RECEIVED
Jul 08 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Judge

Case No. 2024-000491

Annie Pelzer……..……...……Appellant,

v.

Dolgencorp, LLC d/b/a Dollar General…….Respondent.

INITIAL BRIEF OF RESPONDENT

Nashiba Boyd, SC Bar No. 78376
Stephen Foster, SC Bar No. 102709
LEWIS, BLAIN, ROBERTS & BOYD, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
803.790.8838 (telephone)

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT DOCUMENTS

STATUTES AND COURT RULES

OTHER

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly grant Respondent's Motion for Summary Judgment where no genuine issue of material fact existed such that a reasonable jury could find a Respondent breached a duty owed to Appellant?

II. Did Appellant fail to appeal the trial court's ruling that Respondent remedied the alleged hazardous condition by placing warning signs in the area, thereby rendering that ruling the law of the case?

STATEMENT OF THE CASE

This lawsuit arises out of Appellant's allegation that she slipped and fell at the Dollar General store located at 931 Longtown Road, Columbia, South Carolina. Appellant filed her Complaint on December 07, 2021, alleging causes of action for negligence and gross negligence against Respondent. The parties engaged in the exchange of written discovery and depositions, and Respondent filed its Motion for Summary Judgment on July 7, 2022.

On January 24, 2023, a hearing on Respondent's Motion for Summary Judgment was held before the Honorable Alison Renee Lee. Before the Court was Respondent's Memorandum in Support of Summary Judgment and supporting exhibits, including Appellant's deposition and surveillance video from the subject store. Based upon the pleadings and memorandum, as well as arguments of counsel, and the statutory, procedural and common law, Respondent's motion was granted in full by a Form 4 Order dated March 17, 2023, and a formal Order dated December 8, 2023. In its formal Order, the trial court issued two dispositive rulings. First, the trial court found Respondent properly warned Appellant of the hazardous condition and was, therefore, relieved from liability. Second, the trial court found Respondent made a reasonable effort to remedy the hazardous condition by mopping and placing warning signs in the area, and therefore, Respondent was not liable for creating a hazardous condition or leaving the premises in an unreasonably safe condition.

Appellant subsequently filed a Motion for Reconsideration on December 18, 2023, which was denied without a hearing by Judge Lee on February 26, 2024. Appellant filed her Notice of Appeal on March 26, 2024.

STATEMENT OF FACTS

On June 5, 2021, the store's surveillance video captured a customer knocking over a flower display, spilling water near the entrance at approximately 4:58 p.m. *See* Entry Door Surveillance Video at 16:58:15. A store employee immediately responded—within seven (7) seconds—and assisted the customer in returning the display to its original condition. *See* Entry Door Surveillance Video at 16:58:22-50. Two store employees also immediately attempted to address the spill but accidentally knocked over the display a second time. *See* Entry Door Surveillance Video at 16:59:00-48. A store employee again returned the display to its original condition and moved the display to a location slightly off-camera. *See* Entry Door Surveillance Video at 17:00:00-35.

Less than *one minute* later, a store employee placed two bright yellow wet floor caution signs directly at the location of the spilled water. *See* Entry Door Surveillance Video at 17:00:57-17:01:04. At 5:01 p.m., store employees began to clean the spill, which involved mopping and the use of paper towels. *See* Entry Door Surveillance Video at 17:01:59-17:09:00. In order to properly clean the area, an employee removed one of the signs from the location, leaving the other sign centrally located at the mopped area. *See* Entry Door Surveillance Video at 17:07:25. When the employee finished mopping, she then placed the second sign directly over the mopped area while leaving the first sign centrally located between the front door and the area where the spill occurred. *See* Entry Door Surveillance Video at 17:08:31. In the interim, numerous patrons enter the store and walk around the where the spill occurred, clearly aware of the warning signs. *See* Entry Door Surveillance Video at 17:01:00-17:10:50.

Less than two minutes after employees finished cleaning the area, Appellant can be observed entering the store while holding her cell phone up to her face. *See* Entry Door

Surveillance Video at 17:10:53. Appellant can be seen walking directly towards one of the bright yellow warning signs as she enters the store and walks past the area in which both warning signs were placed. *See* Entry Door Surveillance Video at 17:10:53-17:10:55. In her deposition, Appellant acknowledged that she was probably talking on the phone when she walked into the store. *See* Pelzer Dep. Tr. 46:16-18. More importantly, Appellant conceded in her deposition that there were two yellow wet floor signs present at location of the spill at the time of the incident, which is also confirmed by surveillance video, and that she stood next to one of the signs immediately prior to her fall. *See* Pelzer Dep. Tr. 18:3-20; 42:13-24; 44:8-18; 46:10-47:21; 48:4-49:2; 53:19-54:6. Appellant also conceded she was not paying attention as she was walking when she entered the store and was not looking down as she was walking. *See* Pelzer Dep. Tr. 43:2-3; 44:10-11; 46:21-23.

STANDARD OF REVIEW

"'An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP.'" *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 651, 780 S.E.2d 263, 272 (Ct. App. 2015) (quoting *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009)). "'Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting *Bovain*, 383 S.C. at 105, 678 S.E.2d at 424); *see also Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (holding that the "mere scintilla" standard does not apply under Rule 56(c), and the correct standard is the "genuine issue of material fact" standard). The purpose of summary judgment is "to expedite disposition of cases which do not require the services of a factfinder." *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is proper when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Ellis v. Davidson*, 358 S.C. 509, 517-18, 595 S.E.2d 817, 821 (Ct. App. 2004); *Rumph v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004).

In determining whether a genuine issue of fact exists, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in favor of that party. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); *Rumph*, 357 S.C. ar 392, 593 S.E.2d at 186. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should

be granted. *Ellis*, 358 S.C. at 518, 595 S.E.2d at 822; *Rumpf*, 357 S.C. at 393, 593 S.E.2d at 186.

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS APPELLANT FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT REGARDING RESPONDENT'S LIABILITY.

Appellant's argument to this Court is straightforward. The trial court rejected the argument for reasons that are equally straightforward. Appellant maintains her testimony is evidence that Respondent did not properly clean the spill depicted in the surveillance video; therefore, there is a question of material fact as to whether the store was maintained in a reasonably safe condition and the trial court erred in granting summary judgment. *See* App. Br. p. 9. However, Respondent's cleaning efforts were never at issue in this case, given the patently clear warnings Respondent provided to Appellant regarding the condition of the floor. Further, Appellant fails to identify any evidence in the record that raises a genuine issue of material fact regarding Respondent's purported failure to provide a reasonably safe premises. Therefore, this Court should reject Appellant's argument because it misstates the law and misconstrues the trial court's ruling.

Appellant avers the trial court made a credibility determination that was more properly the province of a jury. *See* App. Br. p. 8. In effect, Appellant argues there is a conflict between her testimony and objective video evidence; therefore, a question of material fact exists for a jury to consider, and, in granting summary judgment, the trial court impermissibly weighed her testimony against the video evidence. This argument is meritless on several counts.

First, the trial court did not, in fact, weigh Appellant's deposition testimony against Respondent's objective surveillance video. Rather, the trial court considered Appellant's testimony and found it completely irrelevant to the legal issues before the court. *See* Ex. C, Order Granting Summary Judgment dated Dec. 8, 2023 ("Plaintiff also argued that Defendant actually created the hazardous condition in the course of cleaning and mopping the area of Plaintiff's

incident. While the Court does not agree with this characterization of events; even if true, Defendant still placed Plaintiff on notice of a wet floor."). The trial court found South Carolina courts have routinely ruled that in cases where a merchant's mopping operation leaves a slippery floor, there is only actionable negligence when the merchant fails to give some form of a warning. *See, e.g.*, *Young v. Meeting Street Piggly Wiggly*, 288 S.C. 508, 512, 343 S.E.2d 636, 638 (Ct. App. 1986) (holding that summary judgment was appropriate when the record showed the defendant took reasonable precautions to provide safe premises for its customers, including mopping and placing a warning sign, despite the presence of moisture on the floor). Appellant's testimony that the floor was still slippery after being mopped was not, in any respect, dispositive of the case because the condition of the floor was not at issue.

The question before the Court is not whether *any* issue of fact exists but whether an issue of *material* fact exists. *See* Rule 56(c), SCRCP (providing summary judgment should be granted if the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law"). Because there was no need to further investigate the propriety of Respondent's cleaning of the spill, that fact is, by definition, not material. *See Cullum Mech. Constr., Inc. v. S.C. Baptist Hosp.*, 344 S.C. 426, 432, 544 S.E.2d 838, 841 (2001) (holding summary judgment is appropriate when no further inquiry into the facts is necessary to clarify the application of the law). Therefore, Appellant's argument fails now for the same reason it failed before the trial court on summary judgment: whether the floor was "sufficiently cleaned" is *not* a material fact in determining whether Defendant was negligent. The only material fact in the case is whether Respondent properly *warned* Appellant of the wet floor. It is undisputed that the yellow cautions were present in the immediate area prior to Appellant's fall, providing a

warning to all customers of the possibility that the floor may be wet. Thus, the only material fact dispositive to the case is undisputed.

Second, Appellant is effectively arguing Respondent is the insurer of customer safety and wholly responsible for any injury involving a hazard, regardless of its attempts to remedy by warning patrons of the wet floor. This is not the law. Respondent owed Appellant a duty of ordinary care to keep the subject store in a *reasonably* safe condition. *See Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). Respondent was not responsible for Appellant's safety because "[a] merchant is not an insurer of the safety of his customer but owes the duty of exercising ordinary care to keep the premises in reasonably safe condition." *Garvin*, 343 S.C. at 625, 541 S.E.2d at 832 (citing *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969)). Further, the mere presence of water on the floor, without more, is insufficient to establish liability. *See Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 91, 394 S.E.2d 24, 25 (Ct. App. 1990); *Young*, 288 S.C. at 510, 343 S.E.2d at 638. Appellant's argument requires that Respondent be held liable for its attempts to clean a substance on the floor *regardless* of any warnings Respondent gave to patrons. Accepting Appellant's argument would create a new, heretofore nonexistent duty in contravention of well-established law.

Rather, Appellant was required to show there was an issue of material fact as to whether Respondent failed to *remedy* the hazard for which it was on notice. *See Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728, 729 (2001) (citing *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.E.2d 530, 531 (1988) (holding that to recover for injuries caused by a hazard on a defendant's premises, a plaintiff must show either: (1) that the injury was caused by a specific act of the defendant which created the hazardous condition; or (2) that the defendant had actual or constructive knowledge of the hazardous condition and failed to remedy it)). It is well settled that

the presence of warning signs is evidence that reasonable precautions were taken to remedy a hazard and can form the basis for summary judgment. *See Legette v. Piggly Wiggly*, 368 S.C. 576, 580, 629 S.E.2d 375, 377 (Ct. App. 2006) (holding that summary judgment was appropriate when the record showed the defendant took reasonable precautions to provide safe premises for its customers, despite the presence of moisture on the floor).

This Court's well-reasoned opinion in *Legette* provides the necessary guidance to resolve the question before the Court, as the facts are nearly identical to the present case. In *Legette*, the plaintiff slipped and fell in some moisture near the store's entrance. *Legette*, 368 S.C. at 578, 629 S.E.2d at 376. Legette testified she did not notice water on the floor prior to her fall, and she did not remember seeing any mats or warning signs at the entry where she fell. *Id*. at 580, 629 S.E.2d at 377. However, photographs taken by store employees immediately following the fall depicted large mats and warning signs in the area, despite the fact that Legette testified she did not recall employees bringing mats or warning cones out to the area after she fell or while she was sitting for the photographs. *Id*. When confronted with the photographs, Legette could only be certain that she did not remember seeing the mats and cones; she ultimately conceded that they might have been present. *Id*. at 581, 629 S.E.2d at 377-78. Relying on *Young*, 288 S.C. at 512, 343 S.E.2d at 638, the Court held that the addition of mats at a store's entrance, the periodic mopping of the area, and the placement of at least one warning sign were *all reasonable steps* taken by the store to protect its customers. *Legette*, 368 S.C. at 579-80, 629 S.E.2d at 377. Ultimately, the Court held that "in light of Legette's vacillating testimony" on whether mats and cones were present, given the objective evidence demonstrating that mats and cones *were*, in fact, in place at the time of her

fall, there was no genuine issue of material fact for the jury's consideration regarding the store's liability. *Id*. at 581, 629 S.E.2d at 378.

Here, as in *Legette*, Respondent was on notice of a hazard due to liquid on the floor. It is undisputed that another customer caused the initial spill approximately thirteen (13) minutes before Appellant's fall. *See* Exhibit A, Entry Door Surveillance Video at 16:58:15. It is also undisputed that Respondent's employees were aware of the spill, cleaned the area, and placed two wet floor signs in the immediate area prior to Appellant's fall. *See* Exhibit A, Entry Door Surveillance Video at 17:01:00-17:10:50. Just as in *Legette*, undisputed objective video evidence shows that Respondent did, in fact, remedy the hazard by taking reasonable steps to put patrons on notice that the floor was wet. *Id*. Further, Appellant repeatedly admitted that wet floor signs were present in the area where she fell, conceded she fell next to one of the signs, and video footage shows her falling directly *beside* one of the warning signs. *See* Exhibit B, App's Dep. Tr. 18:3-20; 42:13-24; 44:8-18; 46:10-47:21; 48:4-49:2; 53:19-54:6; *See* Exhibit A, Entry Door Surveillance Video at 17:10:53-17:10:55.

Importantly, Appellant does *not* argue that the signs were inadequate or improperly placed; rather, she argues, in effect, that the presence of well-placed signs is irrelevant to the case. On the contrary, the presence of the signs is dispositive. Appellant's failure to pay attention as she entered the store does not create an issue of material fact on the question of liability. Appellant repeatedly testified that she simply did not observe the two bright yellow warning signs because she "wasn't even looking down" as she was walking. *See* Pelzer Dep. Tr. 43:2-3; 44:10-11; 46:21-23. Indeed, Appellant conceded that several other customers were able to safely walk through the area, explaining that those customers were able to navigate the area safely *because they saw the signs*. *See* Pelzer Dep. Tr. 56:3-5; 57:19-23. Appellant is attempting to create

an issue of material fact by asserting that Respondent failed to satisfy its duty to remedy a hazard by simply offering her opinion that Respondent's efforts were not "good enough." Our courts do not allow conclusory statements on the ultimate issue to overcome summary judgment. *See Shupe v. Settle*, 315 S.C. 510, 517-18, 445 S.E.2d 651, 655 (Ct. App. 1994) (holding "[a] conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment").

In sum, the trial court granted summary judgment because objective video evidence proves beyond any doubt that Respondent remedied the hazard by cleaning the area and placing unmistakable warning signs directly over the area. That is all the law requires. The trial court did not question or dispute Appellant's version of events or raise questions about the credibility of her testimony. Rather, the trial found that Appellant's admission that the warning signs were present was evidence, along with the surveillance video, of a reasonable effort by Respondent to remedy the hazard. Appellant has presented no evidence to the contrary.

Therefore, the trial correctly found there was no genuine issue of material fact in this case and summary judgment was proper. Accordingly, this Court must affirm the trial court's grant of summary judgment in favor of Respondent.

II. APPELLANT FAILED TO APPEAL A DISPOSITIVE RULING BY THE TRIAL COURT; THEREFORE, THAT RULING IS THE LAW OF THE CASE.

Appellant fails to challenge a dispositive ruling by the trial court, and this Honorable Court should decide the case in Respondent's favor on this basis alone. The trial court issued two rulings in favor of Respondent: "Based upon the established case law, this Court declines to impose a duty upon merchants that they must effectively ensure the safety of all customers by *both* warning of any known hazard *and* fully remedying all hazards from the premises." *See* Ex. C, Order Granting

Summary Judgment dated Dec. 8, 2023 (emphasis added). First, the trial court found, "Defendant properly warned Plaintiff of the hazardous condition; thus, relieving Defendant from liability." *Id*. The trial court further found Appellant failed to argue that the signage was deficient. *Id*. Second, the trial court found—in addressing Appellant's argument that Respondent did not sufficiently clean up the spill—that Respondent met its duty to remedy the hazardous condition by mopping and placing warning signs in the area; therefore, Respondent's premises was in a reasonably safe condition at the time of the incident. *Id*. The trial court concluded that Respondent "*both* warned Plaintiff of a potentially hazardous condition *and* reasonably remedied the condition." *Id*. (emphasis added).

Appellant does not challenge on appeal the trial court's ruling that Respondent properly and adequately warned her of the hazardous condition. Therefore, that ruling is the law of the case and should be affirmed. *See In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); *see also Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015) ("The policy behind the law of the case is to 'promote[] the finality and efficiency of the judicial process by protecting against the agitation of settled issues.'" (quoting *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988))).

The issue of whether Respondent provided an adequate warning of the hazardous condition, thus relieving it of liability, is settled. *See Flexon*, 413 S.C. at 573, 776 S.E.2d at 404. As argued previously, objective surveillance video and Appellant's own testimony

demonstrate conclusively that multiple unmistakable, well-placed warning signs were in place to warn patrons of the potentially hazardous condition. There is no evidence in the record to the contrary. The trial court found these warnings absolved Respondent of liability and granted summary judgment to Respondent on this basis.

On appeal, Appellant argues only that the trial court erred in discounting her personal testimony that Respondent did not adequately clean the floor, thereby making an improper credibility judgment about her testimony and impermissibly weighing that testimony against competing evidence in ruling that Respondent's premises was in a reasonably safe condition. While meritless, this argument also fails to acknowledge, much less challenge, the trial court's alternative ruling on liability; namely, Respondent satisfied its duty to Appellant by displaying the warning signs. Indeed, the *only* time Appellant mentions the warning signs in her entire argument is in her admission that she did not see them because she was not looking as she was walking. *See* App. Br. p. 7. Therefore, the trial court's ruling that Respondent is absolved of any liability because it adequately warned Appellant of the hazardous condition is the law of the case and must be affirmed. *See First Union Nat'l Bank of S.C.*, 333 S.C. at 566, 511 S.E.2d at 378 (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); *see also Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010))).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that this Honorable Court affirm the trial court's grant of summary judgment in favor of Respondent on all of Appellant's causes of action.

Respectfully submitted,

s/Nashiba Boyd
Nashiba Boyd, SC Bar No. 78376
Stephen Foster, SC Bar No. 102709
LEWIS, BLAIN, ROBERTS & BOYD, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina, 20204
803.790.8838 (telephone)
803.790.8841 (fax)

July 8, 2024

Attorneys for Respondents