The Supreme Court of South Carolina

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June 27, 2014

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: Amy Davidson v. City of Beaufort - Appellate Case No. 2011-199428
Lower Court Case No. 2006CP0702683, 2006CP0702682

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Laura Johnson Evans, Esquire
Phillip S. Ferderigos, Esquire
H. Michael Bowers, Esquire
Mary Bass Lohr, Esquire
R. Patrick Flynn, Esquire
William B. Harvey, III, Esquire
Edward K. Pritchard, III, Esquire
James H. Moss, Esquire
H. Fred Kuhn, Jr., Esquire
Robert J. Cardillo, Esquire
M. Dawes Cooke, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Amy Davidson, Petitioner,

v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineering, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC, Defendants, of whom Collins Engineering Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC, are Respondents.

and

Phillip Davidson, Petitioner,

v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineering Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC, Defendants, of whom Collins Engineering, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC, are Respondents.

Appellate Case No. 2011-199428

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Beaufort County
Marvin H. Dukes, III, Special Circuit Judge

Memorandum Opinion No. 2014-MO-010
Heard February 19, 2014 – Filed April 16, 2014

DISMISSED AS IMPROVIDENTLY GRANTED

H. Fred Kuhn, Jr. and James H. Moss, both of Moss Kuhn & Fleming, PA, of Beaufort, for Petitioners.

H. Michael Bowers and Laura Johnson Evans, both of Smith Moore Leatherwood, LLP, M. Dawes Cooke, Jr. and Phillip S. Ferderigos, both of Barnwell Whaley Patterson & Helms, LLC, R. Patrick Flynn and Robert J. Cardillo, both of Robertson Hollingsworth & Flynn, all of Charleston, for Respondents.

PER CURIAM: After careful review of the Appendixes, Briefs, and Record, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, Acting Chief Justice, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amy Davidson, Appellant,

v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineering, Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC, Defendants,

of whom Collins Engineering Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC, are Respondents.

Phillip Davidson, Appellant,

v.

City of Beaufort, Branch Banking & Trust of South Carolina, Collins Engineering Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC, Defendants,

of whom Collins Engineering Inc., Brantley Construction Company, Inc., and Tidal Wave 23, LLC are Respondents.

Appeal From Beaufort County
Honorable Marvin H. Dukes, III, Master-in-Equity

Unpublished Opinion No. 2011-UP-199
Submitted April 1, 2011 – Filed May 3, 2011

AFFIRMED

James H. Moss and Kimberly L. Smith, both of

Beaufort, for Appellants.

Dawes Cooke, Jr. and Phillip S. Ferderigos, both of Charleston, for Respondent Tidal Wave 23, LLC.

R. Patrick Flynn, of Charleston, for Respondent Brantley Construction Company, Inc.

H. Michael Bowers, of Charleston, for Respondent Collins Engineers, Inc.

Mary A. Lohr and William B. Harvey, both of Beaufort, for Respondent City of Beaufort.

Edward K. Pritchard, III, of Charleston, for Respondent Branch Banking & Trust of South Carolina.

PER CURIAM: Appellants, Amy Davidson and Phillip Davidson (the Davidsons), each brought separate negligence actions against Respondents, Tidal Wave 23, LLC (Tidal Wave), Brantley Construction Company, Inc. (Brantley), and Collins Engineering, Inc. (Collins) (collectively Respondents), after they were abducted from Tidal Wave's parking lot and assaulted by two men. The City of Beaufort (the City) and Branch Banking & Trust of South Carolina (BB&T) were also named as Defendants in each action. The circuit court consolidated the two actions, and the Master-in-Equity granted Respondents' respective summary judgment motions. The Davidsons seek review of the master's order granting summary judgment. We affirm.[1]

FACTS/PROCEDURAL HISTORY

In 2005, the City awarded a contract to Brantley for repairs and upgrades to the Henry C. Chambers Waterfront Park in downtown Beaufort, along the Beaufort River. The City also hired Collins to oversee the daily construction activities to ensure that Brantley performed according to contract specifications. On May 26, 2006, during the time period in which Brantley performed construction in the Waterfront Park, the Davidsons traveled to the City's waterfront area for the purpose of meeting with friends at Saltus Riverfront Bar and Grill (Saltus), located at 820 Bay Street and adjacent to the Waterfront Park.[2] When they arrived at the waterfront area, they parked their car in a parking lot adjoining the office building at 706 Bay Street, owned by Tidal Wave, which was also adjacent to the Waterfront Park. BB&T operated in this building and maintained a 24-hour ATM in the corner of the parking lot. There was a "No Parking" sign at the parking lot's entrance from the Carteret Street side,[3] and the space that the Davidsons parked in was marked "For BB&T Customers Only." It is undisputed that the Davidsons did not use BB&T's ATM.

After the Davidsons visited Saltus, they returned to their car at approximately 1 a.m. Tragically, two men attacked, carjacked, and robbed them and sexually assaulted Mrs. Davidson. The Davidsons later filed these negligence actions, alleging that Respondents breached their duty to provide sufficient lighting and security for Tidal Wave's parking lot. The Davidsons maintained that this breach proximately caused their abduction as well as resulting physical and mental injuries.

The complaint also alleged that there were multiple signs directing the public to park in Tidal Wave's parking lot. Additionally, the complaint stated that Brantley and Collins were on notice of a prior abduction from Tidal Wave's parking lot, and, therefore, they had a duty to provide lighting to the premises. The complaint cited numerous other crimes committed in the waterfront area in the recent past due to the lack of lighting and other unspecified "dangerous conditions" in the construction area. The complaint asserted that these crimes were "publicized and generally known to the community."

During discovery, Tidal Wave served the following Requests to Admit on the Davidsons:

> 1.Admit that Plaintiffs' presence at the BB&T parking lot on the date of the incident, May 26, 2006[,] did not confer any benefit on the commercial landlord Tidal Wave 23, LLC.
>
> 2.Admit that Plaintiffs' presence at the BB&T parking lot on the date of the incident, May 26, 2006[,] did not confer any benefit to the commercial tenant BB&T.
>
> 3.Admit that Plaintiffs did not use BB&T's ATM at 706 Bay Street, Beaufort, SC[,] on the date of loss of May 26, 2006.
>
> 4. Admit that Plaintiffs did not intend to use BB&T's ATM at 706 Bay Street, Beaufort, SC[,] on the date of loss of May 26, 2006.
>
> 5. Admit that Plaintiffs are not customers of and do not conduct business with the commercial landlord Tidal Wave 23, LLC[,] on May 26, 2006.
>
> 6. Admit that Plaintiffs are not customers of and were not transacting business with BB&T on May 26, 2006[,] at 706 Bay Street, Beaufort, SC.
>
> 7. Admit that the "public parking" signs referred to in Plaintiffs' Complaint are the property of the City of Beaufort and were located on the City of Beaufort's real property on the date of the incident, May 26, 2006.
>
> 8. Admit that the "public parking" [signs] referred to in Plaintiffs' Complaint were not the property of Tidal Wave 23, LLC[,] or BB&T and are not located on the real property of Tidal Wave 23, LLC[,] or BB&T.
>
> 9. Admit that the Tidal Wave 23, LLC[,] property had a "no parking" sign at the entrance of Tidal Wave's parking lot upon entering the parking lot from the Cataret [sic] Street side.
>
> 10. Admit that the Plaintiffs parked in BB&T's parking space that was marked "for BB&T customers only."
>
> 11. Admit that the BB&T's parking lot space that the Plaintiffs parked in was held open to the public for BB&T customers only.
>
> 12. Admit that Plaintiffs parked in the BB&T parking lot in order to go have dinner and drinks at the Saltus restaurant.

The Davidsons did not submit a timely response to these Requests to Admit, and, therefore, they were deemed admitted pursuant to Rule 36(a), SCRCP.[4] However, at the summary judgment hearing, the master asked the Davidsons' counsel "[A]re ya'll going to move to work that out or strike that or are they admitted?" Counsel responded:

> No, there are a couple that we don't admit to, namely that I believe the one that says the Public Parking sign is on . . . City of Beaufort property, and the reason for that being even in the depositions of the people from the City, we couldn't figure it out. Nobody will take credit for who put the sign there or who, you know, who it belongs to.

The master replied "Gotcha." There is nothing in the record indicating that counsel ever filed a formal motion to withdraw these two admissions.[5]

The master concluded that based on their admissions, the Davidsons could not be classified as invitees and, therefore, there was no South Carolina precedent creating a duty on Respondents' part to protect the Davidsons from the criminal acts of third parties. The master granted summary judgment to Respondents and denied the Davidsons' motion for reconsideration. This appeal followed.

ISSUES ON APPEAL

1. Did the master properly grant summary judgment to Tidal Wave when the Davidsons presented no evidence that BB&T or Tidal Wave invited or gave consent for them to enter and use the parking lot in question?

2. Did the master properly grant summary judgment to Brantley and Collins when there existed no legal duty on their part to the Davidsons?

3. Did the master properly grant summary judgment to Respondents despite the fact that discovery had not yet been completed?

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. **Brockbank v. Best Capital Corp.**, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). 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. Rule 56(c), SCRCP; **Adamson v. Richland Cnty. Sch. Dist. One**, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998). "To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the [nonmoving] party." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Further, "in cases applying the preponderance of the evidence burden of proof, the [nonmoving] party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." **Hancock v. Mid-South Mgmt., Inc.**, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

"The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "Summary judgment is appropriate in those cases in which plain, palpable and undisputable

facts exist on which reasonable minds cannot differ." Priest v. Brown, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." Id.

Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP; Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001). Specifically, Rule 56(e) states in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule,[6] must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(emphasis added).

If the party opposing summary judgment asserts he or she cannot present by affidavit facts justifying opposition, he must set forth this belief and the reasons for this belief in an affidavit for the trial court's review. Rule 56(f), SCRCP. Specifically, Rule 56(f) states the following:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(emphasis added). In other words, to obtain the benefit of Rule 56(f), a party must file an affidavit setting forth the reasons that he is unable to "present by affidavit facts essential to justify his opposition." See Doe ex rel. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery.").

"Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). "[T]his court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment." West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000).

LAW/ANALYSIS

I. Tidal Wave

The Davidsons maintain that the master erred in granting summary judgment to Tidal Wave because there existed genuine issues of material fact regarding who was responsible for

lighting the parking lot and whether the Davidsons were invitees, licensees, or trespassers on the property. We disagree.

"South Carolina recognizes four general classifications of persons who come on premises: adult trespassers, invitees, licensees, and children." Estate of Adair v. L-J, Inc., 372 S.C. 154, 157-58, 641 S.E.2d 63, 65 (Ct. App. 2007) (internal citation and quotation marks omitted). The highest duty of care is that owed to an invitee, who enters the property at the express or implied invitation of the property owner. Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 64 (Ct. App. 1996). There are two types of invitees: (1) a public invitee, who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public; and (2) a business visitor, who is invited to enter or remain on land for a purpose connected with business dealings with the possessor of the land. Id. at 536, 479 S.E.2d at 65. The duty owed to invitees is to take reasonable care to protect them from dangerous conditions. Id.

A landowner has a lesser duty of care to a licensee, who is privileged to enter upon land by virtue of the possessor's consent. Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). The possessor is under no obligation to exercise care to make the premises safe for the licensee's reception, and is under no duty toward him except:

> (a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land.
>
> (b) To use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discover.

Id.

A landowner's lowest duty of care is toward an adult trespasser, "whose presence is neither invited nor suffered[.]" Estate of Adair, 372 S.C. at 158, 641 S.E.2d at 65 (internal citation and quotation marks omitted). A landowner owes no duty to a trespasser except the duty not to do him willful or wanton injury. Estate of Adair, 372 S.C. at 160, 641 S.E.2d at 66.

Here, the Davidsons alleged in their complaint that that there existed multiple signs directing the public to park in the BB&T parking lot. They argue that by virtue of these purported signs, they were public invitees. However, they did not submit affidavits or any other evidence at the summary judgment hearing to support this allegation.[7] The depositions, answers to interrogatories, and admissions included in the Record on Appeal are devoid of any evidence that Tidal Wave or BB&T posted signs directing the public to park in the BB&T parking lot or that the Davidsons were otherwise invited into the parking lot. Rather, the record contains admissions by the Davidsons that the alleged signs belonged to the City and were located on the City's property, and it is questionable whether the master allowed the Davidsons to withdraw these admissions.

Further, the Davidsons presented no evidence that BB&T or Tidal Wave gave consent for them to enter and use the parking lot in question. Hence, there was no evidence that the Davidsons enjoyed the status of licensees. See Estate of Adair, 372 S.C. at 158, 641 S.E.2d at 65 (stating that a licensee is a person not invited but whose presence is suffered). In fact, the

Davidsons admitted that there was a "No Parking" sign at the parking lot entrance from Carteret Street and that the space they parked in was marked "For BB&T Customers Only."

In sum, the Davidsons failed to present even a scintilla of evidence showing their status as invitees or licensees. Therefore, the only duty BB&T or Tidal Wave had toward the Davidsons as trespassers was the duty not to do them willful or wanton injury. See id., 372 S.C. at 160, 641 S.E.2d at 66 (indicating that a landowner owes no duty to a trespasser except the duty not to do him willful or wanton injury). There is no evidence in the record showing that Tidal Wave or BB&T willfully or wantonly injured the Davidsons.

Based on the foregoing, the master properly granted summary judgment to Tidal Wave. See Rule 56(c), SCRCP (providing that summary judgment must be granted "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").

II. Brantley and Collins

The Davidsons assert that the master erred in granting summary judgment to Brantley and Collins because there was a genuine issue of material fact regarding whether Brantley or Collins was responsible for maintaining the safety of the area surrounding the construction site at the Waterfront Park.[8] We disagree.

To establish a negligence claim, a plaintiff must show: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty; and (3) damages proximately resulting from the breach. Fowler v. Hunter, 388 S.C. 355, 361, 697 S.E.2d 531, 534 (2010). "Generally, there is no common law duty to act." Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). "An affirmative legal duty, however, may be created by statute, contract relationship, status, property interest, or some other special circumstance." Id.

Here, any activities undertaken by Brantley or Collins that could have possibly affected any adjacent property (such as the BB&T parking lot) are irrelevant because the Davidsons presented no evidence to establish their status as invitees on the parking lot or to show any special relationship between themselves and Brantley or Collins. See Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) ("A complete failure of proof concerning an essential element of the [nonmoving] party's case necessarily renders all other facts immaterial.") (internal citation and quotation marks omitted).

Further, the Davidsons cite no statute imposing a duty on Brantley or Collins to protect them. Moreover, the City's contractual relationships with Brantley and Collins do not contemplate any third party beneficiaries. The City's contractual relationship with Brantley merely requires it to take reasonable steps to avoid harm to persons on the construction site resulting from any construction activities. No provision of the contract requires Brantley to protect trespassers on adjacent property from the criminal acts of third parties. Likewise, no provision of the City's contract with Collins requires such protection.

Based on the foregoing, Brantley and Collins were entitled to judgment as a matter of law. Therefore, the master properly granted summary judgment to them.

III. Discovery

The Davidsons maintain that the master erred in granting summary judgment to Respondents when discovery had not yet been completed. We disagree.

"A complete failure of proof concerning an essential element of the [nonmoving] party's case necessarily renders all other facts immaterial." Gauld, 380 S.C. at 559, 671 S.E.2d at 85 (internal citation and quotation marks omitted). Therefore, "the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (internal citation and quotation marks omitted) (emphasis added).

The Davidsons assert that numerous depositions were required to gather evidence on the following issues: (1) how the BB&T parking lot was "held open to the public;" (2) lighting in the parking lot; and (3) who was responsible for lighting. They also argue that they were prevented from completing discovery on these topics, including giving their own depositions, by the circuit court's August 3, 2007 order staying their action pending the conclusion of the criminal investigation of the abduction. However, this order clearly states "[D]iscovery shall proceed to the degree possible without the disclosure of the subject criminal file." Further, the circuit court issued another order on March 26, 2008, to clarify the intent of its August 3, 2007 order. In the March 26, 2008 order, the circuit court ruled that the earlier order staying the action did not preclude the master from hearing dispositive motions.

Therefore, nothing precluded the Davidsons from submitting their own affidavits to support their allegation that Tidal Wave or BB&T invited them into the BB&T parking lot. Because the Davidsons failed to submit any evidence supporting this essential element of their negligence claim when they had the opportunity to do so, all other facts in the case were immaterial at that point, and further discovery would have been useless. See Dawkins, 354 S.C. at 69, 580 S.E.2d at 439 (holding that the nonmoving party must show a likelihood that further discovery will uncover additional relevant evidence); Gauld, 380 S.C. at 559, 671 S.E.2d at 85 (holding that a failure of proof on an essential element of the case renders all other facts immaterial).

CONCLUSION

Accordingly, the master's order is

AFFIRMED.

WILLIAMS, GEATHERS, and LOCKEMY, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] The Davidsons were Charleston residents.

[3] Carteret Street is perpendicular to and intersects with Bay Street, as shown in the site plan attached to the City's contract with Collins.

[4] Rule 36(a), SCRCP, states in pertinent part: "The matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney . . . ."

[5] See Rule 36(b), SCRCP ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.").

[6] Subsections (c) and (e) of Rule 56 allow the parties to supplement or oppose affidavits with depositions, answers to interrogatories, and admissions on file.

[7] At a prior hearing on a motion to dismiss filed by Tidal Wave and BB&T, counsel submitted photographs, which were taken a few weeks after the abduction, purporting to depict the alleged public parking signs. Counsel also briefly questioned a city employee in his deposition about two photographs of the purported signs. Yet, the employee did not indicate to whom the signs belonged or where they were located, despite counsel's prompting. Curiously, counsel did not submit these photographs to the master at the summary judgment hearing. But even assuming these photographs could be considered part of the record before the master, the Davidsons did not include the photographs in the Record on Appeal. Therefore, we are unable to consider them. See Rule 210(h), SCACR ("Except as provided by Rule 212 [Supplemental Record] and Rule 208(b)(1)(C) and (2) [Statement of the Case], the appellate court will not consider any fact which does not appear in the Record on Appeal."); Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) ("Appellant has the burden of providing this Court with a sufficient record upon which this Court can make its decision.").

[8] The Davidsons alleged that Brantley disconnected the electricity to the lighting for the BB&T parking lot. There is deposition testimony in the record indicating that Brantley disconnected electricity to certain power feeds in the Waterfront Park so that it could "rework" all of the lighting pursuant to its contract with the City. However, it was required to do so to prevent any electrical shortages or shocks to anyone. Additionally, there was testimony that Brantley did not disconnect any lighting outside the project's perimeter.