

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2012-CP-23-02379

Frankie Orr,Respondent,

v.

Greenville Hospital System,Appellant.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The sole issue on appeal is whether the trial court erred in denying Defendant Greenville Hospital System's ("GHS") motions for directed verdict and for judgment notwithstanding the verdict when Plaintiff Frankie Orr failed to put forth any evidence at trial in support of her allegation that GHS's negligence caused her injuries.

STATEMENT OF THE CASE

This suit arose out of Ms. Orr's allegations that she was injured on or about April 5, 2010 when a framed picture fell off the wall and struck her on the head while she was visiting her mother at GHS's Hillcrest Memorial Hospital. Ms. Orr filed her Complaint on April 4, 2012. In her Complaint, Ms. Orr alleged that GHS was negligent by failing to secure the picture frame to the wall; failing to warn her of the instability of the picture frame; and generally failing to maintain a safe, sanitary, and clean environment in which to conduct its business. GHS timely answered and denied all allegations of negligence. At no point in time thereafter did Ms. Orr conduct any discovery or otherwise attempt to prove her allegations.

Ms. Orr was deposed on August 29, 2012. Following Ms. Orr's deposition, GHS moved for summary judgment on the basis that Ms. Orr had stated in her deposition that she had no idea what caused the picture to fall off the wall. (Def. Mot. for Summ. J., p. 1.) The motion was heard on March 22, 2013. GHS argued that Ms. Orr was relying solely on *res ipsa loquitur*, which was not sufficient under South Carolina law to survive summary judgment. Citing Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) for the proposition that summary judgment should not be granted until the opposing party has had a full and fair opportunity to complete discovery, the court denied

the motion on the basis that it was not persuaded summary judgment was appropriate at that time. (April 1, 2013 Order.) However, despite essentially being warned by the court that she should conduct discovery, Plaintiff continued to make no attempt to prove her allegations in advance of trial.

The case was tried on November 18, 2013 before a jury and the Honorable D. Garrison Hill. Ms. Orr testified on her own behalf and called her chiropractor to testify in regards to her alleged injuries. No other witnesses were called, either by Ms. Orr or by GHS. Ms. Orr was the only witness who provided any testimony about the picture and the circumstances that led to it falling off the wall. Like she had done during her deposition, Ms. Orr again testified that she did not know what caused the picture to fall off the wall. Ms. Orr's only trial exhibit, Plaintiff's Exhibit P-1, was a document summarizing her medical specials. GHS's only trial exhibits, Defense Exhibits D-1 and D-2, were two printouts from the chiropractor's website used during his cross-examination. There were no photographs or any other exhibits introduced as evidence of what the picture looked like or how it was hung.

After Ms. Orr rested her case, GHS moved for directed verdict. Following brief oral arguments from counsel, Judge Hill, citing Chaney v. Burgess, 246 S.C. 261, 143 S.E.2d 521 (1965), denied the motion for directed verdict holding that Ms. Orr had put forth circumstantial evidence in support of her allegation that GHS had been negligent. (Transcript p. 139:15-20.)

As previously noted, GHS chose to call no witnesses, so following closing arguments, the case went to the jury. The jury deliberated briefly before returning a verdict on behalf of Ms. Orr in the amount of \$40,000.00.

Following the discharge of the jury, GHS moved for a judgment notwithstanding the verdict on grounds that there was no basis to support the jury's finding of liability on the part of GHS. Judge Hill denied the motion holding that "it was up to the jury and there was evidence to support the verdict." (Transcript, p. 182:13-15.)

GHS timely filed the instant appeal on December 3, 2013. GHS asserts that Ms. Orr relied solely upon the doctrine of *res ipsa loquitur* and did not put forth any evidence to prove GHS caused the picture to fall on her.

STATEMENT OF FACTS

On direct examination, Ms. Orr testified to the following facts relevant to this appeal:

She went to visit her mother at Hillcrest Hospital on April 5, 2010. (Transcript p. 52:5-9.) It was the first time she had visited her mother in that particular room at the hospital. (Transcript, p. 53:6-7.) When she entered the room, she walked over and gave her mother a kiss before walking back to the foot of the bed and sitting down in a chair. (Transcript, p. 53:15-21.) Almost immediately after she sat down, a picture fell off the wall and hit her on the head. (Id., p. 53:21-23.) She had not noticed the picture before sitting down. (Id., p. 55:8-9.)

On cross-examination, Ms. Orr admitted the following:

She did not know what caused the picture to fall off the wall. (Id., p. 68:17-18.) She did not know how the picture had been hung. (Id., p. 69:5-6.) She did not know how long the picture had been hanging on the wall prior to it falling. (Id., p. 69:7-9.) She did not know who hung the picture. (Id., p. 69:14-16.)

ARGUMENT

Because Ms. Orr failed to put forth any direct or circumstantial evidence to prove the picture fell as a result of GHS's negligence, the court erred in denying GHS's motions for directed verdict and judgment notwithstanding the verdict.

I. Standard of Review

On a motion for directed verdict by the defendant, the testimony must be viewed in a light most favorable to the plaintiff, but if the only reasonable inference to be drawn from all the testimony is that the plaintiff failed to make out her case against the defendant, then it is the duty of the judge to direct a verdict against the plaintiff. Owens v. South Carolina State Highway Dep't, 239 S.C. 44, 56-57, 121 S.E.2d 240, 247 (1961)).

South Carolina has consistently refused to adopt the doctrine of *res ipsa loquitur*:

“In this State it is well settled that the burden rests upon the party to prove negligence. This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence, Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857; Perry v. Carolina Theatre, 180 S.C. 130, 185 S.E. 184. In order, therefore, for a plaintiff to recover damages, she must prove by the greater weight or preponderance of the evidence not only the injury but also that it was caused by the actionable negligence of the defendant.”

King v. J. C. Penney Co., 238 S.C. 336, 339-40 120 S.E.2d 229, 230 (1961). Courts simply are not permitted to leave the question of whether misfortune was the result of negligence to mere conjecture or speculation. Fletcher v. Med. Univ., 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010).

A property owner is not an insurer of the safety of an invitee, “but only owes 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 832 (2001); see also Denton v. Winn-Dixie Greenville, Inc., 312 S.C. 119, 120, 439 S.E.2d 292, 293 (Ct. App. 1993)

(holding that a store has no duty to make the parking lot accident proof because it “is not required to maintain the premises in such a condition that no accident could happen to a patron using them.”) A defendant is not presumed to be responsible for the condition of an area simply because the defendant may have had control over the area. In order to recover damages, the plaintiff must prove actionable negligence on the part of the defendant. Gilliland v. Pierce Motor Co., 235 S.C. 268, 111 S.E.2d 521 (1959).

In order for a plaintiff “to recover damages for injuries caused by a dangerous or defective condition, the plaintiff must show either (1) that the injury was caused by a specific act of the [defendant] which created the dangerous condition or (2) that the [defendant] had actual or constructive knowledge of the dangerous condition and failed to remedy it.” Garvin, supra.

II. Analysis

Under the law, Ms. Orr had the burden of presenting sufficient evidence from which a jury could reasonably infer without conjecture or speculation that her injuries were caused by a specific act of GHS that created a dangerous condition, or that GHS had knowledge of a dangerous condition and failed to correct it. As applied to the specific facts of this case, Ms. Orr had the burden of establishing evidence that GHS either hung the picture in such a manner that it presented an unreasonable risk of falling and hitting someone, or GHS had knowledge that the picture was hung in such a manner and failed to either correct it or adequately warn Ms. Orr of it.

As Judge Hill properly instructed the jury, evidence consists of two sources, witness testimony and exhibits. (Transcript, p. 167:21-23.) At trial, Ms. Orr relied purely upon conjecture and speculation and failed to put forth any evidence from which a jury could infer that GHS was liable for her injuries.

A. No evidence the picture was hanging in such a manner at the time of the incident that it presented an unreasonably dangerous condition.

Ms. Orr presented no evidence from which the jury could infer that at the time of the incident, the picture was hanging in such a way that it created a dangerous condition. Ms. Orr admitted that she never examined the picture herself or asked anyone about how it had been hung or what might have caused it to fall off the wall. All she knew was the picture fell off the wall when she sat down. She had no idea why.

Her entire theory that it must have been hanging in a defective manner was based solely upon her belief that it wouldn't have fallen had it been hung correctly. Essentially, she believed the fact that it fell should speak for itself. That was confirmed by her counsel during his closing when he argued to the jury,

“We know that it wasn't hung properly. Guess why? It fell off.”
(Transcript, p. 161:20-21.)

While that may be a reasonable belief, it is the very definition of *res ipsa loquitur*, and it is not enough to establish liability in South Carolina.

B. No evidence GHS was responsible for the condition of the picture at the time of the incident.

Even if the mere fact that the picture fell were legally enough under the circumstances to infer that it must have been hanging in a defective manner at the time of the incident, Ms. Orr put forth no evidence from which the jury could infer that GHS either caused the picture to be hanging in such a manner or that GHS had notice that it was in fact hanging in such a manner at the time.

Ms. Orr could not definitively say that GHS created the allegedly dangerous condition, because she admitted that she had no idea who actually was responsible for hanging the picture. She only assumed it was GHS, because GHS owned the building.

But again, it cannot be presumed that GHS was responsible for the condition of the picture simply because GHS may have had control over the room where the picture was hanging. Gilliland, supra.

But even if one were to assume that GHS was responsible for originally hanging the picture, there was no evidence that the picture was still hanging in the same manner at the time of the incident. If one were to speculate, as Ms. Orr repeatedly asked the jury to do, one could just as easily speculate that the picture was hung years ago in a secure manner but had only recently become unsecure through no fault of GHS. In that case, Ms. Orr needed to prove that it had been in an unsecure state long enough for GHS to have discovered it. See Milligan v. Winn Dixie, 273 S.C. 118, 254 S.E.2d 798 (1979)(holding notice may be proven by showing that defective condition existed sufficiently long enough that the defendant was negligent in failing to discover it). But, as has been noted multiple times already, Ms. Orr knew nothing about how the conditions of the picture prior to it falling, much less how long it had been in that condition.

C. The jury inappropriately relied solely upon conjecture and speculation to find GHS liable for Ms. Orr's injuries.

The law provides that sometimes accidents happen for which no one is to blame, and the fact of injury, in and of itself, even absent explanation, does not necessarily mean that a party has been guilty of negligence. Kapuschinsky v United States of America, 248 F. Supp. 732 (D.S.C. 1966) (quoting State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 462, 67 S. Ct. 374, 375, 91 L. Ed. 422) (internal quotations omitted). However, in this case, it is clear from the verdict that the jury decided to ignore the law and the lack of evidence and place the blame on GHS for likely no other reason than they believed they had to blame someone. The jury likely thought that pictures don't just fall off walls

for no reason. It had to be someone's fault. No one argued it was Ms. Orr's fault, so the only option was to blame GHS. It was GHS's property, so it seemed reasonable to believe that GHS must have had something to do with it, right?

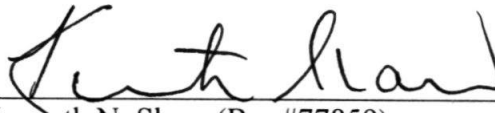
While such thinking from the jury may be understandable, it is not a proper basis for imputing liability under the laws of this State. See Gilliland, supra. When given the chance, juries have proven themselves willing, despite instructions to the contrary, to ignore the law and rely solely upon speculation and conjecture to find liability, which is exactly what happened in this case. That is one of the reasons why the South Carolina Supreme Court has consistently rejected the doctrine of *res ipsa loquitur*, and why the Court has consistently held that cases like this one should not be allowed to make it to the jury.

CONCLUSION

For reasons cited herein, GHS respectfully requests the Court reverse and set aside the verdict and judgment appealed from and remand the case to the trial court with instructions to enter judgment in favor of GHS.

[Signature block appears on the following page]

Respectfully submitted,



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

Appellant Greenville Hospital System proposes the following be included in the
Record on Appeal:

1. Defendant's Motion for and Memorandum in Support of Summary Judgment,
including Exhibit 1 (filed December 21, 2012);
2. Order Denying Motion for Summary Judgment (filed April 1, 2013);
3. Transcript of Record (trial held November 18, 2013);
4. Order of Judgment (filed November 19, 2013).

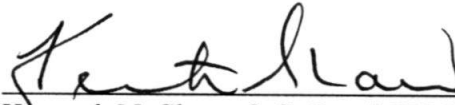
I certify that this designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

The undersigned hereby certifies that, on the date indicated below, he served counsel for the Respondent with a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

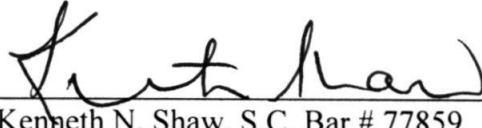
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The Honorable Jenny Abbott Kitchings
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Re: Frankie Orr v. Greenville Hospital System
Appellate Case No.: 2013-002583
Greenville County C.A. No.: 12-CP-23-2379
HSB File No.: 08565.0582

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy each of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal, together with our Proof of Service of same. After filing, please return a file-stamped copy to me in the enclosed self-addressed, postage paid envelope.

By copy of this letter, I am serving copies of same upon counsel for Respondent, Randy Chambers, Esq.

Please feel free to contact me should you have any questions or concerns.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.



Kenneth N. Shaw

Enclosures

cc: Randy Chambers, Esq.

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