have anticipated the condition would cause someone to hurt themselves and a jury could find against the owner.***

Briefly, in Collander an elderly man sat on a stool in a donut shop that did not have a seat; in Creech, a lady fell off a viewing platform that did not have a safety rail; in Hancock a person fell in a hole in the concrete in a parking garage that everyone knew about for weeks and no one repaired; in Padgett a man took a short cut around the Courthouse and fell in a hole beside the building; in Davenport v. Cotton Hope no one repaired a light in a stair well and one night someone fell.

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Undisputed facts for presentation at a hearing or the trial of this case

1. Approximately six to eight months previous to Plaintiff’s October 26, 2017 trip and fall over an uneven segment of sidewalk in the common area of the Estate at Westbury. As a result of this fall, the Plaintiff sustained a comminuted, split y-shaped fracture of his left knee cap. Hilton Head Hospital, Diagnostic Radiology, Nicholas A. Maranino MD. Exhibit 3

2. At least six (6) months previous to Sanfilippo’s trip and fall accident, an elderly woman in a wheel chair hit an uneven section of concrete walkway within the curtilage of the Estate of Westbury walkway and her wheelchair flipped over onto the sidewalk.

Deposition of Rocky Dunlap, Vice President of the Estate at Westbury Board of Directors, August 6, 2020, P. 38 L:1 to page 40 L:1.

**RECEIVED**

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SC Court of Appeals

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

APPELLANT'S RESPONSE TO THE  
RESPONDENTS' INITIAL 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  
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