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Nov 08 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2024-001299

Estate of Thomas Sullivan, ... Respondent,

v.

Dolgencorp, LLC d/b/a Dollar General Corporation, ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant, Dolgencorp, LLC d/b/a Dollar General Corporation ("Appellant"), hereby replies to the Initial Brief of Respondent, the Estate of Thomas Sullivan ("Respondent").

ARGUMENT

Despite Respondent's arguments to the contrary, Appellant was entitled to judgment as a matter of law and the Court abused its discretion in failing to grant a new trial.

A. Appellant Is Not Liable As A Matter Of Law.

The parties agree a "merchant is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in reasonably safe condition." *Garvin v. Bi-Lo, Inc*., 343 S.C. 625, 628, 541 S.E.2d 831, 832 (S.C. 2001). Further, there does not appear to be a dispute that Respondent must demonstrate that the injuries to Thomas Sullivan ("Decedent") were caused by the alleged negligence of Appellant. *See Hunter v. Dixie Home Stores,* 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957) ("It is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should also be kept in mind that the doctrine of *res ipsa loquitur* does not apply in this State."). Finally, there does not appear to be a dispute that a premises owner "is not liable to his invitees for physical harm caused to them 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 or obviousness." *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 234, 743 S.E.2d 858, 860 (Ct. App. 2013).

Here, no dangerous condition existed, Appellant did not create or have notice of the alleged dangerous condition, and, if there were a dangerous condition it was open and obvious to Decedent.

1. Plaintiff presented no evidence that a dangerous condition existed.

Respondent argues Appellant created a "dangerous" condition by having a mat in the foyer that countless customers, including Decedent, walked on to enter and leave the store without incident. There is no dispute that Decedent fell when he made contact with the mat. Further, there is no dispute Decedent suffered from an impaired gait. Thus, Respondent's reliance on the testimony of David Riley and the alleged excited utterance of Decedent do not offer any relevant support to Respondent's claims against Appellant as they, at best, demonstrate the undisputed fact that Decedent made contact with the mat.

Instead, Respondent relies entirely on the inadmissible testimony of Robert McNealy that the mat "was not cleaned or maintained or inspected property, had a curled edge, and was unsecure/sliding." *See* Respondent Brief at pp. 3-4. Respondent fails to explain how a dirty mat could have caused Decedent to fall, let alone be a greater cause of his fail as compared to his impaired gait.

As to the allegation that the mat was "curled" the video does not provide any support, no evidence was introduced that the mat had a tendency to wrinkle or curl or that it was curled prior to Decedent's fall. In fact, Ms. Myers confirmed the mat was flat prior to the incident occurring. Thus, the only evidence of any alleged "curling" prior to Decedent's fall was manufactured by Mr. McNealy based on his alleged viewing of the video, which, as noted below, is improper expert testimony.

Finally, the allegation that the mat was unsecure or sliding is also entirely reliant on the testimony of Mr. McNealy who Respondent admits testified without an inspection of the mat itself. Instead Mr. McNealy uses circular logic to determine that because the mat moved as a result of Decedents fall, the movement of the mat must have cause Decedent's fall. This self-

fulfilling opinion ignores the fact that Decedent's impaired gait caused his feet to come in contact with the flat stable mat, which caused him to fall, which then caused the mat to move.

Put simply, without any evidence of a defect in the mat, Appellant was entitled to judgment in its favor as a matter of law.

2. Even if there were a dangerous condition, Appellant did not create the condition or have sufficient notice.

Even if one were to assume the mat constituted a dangerous condition, Plaintiff failed to introduce evidence that Appellant created or knew of the dangerous condition.

Respondent attempts to sidestep its obligations to demonstrate Appellant created or knew of a dangerous condition by simply arguing that Appellant placed the mat in its foyer. Respondent fails to point to any testimony of any complaint or concern about the mat prior to Decedent's fall. Respondent fails to point to any similar incident by the countless other customers who walked on the mat, without incident, prior to Decedent's fall. The presence of a mat outside a store is not, in and of itself, enough to maintain a claim for negligence. *See Sellers v. Jc Penney Corp.*, 2011 U.S. Dist. LEXIS 124683 (D.S.C. 2011); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1998).

Thus, Appellant is entitled to judgment as a matter of law.

3. Even if there were a dangerous condition and Appellant created the condition or had sufficient notice, the dangerous condition was open and obvious.

Respondent shifts gears when arguing that the dangerous condition of the mat was not open and obvious. Suddenly, the unclean, poorly maintained, and curled nature of the mat was hidden from Decedent's view. Respondent cannot have it both ways. Either Appellant knew or should have known the mat was dangerous when it put it in the foyer of the store due to its obvious defects, which would have been obvious to Decedent. Or, neither Decedent nor

Appellant knew the mat was "dangerous." Respondent attempts to skirt around this obvious problem by arguing an exception to the open and obvious rule. Respondent argues the Decedent was too distracted when leaving the store (and presumably when he entered the store) to notice to obvious problematic condition of the mat. However, Respondent fails to provide any legal or factual support.

The case relied upon by Respondent is inapposite. In *Pecko v. Target Corp.*, 2021 U.S. Dist. LEXIS 2900 (D.S.C. 2021), the plaintiff had testified that she just entered the aisle when she tripped over boxes that were low to the ground. *See id*. at * 9. The Court determined the plaintiff's view may have been blocked by the aisle, and thus, not open and obvious. *See id*.

Here, there is no evidence that Decedent was unable to see the mat or that it was blocked from view when he exited the store. Moreover, there was no evidence as to what might have distracted Decedent upon exiting the store, particularly in light of the fact that he walked on that same mat on the way into the store.

Thus, if in fact the mat was dirty, curled or not secure, which is denied, Decedent had the same ability to observe those facts and any alleged dangerous condition was thus open and obvious to Decedent.

Thus, Appellant is entitled to judgment as a matter of law.

B. A New Trial Is Necessary.

A new trial was warranted under the thirteenth juror doctrine and due to the Court's error in allowing Mr. McNealy to offer expert testimony. Further, a new trial nisi remittitur is warranted.

1. A new trial is necessary under the thirteenth juror doctrine.

As discussed above, the verdict is contrary to the evidence submitted at trial given that the mat did not constitute a dangerous condition caused by, or known to, Appellant. And, if it were the dangerous condition that Respondent claims it was, it was open and obvious to Decedent. Finally, the jury's failure to apportion some, if not all, fault to the Decedent for this incident confirms the verdict is contrary to the evidence submitted in this case. Respondent's own expert witness, Dr. Brown, unwaveringly testified that the Decedent's gait was the cause of the incident. His opinion was confirmed by Brian Boggess, Appellant's biomechanical engineer. Accordingly, given the clear indication that the jury ignored the law and the evidence did not justify the result, a new trial is necessary.

2. A new trial is necessary due to Court allowing Mr. McNealy to offer expert testimony.

It is undisputed Appellant's arguments for the exclusion of Mr. McNealy were not based on his lack of qualifications, but rather the fact that his "expert" testimony violated Rule 702 SCRE. Whether the mat was curled, dirty, or unsecured is not "beyond the ordinary knowledge of the jury" so as to "requir[e] an expert to explain the matter to the jury." *See* Rule 702 SCRE; *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Respondent does not explain why Mr. McNealy's expertise was necessary to establish these alleged facts.

Respondent flippantly dismisses the determination by two different Courts in Texas, who excluded similar expert opinions sought to be offered by Mr. McNealy in similar cases. *See Villanueva v. Wal-Mart Stores Texas, LLC*, 2023 U.S. Dist. LEXIS 17681, 2023 WL 1069306 (S.D. Tex. 2023) (Mr. McNealy's testimony was excluded because "the basis of McNealy's expert opinions is unclear. McNealy does not describe how he arrived at his opinions, or how they are the product of reliable principles and methods" and his opinions were found to be "conclusory and unreliable"); *Castro v. Wal-Mart Real Estate Bus. Trust*, 645 F. Supp. 3d 638

(W.D. Tex. 2022) (Mr. McNealy was excluded from offering expert opinions because "the Court [was] not convinced that Mr. McNealy's testimony as to the condition of the mat [would] be helpful to the jury, given that it [would] primarily rely on footage available to the jury."). Other than offering the declaratory statement that the decisions were "arguably wrongly decided," Respondent fails to distinguish either case from this one. While it is undoubtedly true those are not South Carolina cases, they are persuasive in that they address Mr. McNealy's testimony itself. The rules of evidence as to expert testimony the Texas Courts were following are substantially similar to South Carolina's rules of evidence on expert testimony. *Compare* Fed. R. Evid. 702 & Rule 702 SCRE.

Respondent inaccurately states that Appellant made no objection to any content of Mr. McNealy's testimony during trial. Appellant renewed its pretrial motion to exclude Mr. McNealy when he was tendered as an expert. *See* June 18, 2024 Transcript at p. 8 & Defendant's Motions in Limine.

Put simply, the Court failed to faithfully execute its role as a gatekeeper and should not have allowed Mr. McNealy to testify as to his opinion that the mat at issue in this case was "dangerous." As McNealy was allowed to offer his "expert" opinions, a new trial is necessary in the event judgment as a matter of law is not granted to Appellant.

3. Remittitur is required.

Appellant further moved for a New Trial Nisi Remittitur. It is undisputed that Respondent presented medical bills of approximately $115,000.00 dollars and that Decedent passed away nearly one year after the incident occurred. There was no evidence to support the jury's award of $296,000.00 dollars. Therefore, the Court abused its discretion in refusing to reduce the jury's award.

C. Respondent's Request for Interest and Costs Is Inappropriate.

Respondent requests costs and interest on the judgment. However, Respondent's entitlement to costs and interest are not part of this appeal. *See Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997) (Supreme Court held an issue cannot be raised for the first time on appeal); *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995) (generally, an appellate court cannot address an issue unless the issue was raised to and ruled upon by the trial court). Accordingly, Respondent's request must be denied.

CONCLUSION

For the reasons stated herein, this Court should enter judgment as a matter of law in favor of Appellant. Absent such relief, the Court should grant a new trial.

November 8, 2024

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PROOF OF SERVICE

I certify that I have served the **Initial Reply Brief of Appellant** on the Estate of Thomas Sullivan, by depositing a copy of it in the United States Mail, postage prepaid, on the 8th day of November 2024 addressed to their attorney of record,

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