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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, Circuit Court Judge

Appellate Case No. 2024-000491

Annie Pelzer, ... Appellant,

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE APPELLANT HAD ESTABLISHED A GENUINE ISSUE OF MATERIAL FACT AS TO THE NEGLIGENCE OF RESPONDENT?

STATEMENT OF THE CASE

On December 7, 2021, Annie Pelzer (Pelzer) filed a complaint against Dolgencorp, LLC d/b/a Dollar General (Dollar General). (R. pp. 16-19) The sole cause of action was negligence. (R. pp. 16-19). Dollar General filed an answer generally denying the allegations and asserting comparative negligence (R. pp. 20-26). The deposition of Appellant was held on March 16, 2022. Respondent filed its Motion for Summary Judgment on July 27, 2022. (R. pp. 27-54) Respondent's Motion for Summary Judgment was heard by the Honorable Alison Renee Lee on January 24, 2023. (R. pp. 88-102) Before the lower court were excerpts of Appellant's deposition and video from Respondent's surveillance camera. (R. p. 135) On March 17, 2023, the court filed a Form 4 order granting Respondent's Motion for Summary Judgment asking for the Respondent to prepare a formal order. (R. pp. 2-4). On December 8, 2023, the lower court issued it formal order. (R. pp. 5-12)

Appellant subsequently filed a Motion to Reconsider on December 18, 2023 (R. pp. 55-59). Respondent filed a Memorandum in Opposition to Appellant's Motion to Reconsider on December 21, 2023. (R. pp. 60-87) On February 26, 2024, Judge Lee, without a hearing, denied Appellant's Motion to Reconsider. (R. pp. 13-15) The lower court's orders are the bases for this appeal. On March 26, 2024, Pelzer served the Notice of Appeal on Respondent Dollar General. (R. pp. 136-137)

FACTS

On June 5, 2021, Annie Pelzer went to Dollar General to shop for laundry detergent (R. pp. 16-19, 106-107) Prior to Appellant entering the store, the following timeline of important facts were captured on Respondent's surveillance video:

- A flower display is knocked over causing water to spill on the floor (R. p. 135, timestamp 16:58:16; R. pp. 108, 118-119)
- An employee comes over to the flower display (R. p. 135, timestamp 16:58:22)
- A large puddle of water is growing on the floor (R p. 135, timestamp 16:59:30)
- An employee knocks over the flower display again (R p. 135, timestamp 16:59:43)
- An employee of Dollar General begins to start mopping the floor (R p. 135, timestamp 17:01:40; R. pp. 121-122)
- An employee of Dollar General begins to start cleaning up the floor with paper towels (R p. 135, timestamp 17:02:52)
- Can see a large amount of water on the floor (R p. 135, timestamp 17:07:22; R. p. 122)
- Employee spreads water with a mop for approximately a minute (R p. 135, timestamp 17:04:30)
- Pelzer arrives in her vehicle. Video shows water still glistening on the floor (R p. 135, timestamp 17:10:04)
- Pelzer enters the store and slips (R. pp. 109; R p. 135, timestamp 17:10:50)

Following the Appellant slipping the following occurred:

- Employee comes over to the site of the spill again and moves the sign to the area where Plaintiff fell (R p. 135, timestamp 17:11:30)

- Employees soak up water for 5 more minutes during which the towels are becoming soaked with water (R. pp. 109, 130-131; R p. 135, timestamp 17:12:12-07:17:13)

Appellant, who shopped in the store every day, was looking forward in the direction she intended to travel to reach the detergent section of the store. (R. pp. 108, 111-112, 121-122, 132) She slipped in the water that remained on the floor following the employees attempt to clean up the water (R. pp. 109, 112-113, 116-118, 121, 127, 133; R p. 135, timestamp 17:10:50). Appellant sustained injuries as a result of her slipping. (R. pp. 111, 114-115, 117) Appellant testified that she did not see the yellow wet signs before she fell as they were to her right and not in front of her. (R. pp. 110, 120, 130)

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56(c), [South Carolina Rules of Civil Procedure]." *Holst v. KCI Konecranes Intl. Corp.,* 390 S.C. 29, 35, 699 S.E.2d 915, 916 (Ct. App. 2010) (citing *Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d. 915, 916 (Ct. App. 2006) "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.* (citing *Wilson v. Moseley*, 327 S.C. 144, 146, 488 S.E.2d. 862, 863 (1997) "In ruling on a motion for summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." *Id.*

"Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Singleton v. Sherer,* 377 S.C. 185, 659 S.E.2d. 196, 203 (Ct. App. 2008) (citing *Gadson v. Hembree,* 364 S.C. 316, 613 S.E.2d 196, 203 (2005)

and *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct. App. 2004)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 656 S.E.2d 20, 29 (2008). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Singleton,* 659 S.E.2d at 202.

"Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Id.* at 203. (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004)).

"In order to recover in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Crolley v. Hutchins*, 300 S.C. 355, 356, 387 S.E.2d. 716, 717 (Ct. App. 1989) (citing *South Carolina Insurance Company v. James C. Greene & Co.*, 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986)).

"Summary judgment is appropriate only when it is **perfectly clear** that no genuine issue of material fact is involved and **further inquiry into the facts is not desirable** to clarify the application of the law." *Duck v. Wallace Associates, Inc.*, 313 S.C. 448, 451, 438 S.E.2d 269, 270 (Ct. App. 1993) (citing *Hook v. Rothstein*, 275 S.C. 187, 268 S.E. 2d 288 (1980) (emphasis added). "Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery. " *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) (citing *Baughman v. American Tel. And Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1990)). "[T]he non-moving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence . . . " *Id.*, 354 S.C. at 69. "In determining whether any

triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence **must be viewed in the light most favorable to the nonmoving party**." Id. (citing *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) (emphasis added). "The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." South Carolina Rules of Civil Procedure, Rule 56(c).

"Summary judgment should not be granted even when there is no dispute at to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Huffman v. Sunshine Recycling, LLC*, 417 S.C. 514, 790 S.E.2d 410 (Ct. App. 2016) (quoting *Lanham v. Blue Cross & Blue Shield of S.C. , Inc.* 349 S.C. 356, 362, 563 S.E2d 331, 333 (2002))

ARGUMENT

I. THE LOWER COURT IMPROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT. APPELLANT ESTABLISHED GENUINE ISSUES OF MATERIAL FACT AS TO RESPONDENT'S NOTICE OF THE CONDITION, THE DUTY OF RESPONDENT, THE RESPONDENT'S BREACH OF DUTY AND THE DAMAGE SUFFERED TO APPELLANT.

Appellant's premises liability Complaint contained one cause of action for negligence. (R. pp. 16-19) In the instant premises liability case, Respondent's notice of the condition is not an issue. Prior to Appellant's slip and subsequent injury, Respondent's employees had attempted to clean up the water which had been spilled twice – once by a patron of the store and once by an employee. (R. p. 135) Rather, the issue here is whether the Respondent provided a reasonably safe premises following the flower stand being overturned and water spilling onto the floor. "The parties do not dispute that [Appellant] was an invitee on [Respondent's] premises and that it owe[d] [Appellant] the duty of reasonable care" (R. pp. 5-12)

The lower court found that the Respondent store had provided a reasonably safe premises "by mopping the spill and by placing wet floor signs in place to warn of any additional water that may be on the floor." (R. pp. 5-12) Appellant argues that Respondent had not provided a reasonably safe premises and whether Respondent provided a reasonably safe premises is a genuine issue of material fact for a jury to determine. It is Appellant's position that the evidence provided by Appellant was enough to defeat Respondent's summary judgment motion.

"It is established in South Carolina that a merchant is not an insurer of the safety of its customers but rather owes its customers the duty to exercise ordinary care to keep the premises in a reasonably safe condition." *Felder v. K-Mart Corp*., 297 S.C. 446, 377 S.E.2d 332 (1989) (citing *Howard v. K-Mart Discount Stores*, 293 S.C. 134, 359 S.E.2d 81 (Ct. App. 1987). **"[W]hether a defendant has provided reasonably safe premises is normally a question for the jury**." *Id.* (emphasis added)

"[N]egligence [is a] question[] of fact for the jury and only rarely become[s] [a] question[] of law for the court to decide. If more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit the issues to the jury." *Felder v. K-Mart Corp.*, 297 S.C. 446, 377 S.E.2d 332 (1989) (citing *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984); *Tucker v. Albert Rice Furniture Sales*, 295 S.C. 119, 367 S.E.2d 427 (Ct. App.1988))"

The Court when considering a motion for summary judgment or when considering a directed verdict motion does not have the authority to decide credibility. **"[M]atters of credibility should not be determined at the summary judgment stage. '**All ambiguities, conclusions, and inferences arising in and from evidence must be construed **most strongly against the movant for summary judgment.**'" *Hiers by Hiers v. Mullens*, 425 S.E.2d 57, 61, 310 S.C. 63, 68 (Ct. App. 1992) (quoting *Shea v. State Department of Mental Retardation*, 279 S.C. 604, 610, 310 S.E.2d

819, 822 (Ct.App.1983)) (emphasis added) "When considering a directed verdict motion, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Ray v. City of Rock Hill, S.C.*, 428 S.C. 358, 372, 834 S.E.2d 464, 471 (Ct. App. 2019) (citing *Burnett v. Family Kingdom, Inc.* , 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct. App. 2010)). "A court considering summary judgment neither makes factual determinations **nor considers the merits of competing testimony**; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Clary v. Borrell*, 398 S.C. 287, 296 727 S.E.2d 773, 777-778 (Ct. App. 2012) (citing *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) (emphasis added).

Appellant testified that she was looking out and not down and did not see the caution signs prior to her fall. (R. pp. 108-110) Appellant testified that there was still water on the floor and Dollar General had not sufficiently cleaned up the water. (R. p. 117). Appellant's testimony that there was still water on the floor is substantiated by the surveillance footage. The video footage shows that the floor was still sopping wet after Ms. Pelzer's fall as the employee(s) of Dollar General spent an additional five minutes after Appellant's fall cleaning up the water. (R. p. 135) Additionally, Appellant testified in her deposition that she sustained injuries because of the incident at Dollar General. (R. pp. 111, 114-115, 117)

The lower court in ruling on Defendant's Motion for Summary Judgment did not consider the deposition testimony of the Appellant and granted Respondent's Summary Judgment motion solely on the basis of the video provided to the Court. The Court in essence ruled on the credibility of the testimony of Ms. Pelzer. The Court failed to consider the merits of competing evidence when it discounted Appellant's deposition testimony and the five minutes of footage following

Appellant's slip and injury. The credibility of the Plaintiff and the substance of the video is a determination for the trier of fact.

Plaintiff's testimony creates a conflict between it and the other evidence presented creating an issue for the trier of fact. The Court does not have the authority to resolve this conflict. *Id*. Additionally, the lower did not take the evidence in the light most favorable to the Appellant. *Singleton*, 377 S.C. 185. Nor did the lower court construe the evidence most strongly against the moving party. *Hiers by Hiers*, 425 S.E.2d 57. Here, there is a disagreement concerning the conclusions to be drawn from the facts making summary judgment improper. *Huffman*, 417 S.C. 514.

"[I]t has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care." *Madison ex rel. Bryant v. Babcock Center*, 638 S.E.2d 650, 657, 371 S.C. 123 (S.C. 2006) (citing *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986); *Roundtree Villas Assn. v. 4701 Kings Corp*., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984)) "[W]here the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from lack of care." *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 638 S.E.2d 96, 100, 371 S.C. 340 (Ct. App. 2006) A reasonable jury could find that Defendant knew that a dangerous condition existed (as evidenced by the video footage) and that Defendant did not act with due care (as evidenced by the five additional minutes it took to clean up the water spill.

CONCLUSION

Viewing the evidence in a light most favorable to the Appellant, Appellant provided the lower court genuine issues of material fact that could lead a reasonable jury to conclude that the Respondent and its employees breached their duty by not sufficiently cleaning and remedying the spilled water. It is undisputed by the parties that as an invitee of the store Appellant was owed a duty by the Respondent of a reasonably safe premises.

Appellant testified that there was water still on the floor when she entered the store and that the water on the floor caused her to slip and become injured. The evidence provided herein, between the Appellant's deposition and the video both before and after she fell creates genuine issues of material fact for a jury.

A reasonable jury could determine that the Respondent was negligent in cleaning up the water spill. Appellant's testimony, in itself, creates a conflict with other presented evidence creating a question for the trier of fact. It is only proper for a jury to determine the credibility and weight of Plaintiff's testimony and the video footage prior to her slip and injury and subsequent to her slip and injury. Viewing the evidence in a light most favorable to the Appellant, Appellant provided the lower court genuine issues of material fact that could lead a reasonable jury to conclude by a preponderance of the evidence that the Respondent knew of the spill; did not use due care in cleaning up the spill; that the injury to the Appellant was foreseeable; that the Respondent was negligent; and, that Respondent's negligence was a proximate cause of Plaintiff's injuries. Therefore, the lower court's granting of summary judgment as to Respondent was improper in this case. To hold otherwise, would deprive Appellants of a trial on disputed facts. *Singleton*, 377 S.C. 185.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of the Law Office of Barry B George, counsel for the Appellant, does hereby certify that service of the Final Brief of Appellant in the above-captioned matter was made upon all counsel of record by email only this the 26 day of August 2024 as follows:

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