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.

FINAL BRIEF OF APPELLANT

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This is a case in which Thomas Sullivan, now deceased ("Decedent"), who suffered from an impaired gait, visited a Dollar General store in Rock Hill, South Carolina (the "Store"). Upon his arrival, Decedent entered the Store, walked over the Store's mat, purchased goods, and proceeded to trip and fall over the same flat mat he navigated on his way into the Store. Despite a lack of evidence of any dangerous condition of which Appellant, Dolgencorp, LLC d/b/a Dollar General Corporation ("Appellant") was aware and the open and obvious nature of any allegedly dangerous condition, the jury found Appellant solely liable.

STATEMENT OF THE CASE

On June 10, 2019, Decedent visited the Store with his friend, Dave Riley ("Riley"). R p 376. Decedent entered the store unassisted and Mr. Riley remained in his vehicle. *See id.* Decedent purchased his goods and then proceeded to leave the Store. *See id.* Decedent tripped over a flat mat and fell to the ground. Decedent allegedly incurred approximately $115,000.00 dollars in medical expenses as a result of the fall. R p 353.

Decedent originally filed this lawsuit in April of 2019. R p 10. However, Decedent took his own life in August of 2020, and his personal representative, Martha Ballew ("Ballew") continued prosecuting the case. R p 340. Decedent was not deposed before his death. Plaintiff's entire theory of liability was predicated on the subject mat being curled, unmaintained, and unsecured. R pp 328-329 & 517. Appellant denied liability for the incident and the case proceeded to a jury trial on June 17, 2024.

The Plaintiff called four witnesses during their case-in-chief: (1) Ballew; (2) Riley; (3) Dr. Edward Brown ("Dr. Brown"); and (4) Robert McNealy ("McNealy"). There is no indication that Ballew was present when the incident occurred. R pp 337-355. She presented no independent knowledge of the mat's condition before Decedent came into contact with it. *See id.*

Riley testified that he drove Decedent to the Store, but waited in the vehicle while Decedent shopped. R p 376. He never went inside the store to assist Decedent. *See id.* More importantly, Riley confirmed he did not see the mat prior to the incident occurring. *See id.* He did help Decedent after he fell and saw the condition of the mat at that time. R p 369. Mr. Riley described the mat as "dirty," but failed to identify any inherent defects in the mat. *See id.*

Dr. Brown testified via video deposition, which occurred before trial. R pp 385-410 & 706. Dr. Brown was the orthopedic surgeon who surgically fixed Decedent's fractured hip after this incident occurred. R pp 399-400 & 706. Interestingly, Dr. Brown testified that Decedent had a prior stroke and, as a result, had an impaired gait with his left foot. R p 397 & 706. Dr. Brown watched the video and offered the following opinions to the jury: (1) the subject mat was flat and did not contribute to the subject incident; and (2) the Decedent's impaired gait was the cause of the subject incident. R pp 395-396 & 706.

McNealy, Plaintiff's retained liability expert, was permitted to testify over Appellant's objection concerning his observations of the video footage of the incident. R pp 421 & 291-295. He opined that the mat was dirty based on his view of the video footage. R p 429. He also testified that the mat was unsecured, because Decedent was able to kick up the mat with his impaired gait and fell to the ground. R pp 422-424. McNealy then attempted to testify that the mat was curled when the Decedent came into contact with it, but never identified the actual curl in the mat on which Plaintiff's tripped. R pp 427-429. McNealy then conceded he never inspected the subject mat, never spoke to Decedent, and was impeached for visiting the Store despite claiming it held no relevance to his formulation of opinions in this case. R pp 453-455. Finally, McNealy himself agreed that the mat was not concealed from Decedent in any manner

and agreed Decedent had to walk over the same mat to enter the Store before the incident occurred. R pp 455-456.

After Plaintiff rested her case, Appellant moved for a directed verdict. R pp 458-461. Specifically, Appellant argued: (1) there was no evidence of a mat curl, which required a finding that the mat was not hazardous; (2) there was no evidence Appellant knew or should have known about the alleged curl in the mat; (3) the mat was an open and obvious condition that did not require a warning; and (4) Decedent's comparative negligence far exceeded any negligence attributable to Appellant based on Dr. Brown's testimony. *See id*. The Court denied Appellant's Motion for Directed Verdict.[1] *See id*.

Appellant then proceeded to present two witnesses during their case-in-chief: (1) Laura Myers ("Myers"); and (2) Brian Boggess ("Boggess"). R pp 464-503. Myers was the assistant manager when this incident occurred. R p 466. She testified that the mat was not curled, dirty, or poorly maintained before Decedent encountered it. R pp 470-471 & 480. She also testified that the employees would inspect the mats, including the subject mat, every morning before the Store opened. R pp 468, 474 & 478. She also testified that the mats were cleaned every night after the Store closed. *See id*. Finally, she testified she was not aware of any issue with the mat on the day of the accident and if she had been she would have addressed those issues. R pp 468-471.

Boggess was offered as an expert in biomechanical engineering and mechanical engineering without objection. R p 488. He opined that the mat was flat and the incident occurred because of the Decedent's impaired gait. R pp 489-492. Specifically, Boggess testified that Decedent kicked the mat while exiting the store, which caused the fall to occur. *See id.*

[1] The Court did grant Appellant's motion for directed verdict regarding the issue of punitive damages since there was no evidence of reckless conduct or heightened negligence attributable to the Appellant. R p 461.

At the close of Appellant's case-in-chief, Appellant renewed its Motion for Directed Verdict on the same grounds previously listed. R p 509. The Court, again, denied the Motion for Directed Verdict. *See id.*

The Jury ultimately returned a verdict for Plaintiff and found Appellant 100% liable for the incident. R pp 560-561. The Jury awarded the Plaintiff $296,000.00 dollars. *See id.*

On June 28, 2024, Appellant filed a motion for judgment notwithstanding the verdict or for a new trial. R pp 296-307. Appellant argued that (1) Plaintiff had failed to establish any evidence that the mat was a dangerous condition; (2) there was no evidence that Appellant had notice of any alleged dangerous condition; (3) even if the mat constituted a dangerous condition, it was open and obvious to Decedent; (4) Decedent's comparative fault exceeded Appellant's alleged fault; (5) absent a finding in Appellant's favor as a matter of law, a new trial was necessary as the testimony of McNealy was improper; and (6) if judgment as a matter of law in Appellant's favor and a new trial were not granted, a remittitur in the amount of damages awarded was required. *See id.*

STANDARD OF REVIEW

On appeal of a directed verdict or judgment notwithstanding the verdict, the appellate court views "the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 233, 743 S.E.2d 858, 859 (Ct. App. 2013); *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 243-44, 473 S.E.2d 865, 867 (Ct. App. 1996); *Parrish v. Allison*, 376 S.C. 308, 318, 319 656 S.E.2d 382, 388 (Ct. App. 2007). In making this determination, "the court must determine the elements of the action alleged and whether any evidence existed on each element." *Murphy v. Jefferson Pilot Commc'ns Co.*, 364 S.C. 453, 461, 613 S.E.2d 808, 812 (Ct. App. 2005). An appellate court will

overturn the denial of a motion for directed verdict or JNOV where there is insufficient evidence to support the ruling or where the decision is governed by legal error. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010).

The denial of a motion for new trial is reviewed for an abuse of discretion. *See O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993); *Easler v. Hejaz Temple*, 285 S.C. 348, 329 S.E.2d 753 (1985).

ARGUMENT

In South Carolina, a premises owner owes its invitees "a duty of ordinary care to keep his premises in a reasonably safe condition." *Richardson*, 404 S.C. at 234, 743 S.E.2d at 859. Here, Appellant did not breach that duty as a matter of law. Further, even if this Court disagrees, a new trial is necessary under the thirteenth juror doctrine and because McNealy should not have been permitted to testify. Finally, even if the jury's determination on liability stands, a remittitur is required.

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

As noted, a premises owner owes its invitees a duty of ordinary care, however, 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). "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." *Hunter v. Dixie Home Stores*, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957).

In order to recover, a plaintiff must show (1) that a dangerous condition exists and (2) either that the defendant created the dangerous condition or that the defendant had actual or constructive knowledge of the condition. *See Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Garvin*, 343 S.C. at 628, 541 S.E.2d at 832; *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1998); *Pringle v. SLR, Inc.*, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009). If a dangerous condition is open and obvious, however, 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*, 404 S.C. at 234, 743 S.E.2d at 860.

Here, there was no evidence a dangerous condition existed. Further, even if there were a dangerous condition, there was no evidence that Appellant created the condition or had actual or constructive knowledge of it. Finally, even if there were a dangerous condition, it was open and obvious to Decedent.

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

It is crucial in a premises liability case that actual evidence of a dangerous condition be presented. *See Cook*, 328 S.C. 324, 91 S.E.2d 690. In *Cook*, the plaintiff tripped and fell on a floor mat near the exit of a grocery store. *See id*. at 326, 91 S.E.2d at 691. The plaintiff proffered testimony from multiple grocery store employees that the floor mats would wrinkle or crumple and regularly had to be straightened out. *See id*. Further, the plaintiff testified she tripped on a wrinkled mat. *See id.* The court held "the testimony of the tendency of the floor mats to wrinkle was directly relevant to the issue of whether a dangerous condition existed in the store." *Id*. at 328, 91 S.E. 2d at 692. Ultimately, the court concluded that because the "mats had a tendency to wrinkle" that created "a dangerous condition." *Id.*

Here, unlike in *Cook*, there was no testimony that the mat had a tendency to wrinkle or curl. The mere existence of a mat or rug at the entrance or exit of a store is not a "dangerous condition." Rather, Plaintiff is obligated to present evidence that the specific mat at issue constituted a "dangerous condition." *See Howard v. K-Mart Discount Stores*, 293 S.C. 134, 137-138, 359 S.E.2d 81, 83 (Ct. App. 1987) (court reversed a jury verdict because, "[t]estimony that a floor was slick, without evidence that the slickness constituted an unsafe condition, is insufficient to present a jury question on a merchant's conduct in the care of his floors and its causal relationship to the plaintiff's fall."). The only evidence regarding the condition of the mat shown at trial was the video footage and the testimony of Myers, which confirmed the mat was flat when the incident occurred. R pp 704-705. There was no evidence showing the mat was curled in any manner before the Decedent encountered it. R pp 703-705. More importantly, the only evidence offered by Plaintiff was that the mat was dirty. Whether or not the mat was dirty could have had no impact on causing Decedent to fall. Accordingly, without any evidence that the mat constituted a dangerous condition, Appellant was entitled to judgment in its favor as a matter of law.

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

Even if one were to assume the mat constituted a dangerous condition, Plaintiff failed to introduce evidence that Appellant knew of the dangerous condition. To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it. *See Sellers v. Jc Penney Corp.*, 2011 U.S. Dist. LEXIS 124683 (D.S.C. 2011); *Garvin*, 343 S.C. at 628, 541 S.E.2d at 832 *citing Anderson v.*

Racetrac Petroleum Inc., 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington*, 252 S.C. at 178, 165 S.E.2d at 696.

In *Sellers*, the plaintiff entered the JCPenney store through the mall entrance. *See id*. at * 2. There was a rug or floor mat the covered the entire width of the entrance. *See id*. Due to a "tear in the rug," the plaintiff's shoe became tangled, she stumbled and fell. *See id* at *2-3.

The South Carolina District Court, applying South Carolina law, affirmed summary judgment in favor of a premises owner because the plaintiff "presents no evidence that any JCPenney employee had actual or constructive knowledge, or 'notice,' of a dangerous condition in the purported rug immediately prior to her fall." *Id*. at *9. Further, the court noted that the plaintiff "may not simply rely upon a presumption that if the rug was torn at the time of her fall, it was likely torn for some time beforehand and should have been observed by [the defendant's] employees." *Id.*

Here, Plaintiff's entire theory of liability rested upon the notion that the mat was curled in a manner creating a dangerous condition. R pp 328-329 & 517. Plaintiff failed to present any evidence at trial to establish: (a) the alleged curl in the mat was caused by Appellant; (b) Appellant's employees had actual notice of the alleged curl; or (3) the curl existed for so long to create constructive notice. The video does not show any curl and Plaintiff's own "expert," failed to identify the alleged curl in the mat upon which Decedent fell. R pp 427-429. Additionally, the only testimony about what Appellant's employee's knew or had notice of was supplied by Myers, who testified that she did not know of any issues with the mat prior to the fall and that the mat was regularly inspected. R pp 468-471, 474 & 478-480. Plaintiff's failure to offer evidence that Appellant caused the dangerous condition or knew about its existence entitled Appellant to judgment as a matter of law.

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

As this Court is aware, a merchant does not owe a duty of care for open and obvious conditions. *See Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991). A "possessor of land 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." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009); *Richardson*, 404 S.C. at 234, 743 S.E.2d at 860 (Court affirmed judgment notwithstanding the verdict in favor of premises owner as "[t]he fact that the sidewalk was wet and slippery when she left the store should have been apparent."); *Meadows v. Heritage Vill. Church & Mission. Fellowship*, 305 S.C. 375, 409 S.E.2d 349 (1991) (Supreme Court reversed a jury verdict in favor of plaintiff, holding that the landowner had no duty to warn the plaintiff "about the wet grass because it was a natural condition, the peril of which was obvious.").

Here, assuming there was a curl, Plaintiff has provided no evidence to show that the condition of the mat or any alleged curl was in any way hidden. At trial, Plaintiff's "expert" witness even testified that the mat was not hidden. The video footage showed the Decedent walking over the same mat to enter the Store. To claim the alleged curl, if any, in the mat was somehow hidden from Decedent defies logic. Thus, as any alleged dangerous condition would have been open and obvious when Decedent entered the Store as well as when he was leaving the Store, Appellant is entitled to judgment as a matter of law.

4. Plaintiff's comparative fault exceeded any fault of Appellant.

"Ordinarily, comparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide." *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000)

citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997). "If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted." *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

Plaintiff's own expert, Dr. Brown, testified the accident would not have occurred but for the Decedent's impaired gait. The evidence offered by Plaintiff establishes comparative negligence in this action. Decedent walked over the same mat entering the Store that he tripped over while exiting. It is clear he had knowledge of the mat's existence. Decedent's impaired gait was the greater cause of Decedent's fall and far exceeded any negligence that could be attributable to Appellant. Accordingly, Appellant was entitled to judgment as a matter of law.

B. A New Trial Is Necessary.

Rule 59(a) permits a party to seek a new trial at the conclusion of the trial in a case. Here, a new trial was warranted under the thirteenth juror doctrine and due to the Court's error in allowing McNealy to offer expert testimony. Further, a new trial nisi remittitur is warranted given the circumstances of the case.

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

A trial judge has the ability to grant a new trial based upon the thirteenth juror doctrine. *See Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002). "The thirteenth juror doctrine empowers a trial court who believes the verdict is contrary to the evidence to 'hang' the jury, thus necessitating a new trial." *Ex Parte Travelers Home & Marine Ins. Co.*, 427 S.C. 238, 830 S.E.2d 718 (Ct. App. 2019) (citing to *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004)). The trial court is "is duty-bound to grant a new trial if the evidence does not support the verdict." *Id*. at 244.

It is clear from the verdict in this case that the verdict is contrary to the evidence submitted at trial. As discussed above, there is no evidence demonstrating: (1) a curl in the mat; (2) the Appellant created the curl; (3) the Appellant had actual or constructive notice of the curl; or (4) the mat was hidden from Decedent in some manner. More importantly, the jury's failure to apportion some, if not all, fault to the Plaintiff for this incident confirms the verdict is contrary to the evidence submitted in this case. Plaintiff'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. *See Trivelas*, 357 S.C. at 552, 593 S.E.2d at 508.

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

A new trial is warranted as the court allowed testimony from Plaintiff's "expert" which should have been excluded. The court denied Appellant's pre-trial motion to exclude the testimony of McNealy. McNealy's testimony consisted of reviewing the video footage, that the jury had the ability to review for itself, and providing his expert opinions.

Appellant objected to McNealy testifying, pursuant to Rules 702, 401 and 403 of the *South Carolina Rules of Evidence*, since his opinions were solely based on the video footage. Appellant's position is McNealy's "opinions" invaded the province of the jury, were not helpful to the jury, and, most importantly, were not based on any "scientific, technical, or other specialized knowledge . . .". *See* Rule 702 SCRE. As the Supreme Court has noted:

> [E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider

> expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Watson, 389 S.C. at 446, 699 S.E.2d at 175 (internal citations omitted).

It is hard to understand how a determination of whether a mat was curled or wrinkled "is beyond the ordinary knowledge of the jury." Accordingly, McNealy should not have been permitted to offer his opinions, particularly on whether the mat was curled, wrinkled or dirty at the time of Decedent's fall.

Moreover, McNealy's opinions are not reliable expert opinions as has been found by other courts. *See Villanueva v. Wal-Mart Stores Texas, LLC*, 2023 U.S. Dist. LEXIS 17681, 2023 WL 1069306 (S.D. Tex. 2023) (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) (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.").

Put simply, the Court failed to faithfully execute its role as a gatekeeper and should not have allowed McNealy to testify. 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 Appellants.

3. Remittitur is required.

Appellant further moved for a New Trial Nisi Remittitur. Plaintiff presented medical bills of approximately $115,000.00 dollars. It is undisputed that the Decedent tragically took his own life nearly one year after the incident occurred. There was no evidence provided by Plaintiff 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 given the utter lack of damages beyond the medical expenses. Accordingly, a remittitur in an amount supported by the evidence is appropriate. *See Easler*, 285 S.C. at 356, 329 S.E.2d at 758; *Warren v. Lagrone*, 12 S.C. 45, 53 (1879) (a new trial nisi remittitur is appropriate "[w]hen the damages awarded by the jury appear to the judge to be excessive.").

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.

December 10, 2024

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CERTIFICATE OF COUNSEL

I certify the **Final Brief of Appellant** complies with Rule 211(b), SCACR.

December 10, 2024

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