

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

C.A. NO. 2013-CP-43-2034

Annette S. Robinson and  
Sammy Robinson, Sr.,

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Plaintiffs,

ORDER GRANTING SUMMARY  
JUDGMENT AS TO  
PATTY TINDAL ONLY

vs.

The Pantry, Inc. d/b/a Kangaroo  
Express #3380 and Patty Tindal,

Defendants.

CERTIFIED TRUE COPY  
OF ORIGINAL FILED

RECEIVED

*Sherry H. How*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

MAR 19 2015

SC Court of Appeals

This Order is before me on the Motion for Summary Judgment of defendant Patty Tindal.

A hearing on this matter was held on February 10, 2015. Appearing on behalf of the plaintiffs was Attorney John Clark of the Clark Law Firm located in Sumter, South Carolina. Appearing on behalf of the defendants was Attorney James P. Walsh of the law firm of Clarkson, Walsh, Terrell & Coulter, P.A., located in Greenville, South Carolina. After considering the Memoranda submitted by the parties, as well as the arguments made at the hearing, and for the reasons outlined below, I grant the defendants' Motion for Summary Judgment in favor of Patty Tindal, and dismiss her with prejudice as a defendant in this case.

**FACTS**

This matter arises out of an alleged trip and fall accident that occurred at the Kangaroo Express convenience store located in Sumter, South Carolina. The plaintiffs allege that on June 30, 2011, plaintiff Annette Robinson tripped on a loose metal grate that sat on top of a drain located in the parking lot of the Kangaroo Express store. The plaintiffs allege in their Complaint that the defendants were negligent for, among other things, failing to maintain a safe environment, failing to correct a known hazard, and failing to warn of the hazard by "signs,

personnel or barriers". The plaintiffs allege that both defendant The Pantry, Inc. d/b/a Kangaroo Express #3380 and defendant Patty Tindal, the store manager, are independently liable for the alleged negligence, which the plaintiffs claim caused plaintiff Annette Robinson's fall. The defendants deny any liability to the plaintiffs. Subsequently, defendant Patty Tindal moved this court for an Order granting her summary judgment and a dismissal with prejudice from this case, arguing that under South Carolina law she owed no duty to the plaintiffs, and therefore, as a matter of law she could not be held liable for the negligence alleged by the plaintiffs. It is undisputed that defendant Tindal is paid hourly, and held the title of store manager. However, the store is owned by defendant Pantry, and decisions concerning maintenance and repair of the store are made by The Pantry, at the corporate office.

This Court has carefully considered the arguments submitted by both the plaintiffs and the defendants, and has analyzed the relevant South Carolina law concerning this issue, and hereby concludes that under the facts present in this case, defendant Tindal, as an hourly employee with the title of store manager, who had no control over the ability to repair and maintain the allegedly defective area, owed no duty to the plaintiffs, and therefore, she has no potential liability in this case and her summary judgment motion should be granted.

#### ***Summary Judgment Standard***

Pursuant to Rule 56(c), SCRPC, summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct.App.2008); citing Connor Holdings, LLC v. Cousins, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007); Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006); Bradley v. Doe, 374 S.C. 622,

649 S.E.2d 153 (Ct.App.2007), cert. granted, June 12, 2008; see also Higgins v. Med. Univ. of S.C., 326 S.C. 592, 486 S.E.2d 269 (Ct.App.1997) (a trial judge considering a motion for summary judgment must consider all documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). “The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.” Gauld at 558, 671 S.E.2d at 85. “The plain language of Rule 56(c), SCRCPP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial.” Id at 559; 671 S.E.2d at 85; quoting Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct.App.2001) (citing Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, and Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct.App.1999)); Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991). “A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.” Id. Moreover, a party cannot rely upon mere allegations to overcome a motion for summary judgment; instead, a party must present admissible evidence which establishes that questions of material fact exist. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct.App.1994).

Under South Carolina law, the question of whether a duty existed between the plaintiff and defendant is a question of law to be decided by the court. Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct.App.2009). As stated more fully below, I hereby find that South Carolina's negligence law does not impose a personal duty on a store manager to protect the patrons of his or her employer, unless *unusual and extraordinary* control is exercised by the store manager as to completely preclude the owner in the day-to-day operation of the store.

### *Duty of Care*

In this case, the Plaintiffs allege that Defendant Tindal, as store manager of Kangaroo Express, breached a duty of care which resulted in the Plaintiff's injuries. Specifically, the Plaintiffs' Complaint contains the following allegations:

1. Defendant Tindal was "the Manager of Kangaroo Express #3380 and a servant of Defendant The Pantry;
2. Defendants knew that the conditions of the premises were dangerous and knowingly failed to repair the said dangerous conditions;
3. Defendants owed the duty to the Plaintiff to maintain the premises in a reasonable (sic) safe condition, to give warning of latent or concealed perils, to discover risks and take safety precautions to warn of or eliminate foreseeable risks; and
4. The Defendants were willful, wanton, careless, and grossly negligent in the following particulars:
  - a. In failing to maintain a safe environment;
  - b. In failing to maintain a proper look-out for said hazards;
  - c. In failing to correct a known hazard on the premises;
  - d. In failing to warn Plaintiff of such dangers by signs, personnel, or barricades.

Despite the plaintiffs' allegations, the Court is unaware of any case under South Carolina law that has specifically held that a store manager like defendant Tindal owes a duty of care to the patrons of her employer's business. Under South Carolina law, an "affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437, 451 (2005); Charleston Dry Cleaners Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 586 S.E.2d 586, 588 (2003).

“Generally, there is no common law duty to act... Thus, a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct.” Wogan v. Kunze, 366 S.C. 583, 623 S.E.2d 107, 121 (2005) *emphasis added*; Dennis by Evans v. Timmons, 313 S.C. 338, 437 S.E.2d 138, 141 (1993).

South Carolina case law has held that businesses are held to a higher standard than the general public to protect customers invited into its store. While not an insurer of the safety of its customers, a store owes a duty to keep aisles and passageways in a reasonably safe condition and is liable for any injury resulting from the breach of this duty. Felder v. K-Mart, 297 S.C. 446, 377 S.E.2d 332 (1989); Moore v. Levitre, 294 S.C. 453, 365 S.E.2d 730 (1988); *see also* Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). The duty owed by businesses includes a duty to reasonably inspect the premises and to remove debris that could cause the customer to fall. *See* Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262, 263 (1957). This “[s]torekeeper liability is founded upon the duty of care a possessor of land owes to an invitee.” Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728, 730 (2001). This Court rejects the premise that the store manager is the “possessor of land” in order to create a personal duty owed to business invitees.

In support of their argument against summary judgment, the Plaintiffs argue that the defendant store manager could be liable under South Carolina law to the extent that she maintained sufficient control of the subject premises. However, the only South Carolina state court case that has been presented to support the argument that South Carolina law would impose a duty upon the store manager is Richards v. The Great Atlantic & Pacific Tea Co., 226 S.C. 119, 83 S.E.2d 917 (1954). In that case, the South Carolina Supreme Court upheld a verdict against the store, store manager, and the delivery company after the plaintiff tripped over boxes that were stored behind her. However, the court in Richards never addressed what duty the store manager owed. Instead,

that case focused on a jury instruction and the potential confusion of the jury as it relates to joint and several liability. As a result, the Court holds that Richards is not controlling or even persuasive on this issue.

Having found that Richards is not binding precedent on this case, the Court now turns to Plaintiffs' arguments under several cases from the United States District Court for the District of South Carolina. *See Mobley v. Wal-Mart Stores, Inc.*, 2010 WL 503101 (D.S.C. February 8, 2010); *Cook v. Lowe's Home Ctrs, Inc.*, 2006 WL 3098773 (D.S.C. October 30, 2006); Benjamin v. Wal-Mart, Inc., 413 F.Supp.2d 652 (D.S.C. 2006). The Court notes that these cases all deal with whether a store manager was a sham defendant who was only joined to defeat diversity jurisdiction; however, these courts rendering those opinions attempted to "predict" whether South Carolina courts would find that a store manager owes a duty of care to the patrons of the business he or she manages.

It appears to the Court that Benjamin is the first case to discuss whether a manager of a store was a properly joined defendant or a sham defendant intended to defeat diversity. In order to determine whether a manager was a sham defendant, the court had to first determine whether the store manager owed a duty of care to the business's invitees. Ultimately, the court in Benjamin held that the department manager and employee did not owe a duty. In reaching that conclusion, the court noted that "generally, the duty owed to customers is limited only to the business itself. A party who operates a premises but is neither an owner nor a lessee will only owe a duty of reasonable care with respect to an allegedly dangerous condition in specific and limited situations." Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314, 317 (1947). The court noted in the few circumstances (none dealing with store managers) that other courts have found a duty, the duty arises based upon the unusual control that the non-owner exercises over the

property. The Benjamin court noted that in the few cases recognizing such a duty that the imposition of the duty depended upon whether the “individual has exercised such control of the premises so as to impose a duty to reasonably inspect the premises, a court will generally consider the individual's power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property.” Benjamin v. Wal-Mart Stores, Inc., 413 F.Supp.2d 652, 655 -656 (D.S.C. 2006) *citing* CJS Negligence § 388. This Court agrees with Benjamin and the cases cited from other states that have found that a manager is not personally liable for injuries under premise liability. *See generally* Edmond v. Food Lion, Inc., 895 F.Supp. 103, 104 -105 (E.D.Va.1994)(holding that as “merely the store manager” and “not the owner or operator of the premises” the defendant could not be liable under Virginia law); Adams v. Sears, Roebuck & Co., 227 Ga.App. 695, 490 S.E.2d 150, 153 (1997)(holding that the defendant store manager was not liable because she was not the owner or operator for premises liability analysis). MIC v. Barrett, 313 Ark. 527, 855 S.W.2d 326 (1993) (holding that a manager can only be liable for injuries on the property were the owner has relinquished complete control over the premises).

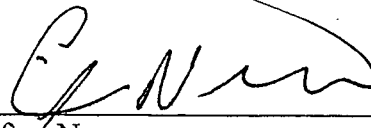
Contrary to the Plaintiffs’ arguments, this Court believes that under South Carolina’s premises liability law “one does not have an affirmative duty to maintain safe premises of a store merely by virtue of being an employee, absent some evidence of more substantial level of control of the business.” Benjamin at 656. *Emphasis added.* As noted in Benjamin, “to hold otherwise would potentially expose all employees to burdensome personal liability every time an individual is injured within a store, which is not the intent of South Carolina negligence law.” Id. This court believes that South Carolina law supports the rule that “merely being a manager or employee does not evidence a sufficient level of control.” Id. This Court finds that the legal theory behind

premises liability against business owners, who receive a direct benefit and profit from the invitee's presence at the business, does not justify holding a store manager to the same duty.

This Court is not prepared to recognize a new duty of care for store managers – especially based upon the facts of this case. In that regard, Defendant Tindal was the store manager for the subject Kangaroo Express. She was not the owner and she had limited control over the store premises, and it certainly was not unusual or substantial. In fact, she did not have the power to make repairs or directly arrange for repairs. Instead, Defendant Tindal was required to notify her district manager of concerns, and the district manager was then required to personally inspect the concern and fill out a work order, which was then forwarded to “corporate” for repair. As a result, Defendant Tindal did not have substantial control over the premises. In fact, it appears to the Court that she had less control than what would normally be expected of a store manager. The only evidence before the Court clearly establishes that Defendant Tindal informed her district manager several weeks prior to this incident that the grate needed to be repaired, and Defendant Tindal testified that at the time she did not deem it to be a trip hazard, but she was concerned that if it was not fixed then it potentially could become a trip hazard at a later date. Importantly, there is no evidence before the Court as to how long the grate had been in a condition to allegedly constitute a trip hazard.

Based upon these facts and the lack of case law in South Carolina creating a duty of a care on a store manager, personally, this Court hereby determines that the Plaintiffs' claims against Defendant Tindal are legally deficient. Therefore, the Court hereby grants Defendant Tindal's Motion for Summary Judgment and dismisses her with prejudice from this case.

AND IT IS SO ORDERED.



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Clifton Newman  
Presiding Judge

Columbia, South Carolina  
February 23, 2015

RECORDED

STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER  
IN THE COURT OF COMMON PLEAS

2015 MAR -2 PM 2:31 JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2013CP4302034

Annette S Robinson

Sammy Robinson  
The Pantry Inc  
SUMTER COUNTY, S.C.

JAMES C. CAMPBELL  
CLERK OF COURT

CERTIFIED TRUE COPY  
Kangaroo Express #3380  
OF ORIGINAL FILED

*Sherry H. How*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: **See attached Order.**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2127  
Judge Code

3/2/2015  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

**John Derrick Clark** PO Drawer 880 Sumter, SC 29151

**James P. Walsh** PO Box 6728 Greenville, SC 29606

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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

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**ATTORNEY(S) FOR THE DEFENDANT(S)**

*James C. Campbell*

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**Court Reporter**

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**James C. Campbell - Clerk of Court**

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**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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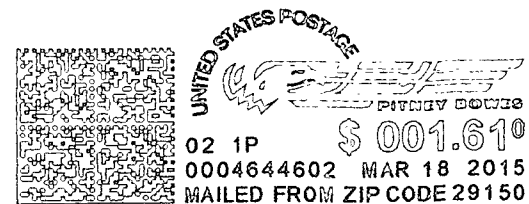
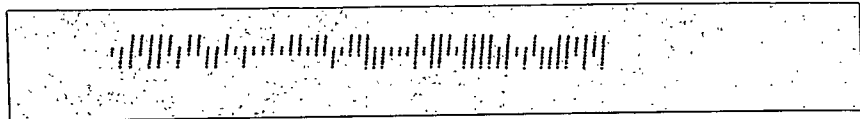
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TO:

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office box 11629  
Columbia, SC 29211

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MAR 19 2015

**SC Court of Appeals**