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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No.: 2015-01328

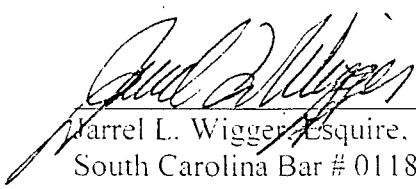
Donna Douglass, ... Appellant,

v.

Berkshire on St. Ives,
Berkshire Property Advisors, LLC,
BVF North Cove, LLC, and
The Berkshire Group, ...Respondents.

FINAL BRIEF OF APPELLANT

December 17, 2015



Harrel L. Wigger, Esquire, Fed. I.D. # 6345
South Carolina Bar # 011824
8086 Rivers Avenue, Suite A
North Charleston, South Carolina 29406
(843) 553-9800
Attorney for Appellant

STATEMENT OF THE ISSUES ON APPEAL:

1. **DID THE TRIAL JUDGE ERR IN ITS APPLICATION OF THE RELEVANT CASE LAW REQUIRING NOTICE IN A CASE WHERE THE DEFENDANTS CREATED THE HAZARDOUS CONDITION?**

2. **DID THE TRIAL JUDGE ERR BY ASSESSING COMPARATIVE FAULT WHICH IS THE PROVINCE OF THE JURY?**

3. **DID THE TRIAL JUDGE ERR BY FAILING TO APPLY THE STANDARD OR PROOF OF SUMMARY JUDGMENT? i.e. THE SCINTILLA STANDARD WHICH HAS BEEN ADOPTED BY SOUTH CAROLINA?**

STATEMENT OF THE CASE

This appeal results from the dismissal of the Plaintiff's case by the Honorable R. Markley Dennis, Jr. on April 8, 2015, in the Charleston County Court of Common Pleas, Civil Action Case No.: 2013-CP-10-7133.

The Plaintiff's negligence action was filed on December 9, 2013. The Plaintiff alleges the Defendant was negligent in causing the Plaintiff injuries when she fell down a flight of stairs due to the lack of adequate lighting. As a proximate result of her injuries, the Plaintiff incurred medical bills, lost wages, physical injuries and other damages. The Plaintiff and Defendant engaged in substantial discovery prior to Summary Judgment. Plaintiff provided their Memorandum in Opposition for Summary Judgment and was prepared to move forward with trial.

Appellant asserts that Judge Dennis erred granting the Defendant's Motion for Summary Judgment. The Plaintiff filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP, which was later denied with the Court finding that there was not a need for oral argument. Said Order was filed May 29, 2015. Judge Dennis' Order did not reflect what transpired or comported with the case law of South Carolina.

FACTS

Prior to January 6, 2011, the Defendants built and maintained an apartment complex. The Defendants leased to residential apartment dwellers and retained control over many areas. The Defendants were responsible for all common areas (which are at issue here), sidewalks, stairs, grass, lawns, parking lots, buildings, plumbing, HVAC, etc.

Neither apartment renters, nor visitors, had the right, responsibility, or ability to do anything to the common areas. Any action by an outside person would be a trespass (see attached deposition excerpts of Greg Moran, page 24, lines -16).

Traversing stairs has long been regarded as an inherently dangerous activity. The International Building Code (IBC), and the Southern Building Code (SBC), etc. have special sections just dealing with stairs. Stairs without lighting have long been recognized to create inherently hazardous conditions. Greg Moran, the maintenance supervisor admitted lighting on the stairs was a safety issue (see attached deposition excerpts of Greg Moran, page 27, lines 7-8).

In designing the stairway, it is undisputed the Defendants only had one (1) light for the stairway. The Defendants know that light bulbs burn out. In the deposition of Greg Moran, testified that the Defendants knew that no lighting in the stairs is a safety issue (see attached deposition excerpts of Greg Moran, page 27, lines 7-8). The Defendants know that resident users of the stairs have no way to fix a burned out light or even report a burned out light in the evening (see attached deposition excerpts of Greg Moran, page 24, lines 1-16). There is no one is on duty at the complex in the evening (see attached deposition excerpts of Greg Moran, page 15, Lines 5-7).

The Defendants' do not check for burned out lights at night (see attached deposition excerpt of Greg Moran, page 28, lines 9-22). The Defendants have a method of checking for burned out lights. (see attached deposition excerpt of Greg Moran, page 13, lines 14-15). Unfortunately and inadequately, the Defendants only use their tool for checking burned out light bulbs once a month (see attached deposition excerpt of Greg Moran, page 13, lines 14-15). This is in spite of knowing vendors and visitors are going to coming and going from the complex at night (see attached deposition excerpts of Greg Morgan, page 30, lines 9-25 and page 31, lines 1-9). Additionally, Defendants repaired stairs within the knowledge of rise and run requirements of the building code.

The owner and manager in this case created the inherently dangerous condition. They would have installed the lights, and controlled their replacement and they created the stairway. As the owner created the hazardous conditions, liability is not conditioned on specific notice. *Cook v. Food Lion, Inc., 328 S.C. 324.* The Plaintiff was invited to the premises for a business purpose and had no choice but to travel through the area of invitation and the inherently hazardous area created by the apartment complex (see attached deposition excerpts of Greg Moran, page 30, lines 9-25 and page 31, lines 1-16). Unfortunately, the Defendants did not provide a lighted area for the Plaintiff to traverse in an inherently dangerous area (see attached deposition excerpts of Donna Douglass, page 38, lines 18-21 and page 39, lines 6-7).

On or about January 6, 2011, the Plaintiff was called and directed to deliver a pizza to a resident located at building 700 on the premises of the Defendants, when she fell down a flight of stairs due to the lack of adequate lighting. Plaintiff was injured

during said fall and had to seek medical treatment (see attached deposition excerpt of Donna Douglass, page 44, line 1).

The Plaintiff was a pizza delivery driver. Her primary source of income is through tips (see attached deposition excerpt of Donna Douglass, page 28, lines 1-11). If she doesn't deliver her pizza, she doesn't get paid. Also Ms. Douglass has diminished mental capacity. As set out in her Workers' Compensation deposition and as referenced in the deposition taken by the Defendants (see attached deposition excerpt of Donna Douglass, page 7, lines 23-25), she has learning disabilities and does not have the same mental capacity as the general population. She lacked the ability to assess a hazardous condition the same as the general public.

When Ms. Douglass got to the facility, the light was out and she had to deliver her pizza. She had no way to call anyone to replace the light, or even repair it, and she fell due to the lack of lighting (see attached deposition excerpt of Donna Douglass, page 29, lines 1-5).

Although it is not binding precedent, the same Judge, in the same capacity, presiding over a failure to provide lighting in a public space case just three (3) months before, where many of the same arguments were presented, *Robert J. Burke, et al vs. Republic Parking System, Inc., Case No.: 2013-CP-10-1400*. The case was allowed to go to the jury and an amount of $4,000,000.00 was awarded by the jury. The arbitrary and capricious nature of the ruling in this case is highlighted by dismissal compared to what happened in the Burke case.

Pursuant to the testimony of the Defendants' Maintenance Supervisor, Greg Moran, he stated that it would not be unusual for more than one or two of the lights to be

out at the same time (see attached deposition excerpts of Greg Moran, page 16, lines 18-19). He further testified that lighting was always a safety issue and that he could not delegate a safety issue to a resident, that he buys the lights and that if he saw a lighting issue it was his responsibility to fix it (see attached deposition excerpts of Greg Moran, page 27, lines 1-24). Mr. Moran went on to state in his deposition that he generally knew the life of a light bulb and that he knew where to locate the life expectancy of a light bulb (see attached deposition excerpts of Greg Moran, Page 27, line 25 and page 28, lines 1-8). He stated that they would not replace the light bulbs until they were burned out and that there were no systems in place to systematically replace the light bulbs (see attached deposition excerpts of Greg Moran, page 28, lines 9-22). He went on to state that he knew when there was a situation where the lighting would burn out, he would wait until it was reported or see before he would replace it, that it was a safety issue and he was aware that it was going to burn out and he should anticipate replacing it. (see attached deposition excerpts of Greg Moran, page 28, lines 23-25 and page 29, lines 1-20). Further in his deposition Mr. Moran went on to state that there was not any other overhead lighting or any lighting that would illuminate the area on the ground at the bottom of the particular stairway where the Plaintiff fell (see attached deposition excerpts of Greg Moran, Page 33, lines 2-7). Mr. Moran also stated he was not familiar with any of the building codes regarding the rise and run of the stairways, that they were always repairing the stairs because they were about 30 years old, made out of wood, and would become misshapen or disfigured (see attached deposition excerpts of Greg Moran, page 34, lines 24-25 and page 35, lines 1-18). Mr. Moran further stated that the maintenance guys do not always make an entry in the maintenance log every time they change a light

bulb (see attached deposition excerpts of Greg Moran, page 35, lines 19-21). He also stated they only checked for light bulbs about once a month and that only residents or employees could put in a work order (see attached deposition excerpts of Greg Moran, page 13, lines 14-15 and page 10, lines 2-3).

The Defendants' previous service manager, Richard King, also testified that sometimes a service request would be written up and sometimes they wouldn't (see attached deposition excerpts of Richard King, page 10, lines 2-4). Mr. King also testified that he would walk through the grounds and that if something needed to be fixed, they would just fix it right away without recording it (see attached deposition excerpts of Richard King, page 10, lines 19-24). Mr. King stated in his deposition excerpts that maintenance work is the apartment complex owner's responsibility and that the stairs were wood and they would constantly have to be nailed down as they were pulling up (see attached deposition excerpts of Richard King, page 13, lines 1-13).

Pursuant to the deposition testimony of both the Defendants' previous service manager and current maintenance supervisor, it appears as if the Defendants do not have any adequate systems in place for the safety issues regarding lighting and that there wasn't always a written log of if and when lights were replaced. The stairs had to be constantly repaired. The stairs had to be repaired and/or replaced. Additionally, although they knew the life expectancy or knew how to find out the life expectancy of a light bulb and had a tool to see if a light bulb was burned out, but they only used it once a month. There were not any overhead lights or any additional lighting that would illuminate the area on the ground below the particular stairway where the Plaintiff fell and that it was the Defendants' responsibility to provide a safe environment for the tenants and/or

visitors on their premises. Plaintiff's counsel was not allowed to set out most of his oral argument and was precluded from providing any more information to the Court.

On April 8, 2015, Plaintiff and Defense counsel attended the Defendant's Motion for Summary Judgment. Plaintiff's counsel began his oral argument when the Honorable R. Markley Dennis, Jr., interrupted several times and stated that (see transcript of April 8, 2015):

> ... I tried one of these, just recently. They ended up settling because, I think, I threatened at the half what I was going to do. Very similar ...

As counsel continued to attempt to present his argument, he cut counsel off and interjected:

> ... Well, I've got news for you. Maybe you haven't had the same problems that I have. I've bought light bulbs and they burn out a heck of a lot sooner than one would think. I appreciate your position, you've briefed it, it's covered. I'm granting the summary judgment...

ARGUMENTS

1. DID THE TRIAL JUDGE ERR IN ITS APPLICATION OF THE RELEVANT CASE LAW REQUIRING NOTICE IN A CASE WHERE THE DEFENDANTS CREATED THE HAZARDOUS CONDITION?

While the court relied on *Wintersteen vs. Food Lion 344 S.C. 32, 35, 542 S.E. 2d 728, 729 (2001) and Larimore vs. Carolina Power Light, 340 S.C. 438, 445, 521 S.E. 2d 535, 539 (Ct. App. 2000)*, the Plaintiff submits that those cases are not the cases that applied to this situation. As set out below; however, even if those cases do have any relevance, Plaintiff should still prevail.

Plaintiff contends that the cases of *Henderson vs. St. Francis Community Hospital, 303 S.C. 177, 399 S.E. 2d 767 (1990) and Margie M. Cook v. Food Lion, Inc., 328 S.C. 324 (1997)* are more analogous to the present case. A look at the facts in those cases is informative as to their applicability here. As those cases set out, if the Defendants' create or are aware of a repeating hazardous situation, specific notice is not required. In *Henderson*, there was a gum tree that was beside the sidewalk. Gumballs would fall out of the tree onto the sidewalk and be present frequently creating a hazard. Even though it was impossible for the Plaintiff to prove the Defendants were aware of the specific gumballs the Plaintiff fell on, since the Defendants' failed to use a regular maintenance program or maintain records, the Hospital was held liable when someone fell on a gumball. The Plaintiff was not required to prove notice of the specific gumball she fell on.

In *Cook v. Food Lion,* there were mats that wrinkled up in the entrance way where the sliding glass doors were. It would have been impossible to prove that the Defendant's knew of the specific wrinkle in the mat that caused Ms. Cook's fall; however, as it was an

ongoing situation, there was liability. Contrary to analysis which at the time would have been the *Simmons vs. Winn-Dixie Greenville, Inc., 318 S.C. 310,* the court recognized and attached liability in the case despite no specific notice. The Plaintiff submits that is what should happen in the present case.

2. DID THE TRIAL JUDGE ERR BY ASSESSING COMPARATIVE FAULT WHICH IS THE PROVINCE OF THE JURY?

As it is clear in the record, Plaintiff's counsel did not get an opportunity to argue. Oral argument is a cherished right and if one side gets the opportunity to fully present their position orally, then the other side should be allowed fair and free discussions. The Plaintiff was prejudiced by not being allowed to fully explain their position on the record prior to the Court making its decision, especially regarding Ms. Douglass' diminished mental capacity.

The Court clearly made the assumption that Ms. Douglass was of average intelligence and was able to make an informed thought out decision. As alluded to in Ms. Douglass' deposition, she is a person who has limited capacity as compared to most of the public and is not capable of analyzing a hazard as it is alleged she did here. Clearly the Court heard no argument on that issue which undercuts its own ruling that as a matter of law Ms. Douglass was more responsible than the landowner who could have fixed the hazard. That decision takes the province of a jury decision away and Ms. Douglass' understanding and comprehension of the situation should be weighed by a jury who has the chance to observe her and weigh that against a commercial business owner that controls the area she was invited to, as to who is responsible.

For all these reasons, the Plaintiff respectfully requests the Court set aside the dismissal and remand the case back to the Court of Common Pleas for a jury trial.

3. DID THE TRIAL JUDGE ERR BY FAILING TO APPLY THE STANDARD OR PROOF OF SUMMARY JUDGMENT? i.e. THE SCINTILLA STANDARD WHICH HAS BEEN ADOPTED BY SOUTH CAROLINA?

South Carolina is now a scintilla of evidence State. Defendant's Motion should be denied due to the fact that this is the standard adopted by South Carolina. *Froneberger v. Smith, 406 S.C. 37, 748 S.E.2d 625 (S.C. App. 2013)*. In Froneberger, the Court concluded that the Plaintiff presented sufficient evidence to satisfy the scintilla of evidence requirement that is needed to defeat summary judgment. *Id.* "However, given the minimal amount of discovery the parties had conducted at the time summary judgment was granted, we find the Smiths' answers created a mere scintilla of evidence that precluded summary judgment". *Id.* South Carolina has now universally adopted this standard. The Plaintiff opposes this motion on the grounds that based on the facts, taken in the light most favorable to the Plaintiff, do not entitle the Defendant to judgment as a matter of law. Moreover, there are issues of material fact which make the matter one for a jury.

At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied. *Hill v. York County Sheriff's Department, 313 S.C. 303, 437 S.E.2d 179, 182 (Ct. App. 1993)*.

Ms. Douglass clearly has met her burden here. There are many jury issues presented and there are many pieces of evidence which combined and provide more than an scintilla evidence that the Defendants should be held liable.

Granting the Defendant's Motion for Summary Judgment is not proper in this action. South Carolina policy favors "the disposition of issues on their merits rather than

on technicalities." *Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001).* While the power to dismiss clearly lies with the courts, it is appropriately exercised only with restraint. Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits. The policy in South Carolina has always been to decide cases on the merits.

"Summary judgment is inappropriate when reasonable minds can differ as to any material fact." *Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447, 448 (1976).* "Generally, negligence claims are not susceptible of summary adjudication because of the many questions normally present in such cases concerning the reasonableness of a party's conduct, forseeability, and proximate cause. *Folkens v. Hunt, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986); Schmidt v. Courtney and Kemper Sports of Crowfield, Inc., Opinion No. 3719 (S.C. App. 12/22/2003) (S.C. App., 2003).*

"Summary Judgment must be denied if there is any genuine dispute between the parties." *Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336, 339 (1977).* "Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Tupper v. Dorchester County, 326 S.E. 318, 487 S.E. 2d 187 (1997); Baugus v. Wessinger, 303 S.C. 412, 401 S.E. 2d 169 (1991).* Even if the only dispute is how to draw conclusions or determinations from undisputed facts, summary judgment should be denied. Tupper, *Supra.* At the summary judgment stage, the Plaintiff need not prove his case, only that there is a genuine issue of material fact regarding the merits of his claim. For summary judgment to be granted, it must be perfectly clear no issue of facts is involved. *Piedmont Engineers, Architects and Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 293 S.E. 2d 706 (1982).*

CONCLUSION

It is clear that the Defendant's Motion for Summary Judgment should not have been granted. The Judge erred by granting the Defendant's Motion for Summary Judgment.

For the reasons set forth above, and for the Judge's error in granting the Defendant's Motion for Summary Judgment, this Order granting said Summary Judgment should be reversed, set aside and the case remanded for trial.

December 17 2015

Jarrel L. Wigger, Esquire, Fed. I.D. # 6345
South Carolina Bar # 011824
8086 Rivers Avenue, Suite A
North Charleston, South Carolina 29406
(843) 553-9800
Attorney for Appellant