THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr.

Case No. 2013-CP-10-7203

Nationwide Property & Casualty
Insurance Company, ... Appellant,

v.

Gary McCombs and Ragan McCombs Albert, ... Respondents.

INITIAL BRIEF OF RESPONDENT RAGAN MCCOMBS ALBERT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL v

STATEMENT OF THE CASE 1

FACTS 2

STANDARD OF REVIEW 4

ARGUMENT

I. The Circuit Court properly granted Respondent Ragan McCombs Albert's Motion for Summary Judgment when Appellant Nationwide failed to produce evidence of negligence 5

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Baggerly v. CSX Transp.,
370 S.C. 362, 635 S.E.2d 97 (2006) 5

Baughman v. At&T,
306 S.C. 101, 410 S.E.2d 537 (1991) 7, 10

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)....................7, 10

Chaney v. Burgess,
246 S.C. 261, 143 S.E.2d 521 (1965) 9, 10

Charping v. J.P. Scurry & Co., Inc.,
296 S.C. 312, 372 S.E.2d 120 (Ct. App. 1988)....................4

David v. McLeod Reg'l Med. Ctr.,
367 S.C. 242, 626 S.E.2d 1 (2006) 10, 11

Estate of Cantrell v. Green,
302 S.C. 557, 397 S.E.2d 777 (Ct. App. 1990)....................5

Evan v. Stewart,
370 S.C. 522, 636 S.E.3d 632 (Ct. App. 2006)....................5

Gunnels v. Roach,
243 S.C. 248, 133 S.E.2d 757 (1963) 5

Hall v. Fedor,
349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002)....................8

Harris v. Rose's Stores, Inc.,
315 S.C. 344, 433 S.E.2d 906 (Ct. App. 1993)....................4

Klippel v. Mid-Carolina Oil, Inc.,
303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990)....................7

Lord v. D & J Enters.,
407 S.C. 544, 757 S.E.2d 695 (2014) 5

McLaughlin v. Williams,
379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008)....................7

Oliver v. South Carolina Dep't of Highways & Pub. Transp.,
309 S.C. 313, 422 S.E.2d 128 (1992) 6

Shealy v. Doe,
370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006) 9

Shelton v. LS & K, Inc.,
374 S.C. 294, 648 S.E.2d 307 (Ct. App. 2007) 6

Sherrill v. Southern Bell Tel. & Tel. Co.,
260 S.C. 494, 197 S.E.2d 283 (1973) 5

Snow v. City of Columbia,
305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991) 9

South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc.,
283 S.C. 182, 322 S.E.2d 453 (Ct. App. 1984) 4

Sunvillas Homeowners Ass'n v. Square D Co.,
301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990) 5

Turner v. Milliman,
392 S.C. 166, 708 S.E.2d 766 (2011) 4

Watson v. Ford Motor Co.,
389 S.C. 434, 699 S.E.2d 169 (2010) 9

Williams v. Chesterfield Lumber Co.,
267 S.C. 607, 230 S.E.2d 447 (1976) 9, 10

COURT RULES

Rule 56(c), SCRCP 4

Rule 56(e), SCRCP 7, 8

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO RESPONDENT RAGAN MCCOMBS ALBERT?

STATEMENT OF THE CASE

On December 11, 2013, Appellant Nationwide Property & Casualty Insurance filed a Complaint against Respondent Gary McCombs ("Respondent McCombs"), Respondent Ragan McCombs Albert ("Respondent Albert"), and Robert G. Albert, seeking to recover the cost of repairs to a condominium owned by its insured, Alison Smith Thornley. (Summons & Complaint, Negligence, filed December 11, 2013). On February 19, 2014, Nationwide filed an Amended Complaint against only Respondents McCombs and Albert. (Amended Complaint, filed Feb. 19, 2014). The only cause of action asserted by Appellant Nationwide is based on negligence. Appellant Nationwide seeks recovery of its estimated cost to repair Ms. Thornley's condominium, prejudgment interest, court costs, and post-judgment interest.

Both Respondents moved for summary judgment based on the fact that Appellant Nationwide failed to produce any evidence of negligence on the part of either Respondent. (Defendant Ragan McCombs Albert's Motion for Summary Judgment, filed July 15, 2014) (Respondent Gary McCombs' Motion for Summary Judgment, filed July 14, 2014).

The Honorable R. Markley Dennis, Jr. heard argument on the motions on August 1, 2014. Counsel for Respondent McCombs pointed out to the Court that Appellant Nationwide had presented no competent evidence: 1) of what caused the water damage in 2010, or 2) of any negligence on Respondents' part that caused or contributed to the 2010 water intrusion into Ms. Thornley's condominium. (Hr'g Tr. p. 6, lines 17-21). When asked by the Court to point to any evidence that showed Respondents caused the damage to the condominium, Appellant Nationwide's counsel responded, "Your Honor,

it's water intrusion from an above apartment," (id. p. 7, line 22 – p. 8, line 1), but could point to no evidence whatsoever of causation or negligence.

Appellant Nationwide's counsel could only state that water had flowed from above, (id. p. 7, line 25 – p. 8, line 1), and admitted that all their evidence shows is that the insurance company "looked at it and there was damage[.]" (Id. p. 8, lines 11-14). After advising Appellant Nationwide's counsel that South Carolina does not recognize the doctrine of *res ipsa loquitur*, the Court granted summary judgment. (Id., p. 8, line 25 – p. 9, line 1). The Court filed a Form 4 Order on August 4, 2014.

Appellant timely appealed to this Court.

FACTS

The facts in this appeal are fairly straightforward. On June 2, 2009, a water heater malfunctioned in a second-floor condominium owned by Respondent Albert, located at 1515 Cambridge Lakes, Mount Pleasant, South Carolina. As a result, the unit directly below Respondent Albert's suffered water damage. (Deposition of Alison Smith Thornley, taken July 11, 2014 ("Thornley Dep."), p. 17, lines 7-22). That unit is owned by Ms. Thornley, who carries property insurance with Appellant Nationwide. (Thornley Dep. p. 13, lines 4-11). Ms. Thornley's unit was completely repaired. (Id., p 22, lines 8-12). Ms. Thornley testified that she had no knowledge of whether the hot water heater had been repaired or replaced. (Id., p. 19, lines 10-13) (Id., p. 61, line 17 – p. 62, line 1). Appellant Nationwide paid for the 2009 repairs to Ms. Thornley's condominium.

Affidavits filed by both Respondent Albert and Respondent McCombs state that Respondent McCombs replaced the water heater in 2009 with a brand new unit purchased from Lowe's. (Affidavit of Ragan McCombs Albert, dated July 15, 2014)

(Affidavit of Gary McCombs, dated July 11, 2014). As far as Respondents are aware, there have been no problems with the new water heater installed by Respondent McCombs. (Id.)

On December 17, 2010, Ms. Thornley's unit experienced water damage again. Ms. Thornley testified that she did not have any discussions with either of the Respondents following the 2010 leak, (Thornley Dep. p. 25, lines 4-10) (id., p. 30, lines 22-24), nor did she inspect Respondent Albert's unit following the second episode of water intrusion. (Id. p. 30, line 22 – p. 31, line 8). Ms. Thornley testified that she did not have any personal knowledge regarding what caused the second leak or that Respondent Albert did anything to cause or contribute to water intrusion into the downstairs unit in 2010. (Thornley Dep. p. 40, lines 1-5) (Id. p. 62, lines 6-24). Although she could not identify the source of the information, Ms. Thornley testified that someone told her that the water came from the hot water heater in the second-floor condominium. (Thornley Dep. p. 24, lines 14-22) (Id. p. 31, lines 5-8) (Id. p. 62, lines 6-18). No witnesses were identified by Appellant Nationwide who can point to the source of the water or actions on the part of Respondent Albert that caused the water intrusion. (Appellant Nationwide's Response to Interrogatory No. 1).

At the hearing before Judge Dennis, Appellant Nationwide presented the Affidavit of Rich Gallion, which was provided to Respondents just prior to the hearing. (Hr'g Tr. p. 3, lines 14-23). Mr. Gallion states that he is an agent for Nationwide, that the supporting damage documentation attached to his affidavit was kept in the ordinary course of business, and that it contained financial information and data concerning the dates and costs of the 2009 and 2010 leaks into Ms. Thornley's condominium.

(Affidavit of Rich Gallion, filed August 4, 2014). After acknowledging that the lawsuit only involved the 2010 water intrusion, his affidavit stated that, "[i]t was determined that the loss was a results [sic] of water intrusion from the above condominium unit for both incidents." (Id., p. 3). Attached to his affidavit as Exhibit B was a Proof of Loss for Ms. Thornley's claim for the 2010 water damage, listing costs and including pictures.

STANDARD OF REVIEW

"Summary judgment is appropriate where it is clear from the evidence before the trial court that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Harris v. Rose's Stores, Inc., 315 S.C. 344, 345-46, 433 S.E.2d 906, 906 (Ct. App. 1993). "When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). A grant of summary judgment should be upheld "against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case."

Where the moving party has met its burden of showing the absence of any material fact, and the non-moving party "makes no factual showing in opposition . . . the court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law." South Carolina Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 189, 322 S.E.2d 453, 457 (Ct. App. 1984). The party opposing summary judgment "may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing there is a genuine issue of material fact for trial." Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 315-16, 372 S.E.2d 120, 122 (Ct. App. 1988). "Although summary judgment is a drastic remedy

which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper." Evan v. Stewart, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006).

ARGUMENT

I. The Circuit Court properly granted Respondent Ragan McCombs Albert's Motion for Summary Judgment when Appellant Nationwide failed to produce evidence of negligence.

To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages. Lord v. D & J Enters., 407 S.C. 544, 558, 757 S.E.2d 695, 702 (2014); Sherrill v. Southern Bell Tel. & Tel. Co., 260 S.C. 494, 499, 197 S.E.2d 283, 285 (1973). In other words, a plaintiff must prove that the defendant owed a duty of care to the plaintiff; that the defendant breached that duty by a negligent act or omission; and that damage proximately resulted from the breach of the duty. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 368-69, 635 S.E.2d 97, 101 (2006). "Unless the plaintiff establishes all three elements, his case fails." Estate of Cantrell v. Green, 302 S.C. 557, 560, 397 S.E.2d 777, 779 (Ct. App. 1990).

The analysis of a negligence claim is centered on the actions of the defendant. Sunvillas Homeowners Ass'n v. Square D Co., 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990). A plaintiff may not merely rest on the allegations in his complaint; instead, he must "present affirmative evidence which, at the very least, places the fact of breach in dispute." Estate of Cantrell, 302 S.C. at 560, 397 S.E.2d at 779. Moreover, any negligence on the part of a defendant "is not actionable unless it is a proximate cause of the injury complained of." Gunnels v. Roach, 243 S.C. 248, 251-52, 133 S.E.2d 757, 759 (1963). Proximate cause requires the plaintiff to prove that the defendant's

negligence was both the factual and legal cause of his injury. Oliver v. South Carolina Dep't of Highways & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992).

The Circuit Court did not err by granting summary judgment to Respondent Albert because Appellant Nationwide failed to produce evidence of her negligence. The movant for summary judgment has the burden to establish the absence of a genuine issue of material fact, which can be satisfied by "showing the trial court that there is an absence of evidence to support the nonmoving party's case." Shelton v. LS & K, Inc., 374 S.C. 294, 297, 648 S.E.2d 307, 308 (Ct. App. 2007). To support her motion for summary judgment, Respondent Albert submitted deposition testimony that Ms. Thornley never went upstairs to determine the cause of the 2010 water intrusion (Thornley Dep. p. 24, lines 12-14) (id. p. 62, line 22-24) and never spoke with Respondent Albert or Respondent McCombs regarding the origination or cause of the 2010 water leak. (Id., p. 25, lines 4-6). Ms. Thornley testified that she had no personal knowledge as to whether or not Respondent Albert did anything to cause or contribute to the damage in the first-floor condominium in December 2010. (Id. p. 40, lines 2-5). Both Respondent Albert and Respondent McCombs submitted affidavits asserting that a new hot water heater was installed after the 2009 water intrusion and that they are not aware of any problems with the current hot water heater. (Affidavit of Ragan McCombs Albert, dated July 15, 2014) (Affidavit of Gary McCombs, dated July 11, 2014). Accordingly, the record is silent as to the actual cause of the water intrusion or any breach by Respondent Albert, both of which are indispensable elements of Appellant Nationwide's negligence claim.

Once Respondent Albert, as the movant, established the lack of evidence to support Appellant Nationwide's cause of action, the burden shifted to Appellant Nationwide to set forth specific facts "by affidavits or other evidence demonstrating a genuine issue of material fact." Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 129, 399 S.E.2d 163, 164 (Ct. App. 1990). As the party with the burden of proof, Appellant Nationwide "must offer some evidence that a genuine issue of material fact existed as to *each* element" of its negligence claim. McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008) (emphasis added).

Appellant argues that summary judgment is inappropriate because it presented more than a scintilla of evidence that Respondent Albert is liable for the damage.[1] As evidence of negligence, Appellant Nationwide, relying on Ms. Thornley's deposition testimony, alleges that the condominium sustained water damage in 2010 that was similar to the water damage caused by a defective hot water heater in 2009. Ms. Thornley also testified that "[s]omeone told me" that it was the hot water heater, but she could not identify the source of the information. (Thornley Dep. p. 24, lines 12-22) (Id. p. 31, lines 5-8) (Id. p. 62, lines 6-21). This statement cannot be considered by the Court in its analysis nor can it be used to create a genuine issue of material fact. Not only did Ms. Thornley fail to identify the source of the information but, more importantly, this

[1] In its brief, Appellant Nationwide takes issue with the fact that Respondent Albert does not deny that a leak came from the condominium, just that a leak did not come from the water heater. (Brief of Appellant, p. 7-8). However, the burden is on the non-movant to show a genuine issue of material fact, not on the movant to disprove the case. The movant may point out to the trial court that there is a lack of evidence to support the plaintiff's case; the motion does not need to be supported by affidavits or other materials negating the plaintiff's claim. Baughman v. At&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Moreover, this affidavit directly addresses the assumption relied on by Nationwide Appellant that the new water heater *may* have malfunctioned, which is the only theory it has offered.

testimony is hearsay, which is inadmissible to refute a motion for summary judgment. Rule 56(e), SCRCP; Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654, 657 (Ct. App. 2002) ("[M]aterials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.").

A business records affidavit from Rich Gallion, who is employed as an agent for Appellant Nationwide, states that "the loss was a results [sic] of water intrusion from the above condominium for both incidents." (Affidavit of Rich Gallion, filed August 4, 2014). His affidavit is solely based on a review of the Nationwide records, however, and not his personal inspection of the condominium. *See* Rule 56(e), SCRCP ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). The Nationwide records pertaining to the 2010 loss, attached as Exhibit B to the affidavit, only include financial records and pictures of the first-floor condominium. Neither Mr. Gallion's affidavit nor the records produced in Exhibit B set forth the cause of the water intrusion or pinpoint any actions of Respondent Albert that caused the water intrusion. Instead, the affidavit is silent as to both negligence and causation.

At the hearing, Appellant Nationwide argued that an adjuster "went out and looked at" the first-floor condominium unit. (Hr'g Tr. p. 7, lines 19-21). When questioned by the Circuit Court as to what actually caused the damage, however, counsel for Appellant conceded that the evidence showing Respondent Albert's alleged negligence was based solely on the fact that "they looked at [the condominium] and there was damage." (Hr'g Tr. p. 8, lines 11-15).

Although either direct or circumstantial evidence may be used to prove negligence, the plaintiff may not rely on "mere conjecture or speculation" to show that the injury resulted from the negligent act of a defendant. Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965); Shealy v. Doe, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006) (explaining that circumstantial evidence must lead to a conclusion with reasonable certainty, not mere speculation).

Further, the existence of an injury, *i.e.,* water damage, does not automatically give rise to an inference of negligence. *See* Snow v. City of Columbia, 305 S.C. 544, 555, 409 S.E.2d 797, 803 (Ct. App. 1991) (requiring a plaintiff to show more than the mere fact of damage to her property). As pointed out by the Circuit Court, Appellant Nationwide cannot satisfy its burden of proof "by relying on the theory that . . . the very fact of injury indicates a failure to exercise reasonable care." Id. It is well-established that the doctrine of *res ipsa loquitur* is not recognized in South Carolina. Id. at n.7; *see also* Watson v. Ford Motor Co., 389 S.C. 434, 452, 699 S.E.2d 169, 178 (2010) (noting that South Carolina does not recognize *res ipsa loquitur*).

Appellant Nationwide also relies on Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976) to support its contention that summary judgment should not have been granted. In Williams, the plaintiff was injured when the machine he was repairing suddenly started. Although he could not identify the person who turned on the machine, he understood that the foreman of the company had the sole authority to operate the machine. The foreman denied starting the machine, and subsequent testing showed that the switch was not defective. The court determined that a factual issue existed as to who had control and authority over the switch.

The case at hand is distinguishable from Williams. There, one simple issue was present: who had control over the machine. The potential causes for the machine unexpectedly starting were narrowed when the switch was tested and was shown to be operating normally. Here, however, no evidence of negligence has been presented by at all by Appellant Nationwide. While it is true that "ambiguities, conclusions and inferences arising in and from the evidence" must be viewed in the light most favorably to the non-movant, id., at 610, 230 S.E.2d at 448, the non-movant still has the burden to put forth some evidence. Appellant Nationwide can only state that the first-floor condominium suffered water damage. There no evidence in the record or witnesses identified or proposed by Appellant Nationwide pointing to the source of the water or any actions or omissions on the part of the Respondents that caused the damage. Appellant Nationwide is not asking the Court to view the evidence in the light most favorably to the non-movant, it is asking the Court for permission to rely, inappropriately, on mere speculation and conjecture to satisfy its burden, which is expressly proscribed. *See* Chaney, 246 S.C. at 266, 143 S.E.2d at 523.

Summary judgment is warranted when a party 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. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Baughman v. At&T, 306 S.C. 101, 116, 410 S.E.2d 537, 545-546 (1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)); *see, e.g.*, David v. McLeod Reg'l

Med. Ctr., 367 S.C. 242, 626 S.E.2d 1 (2006) (upholding summary judgment because the submitted affidavit failed to establish the standard of care that was breached, an essential element of a medical malpractice cause of action).

Although Nationwide had the opportunity to investigate the cause of the water intrusion and determine the party, if any, at fault, it chose, for reasons unknown to Respondent Albert, not to do so. Accordingly, because Appellant Nationwide has failed to present any evidence whatsoever that supports its allegations against Respondents showing breach or causation, summary judgment should be affirmed.

CONCLUSION

For all the reasons stated above, this Court should affirm the Circuit Court's grant of summary judgment in this case.

Respectfully submitted,

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March 19, 2015

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PROOF OF SERVICE

I certify that on the 19th day of March 2015, I served the **Initial Brief of Respondent Albert** and **Designation of Matter** by depositing copies of the same in the United States Mail, postage prepaid, addressed to the following:

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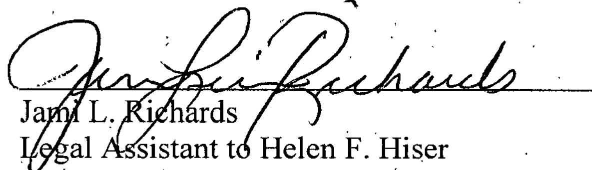

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