THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr.

Case No. 2013-CP-10-7203
Appellate Case No. 2014-001907

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

v.

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

BRIEF OF RESPONDENT GARY MCCOMBS

Andrew S. Halio
Halio & Halio
Post Office Box 747
Charleston, SC 29402-0747
(843) 577-5200

Attorneys for Respondent Gary McCombs

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1. DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT IN FAVOR OF GARY MCCOMBS BASED ON THE ABSENCE OF ANY EVIDENCE OF NEGLIGENCE ON HIS PART?

STATEMENT OF THE CASE

On December 11, 2013, Appellant Nationwide Property & Casualty Insurance Company ("Nationwide") filed this negligence action against Gary McCombs, Regan McCombs Albert, and Robert G. Albert action seeking damages in the amount of $18,923.91 for the cost of repairing a condominium due to water damage. On February 19, 2014, Nationwide filed an Amended Complaint against Respondents Gary McCombs ("McCombs") and Regan McCombs Albert ("Albert") only. McCombs and Albert answered the Amended Complaint on March 4, 2014, asserting a general denial and various affirmative defenses.

After conducting discovery, McCombs and Albert filed motions for summary judgment, supported by their affidavits, asserting that Nationwide failed to produce evidence of negligence that caused or contributed to the damages that it was claiming. Nationwide filed a Reply to the motions accompanied by an affidavit from one of its employees.

The motions for summary judgment were heard on August 1, 2014. After considering the arguments of counsel, the Circuit Court determined that Nationwide had failed to produce any evidence of negligence and granted the motions. A Form 4 Order, "Judgment in a Civil Case," was entered on August 1, 2014.

Nationwide filed a Notice of Appeal on September 4, 2014 and an Amended Notice of Appeal on September 5, 2014.

FACTS

Alison Thornley is the owner of a condominium in Cambridge Lakes Horizontal Property Regime, Mt. Pleasant, South Carolina. (R. p. 156, line 25-p. 157, line 5) Her condominium is insured by Nationwide. (R. p. 166, lines 4-5) Mrs. Albert owns a condominium unit above hers. (R. p. 169, lines 15-21; p. 191, lines 8-21) In June 2009, Mrs. Thornley's unit sustained water damage that she understood was caused by a leaky hot water heater in Mrs. Albert's unit. (R. p. 194, line 22-p. 195, line 7) The damage was repaired. (R. p. 177, lines 8-12) The June 2009 incident is not the subject of this lawsuit.

Following the June 2009 incident, Mrs. Albert's father, Gary McCombs, installed a new hot water heater from Lowe's in her unit. (R. p. 393) According to both Mr. McCombs and Mrs. Albert, there have been no problems with the new hot water heater, and it is still in use today. (R. pp. 393-395) This lawsuit was their first notice of any alleged problems or issues. (R. pp. 393-395)

On December 11, 2013, Nationwide filed this lawsuit. The Amended Complaint alleges that in December 2011 water from Mrs. Albert's unit damaged the Thornley unit. (R. p. 25, ¶ 6) According to a Nationwide employee, the date of loss was actually December 17, 2010. (R. p. 344, ¶ 6A) With respect to negligence, the Amended Complaint merely alleges that the "Defendant" failed to "maintain his property and has thus breach (sic) his duty to the below property owners." (R. p. 25, ¶ 10).

The parties conducted discovery. Nationwide identified two fact witnesses: its insured, Alison Thornley, and Katie Crookshank, Claims Specialist. (R. pp. 398-

399) No expert witnesses were identified. (R. p. 400) Nationwide produced no witness statements or other documents indicating that it had spoken to anyone with knowledge of - or that it otherwise investigated - the cause of the loss. (R. pp. 401-477) Mrs. Thornley was deposed, and her testimony indicated that she has no first-hand knowledge of what caused the water damage to her unit or who was responsible.

McCombs and Albert subsequently filed their motions for summary judgment and affidavits. (R. pp. 106-107, 393; 394-395; S. pp. 4-5) In response, Nationwide filed a Reply and an affidavit from employee Rich Gallion. (R. pp. 129-135; R. pp. 343-345) Neither the testimony cited in the Reply nor the contents of Mr. Gallion's affidavit includes evidence of negligence on the part of McCombs or Albert. (R. pp. 130-131; R. pp. 343-345)

At the motions hearing, the Court attempted to determine if Nationwide had any evidence of negligence or knew of any witnesses who could provide evidence of negligence. (R. p. 144, lines 11-24) Nationwide's counsel was unable to point out evidence of negligence in the record or to identify any witnesses who could provide such evidence. (R. p. 144, line 11 – p. 145, line 14) Accordingly, the Court granted the motions. (R. p. 145, lines 15-16)

STANDARD OF REVIEW

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories and affidavits show that 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. The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact; the moving party may discharge the

burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. *Bennett v. Investors Title Ins. Co.,* 370 S.C. 578, 635 S.E. 2d 649, 654 (Ct. App. 2006). To withstand a motion for summary judgment, the nonmoving party is only required to submit a scintilla of evidence warranting determination by a jury. *Murphy v. Tyndall,* 384 S.C. 50, 681 S.E. 2d 28, 30 (Ct. App. 2009), *reh'g denied.* However, a party opposing a motion for summary judgment must do more than rely on mere allegations. *Walton v. Mazda of Rock Hill,* 376 S.C. 301, 657 S.E. 2d 67, 70 (Ct. App. 2008), *cert. denied.* The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Bennett v. Investors Title Ins. Co.,* 370 S.C. 561, 635 S.E. 2d 660 (Ct. App. 2006). Rule 56 (c) requires the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case on which that party will bear the burden of proof at trial. *Carolina Alliance for Fair Employment v. South Carolina Dep't. of Labor, Licensing, and Regulation,* 337 S.C. 476, 523 S.E. 2d 795, 800 (Ct. App. 1999). When reviewing a grant of summary judgment, this Court applies the same standard applied by the trial court: summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Savannah Bank, N.A. v. Stalliard,* 400 S.C. 246, 734 S.E. 2d 161, 163 (2012).

ARGUMENT

1. THE CIRCUIT PROPERLY GRANTED GARY MCCOMBS' MOTION FOR SUMMARY JUDGMENT WHERE NATIONWIDE FAILED TO PRODUCE ANY EVIDENCE OF NEGLIGENCE ON HIS PART.

A plaintiff must establish three elements to recover in a negligence action: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; and (3) damage proximately resulting from the breach. *Chakrabarti v. City of Orangeburg,* 403 S.C. 308, 743 S.E. 2d 109, 112 (Ct. App. 2013). If the plaintiff fails to establish any one of these elements, the action fails. *Richardson's Restaurants, Inc. v. National Bank of South Carolina,* 304 S.C. 289, 403 S.E. 2d 669, 672 (Ct. App. 1991). The burden of proof is on the plaintiff to show not only the injury but also that the injury was caused by the actionable negligence of the defendant. *King v. J.C. Penney Co.,* 238 S.C. 336, 120 S.E. 2d 229 (1961). South Carolina does not follow the doctrine of *res ipsa loquitur, Watson v. Ford Motor Co.,* 389 S.C. 434, 699 S.E. 2d 169, 179 (2010), *reh'g denied,* and the plaintiff's burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care. *Snow v. City of Columbia,* 305 S.C. 544, 409 S.E. 2d 797 (Ct. App. 1991).

The evidence in this case comes from four witnesses: Alison Thornley, by way of deposition; and Gary McCombs, Ragan McCombs Albert and Rich Gallion, by way of affidavits. Nationwide's discovery responses are also relevant to this discussion. A careful examination of the record will show that the there is no direct evidence of negligence on the part of Mr. McCombs and that Nationwide's attempt to create an issue of fact based on circumstantial evidence amounts to mere conjecture

and speculation. The Circuit Court properly granted the motion, and this Court should affirm.

Testimony of Alison Thornley

Alison Thornley did not talk to Mr. McCombs or Mrs. Albert or the occupants of the upstairs unit about the 2010 incident. (R. p. 223, lines 2-5) She did not walk upstairs to see where the water was coming from. (R. p. 188, line 25-p 189, line 4; R. p. 223 lines 22-24) Accordingly, she provided no evidence as to the source of the water or as to any negligent conduct.

Affidavits of Gary McCombs and Ragan McCombs Albert

In his affidavit, Gary McCombs stated that he installed a brand new hot water heater in his daughter's apartment after a leak in June 2009; that it is still in use; that he is unaware of any problems with the new hot water heater; and that he was unaware of any issues with the water heater until he was served with this lawsuit. (R. p. 393) Similarly, Mrs. Albert stated that the hot water heater is still in use; that she is unaware of any problems with it; and that she was unaware of any alleged issues with it until she was served. (R. pp. 394-395)

Nationwide's Discovery Responses

Nationwide identified no witnesses other than its insured, whose testimony is discussed above, and a subrogation claims specialist, Katie Crookshank, who did not provide an affidavit in opposition to the motions. (R. p. 398) Nationwide's document production was limited to photographs of its insured's unit and repair estimates and included nothing indicating that it sent anybody to look at the upstairs unit or that it otherwise investigated the cause of the loss. (R. pp. 401-477)

Nationwide's Reply

In its Reply to the motions, Nationwide referenced certain portions of the Thornley deposition, none of which establish any negligent acts or omissions on the part of Gary McCombs. The testimony cited by Nationwide included the following:

1) There were two instances of water damage;
2) McCombs was involved in fixing his daughter's hot water heater after the first incident;
3) Thornley's tenants informed her that there was water pouring down the walls in 2009;
4) Different tenants were in the unit at the time of the second incident; and
5) The new tenants informed Thornley that the water was coming from upstairs in 2010.
(R. pp. 130-131)

Affidavit of Rich Gallion

Nationwide filed an affidavit from Rich Gallion in opposition to the motions. Mr. Gallion identified himself as an "agent" for Nationwide. (R. p. 343, ¶ 3) The affidavit is a business records affidavit based on a review of the file. (R. pp. 343-344, ¶¶ 3–5) The substance of the affidavit is that Nationwide insured the Thornley unit; that there were two separate claims in 2009 and 2010; and that Nationwide paid both claims. The records attached to the affidavit are essentially the same photographs of the Thornley unit and repair estimates that were attached to Nationwide's discovery responses. (R. pp. 346-392) There is nothing in the affidavit or the records indicating that anybody from Nationwide investigated what actually caused the loss. Nonetheless, Mr. Gallion concludes that: "It was determined that the loss was a results (sic) of water intrusion from the above condominium unit for both incidents." (R. pp. 344-345, ¶ 6).

Motions Hearing

The Circuit Court did its best to determine if Nationwide could provide any evidence of what caused the water damage and who was potentially responsible. The Court specifically asked Nationwide's counsel who could provide evidence of a "problem" in the upstairs unit. (R. p. 144, lines 16-18) The response from counsel was that "the adjuster went out and looked at the unit." (R. p. 144, lines 19-21) No information was provided - in the argument or in the affidavit or in discovery responses - as to who the adjuster was, where the adjuster went, what the adjuster did, or any other information pertinent to establishing the cause of and potential responsibility for the loss. The Court then asked for evidence that "this was caused by the person that you've sued." (R. p. 144, lines 22-24) The response was that there was "water intrusion from an above apartment." (R. p. 144, line 25-p. 145, line 1). After noting that *res ipsa loquitur* is not applicable in South Carolina, the Court once again reminded counsel that "you've got to prove what they did." (R. p. 145, lines 2-8) Nationwide's counsel responded: "I believe that's a question of fact." (R. p. 145, lines 9-10) The Court summarized Nationwide's argument as follows: "That's all you've got, basically that they looked at it and there was damage?" (R. pg. 145, lines 11-12) The response was: "Yes, Your Honor." (R. p. 145, line 13) Faced with this evidence and these arguments, the Circuit Court had no option other than to grant the motions.

The Appeal

There is nothing in Nationwide's appeal that should change the result in this Court. In its brief, Nationwide cites the following evidence in support of its position:

1) There were two incidents of water damage;

2) Mrs. Thornley was told that the second leak came from Mrs. Albert's unit;
3) The same damage occurred in both incidents;
4) Nationwide sent somebody over to assess the damage;
5) Gallion "testified" that "it was determined" that the water came from the Albert unit on both occasions; and
6) Gallion's affidavit is "direct evidence" that the water came from the above unit.

Based on this evidence and "reasonable inference," Nationwide concludes that the Defendants are "liable" for the damage. (Brief of Appellant, pp.7-8)

The evidence cited by Nationwide is insufficient to establish negligence, and some of it should not be considered. Mrs. Thornley did testify that she received information that the water came from the Mrs. Albert's unit in 2010. (R. p. 180, lines 12-18) Unfortunately, she cannot remember who told her. (R. p. 223, lines 16 – 18) The information might have come from a representative of her homeowner's association, or the property manager for the HOA, or a Nationwide employee. (R. p. 180, lines 2-22; R. p. 223, lines 6-18) Whoever it came from, this testimony is hearsay, and it should be disregarded. Materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence at trial. *Hall v. Fedor,* 349 S.C. 169, 561 S.E. 2d 654, 657 (Ct. App. 2002).

Mr. Gallion's affidavit provides no "direct evidence" of anything, and his conclusory statement that the second loss was caused by water from Mrs. Albert's unit should also be disregarded. It appears from the notary stamp that Gallion is from Los Angeles (R. p. 345), which probably explains why his affidavit is based on a review of the file and not on first-hand knowledge. (R. pp. 343-344, ¶¶ 3-5) His affidavit purportedly includes the "relevant financial information and data concerning

the Plaintiff's claim." (R. p. 344, ¶ 6) The affidavit does not contain any details of an investigation into the cause of the loss, and it does not indicate that Gallion had any personal involvement in the investigation. Yet it concludes that: "It was determined that the loss was a results (sic) of water intrusion from the above condominium for both incidents." (R. p. 345, ¶ 6G) There is no information as to who made this determination, when it was made, or how it was made. Rule 56 (e), SCRCP, states that affidavits "shall be made on personal knowledge." Gallion's statement that the water intrusion came from the above condominium is not based on personal knowledge and must therefore be disregarded. Furthermore, there is nothing in the records that he reviewed that support the statement that the water damage in the 2010 incident was the result of water from the upstairs unit. Gallion's affidavit merely establishes that Nationwide paid two water damage claims on the Thornley unit.

Clearly, there is no direct evidence of negligence on the part of Gary McCombs and no direct evidence that the water heater was even involved in the 2010 incident. Furthermore, Nationwide has failed to establish a genuine issue of material fact based on circumstantial evidence. Considering the admissible evidence, Nationwide's argument boils down to the following: there were two incidents of water damage, the first of which was caused by a leaky hot water heater in the upstairs unit, and since the damage was similar in both incidents, the upstairs unit must have been the cause of the damage in the second incident. For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and must have sufficient probative value to constitute the basis for a legal inference and not for speculation, surmise or

conjecture. *Gastineau v. Murphy,* 331 S.C. 565, 503 S.E.2d 712 (1998), *reh'g denied.* To suggest that McCombs may be responsible for this loss because he installed a hot water heater – a new hot water heater that was in use for over a year before the loss, is still in use and may not have even been involved in the 2010 incident– is pure speculation.

Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E. 2d 447 (1976), cited by Nationwide in support of its argument on liability, is distinguishable from the instant case. *Williams* involved a machine that injured the plaintiff. The main issue in the case was whether summary judgment was appropriate where it could not be determined exactly who had authority and control over the machine's switch. There does not appear to have been an issue as to negligence or as to what caused the injury, only as to which party was negligent. Here Nationwide can provide neither proof of negligence nor evidence of what caused the water damage. (Brief of Appellant, p. 4) *Williams* does not support its position in this case.

Gary McCombs satisfied his initial burden of pointing out the lack of evidence of negligence in the record, and Nationwide has been unable to come forward with evidence showing a genuine issue for trial. Nationwide had the opportunity to investigate what caused the loss, but instead of sending somebody upstairs to knock on the door, chose to wait three years and file suit. Under the circumstances, the Circuit Court properly granted the summary judgment motions, and nothing presented in this appeal warrants reversal.

CONCLUSION

For the reasons set forth above, the Respondent, Gary McCombs, requests that this Court affirm the order granting summary judgment in his favor.

Respectfully submitted,

December 31, 2015

Andrew S. Halio
Halio & Halio
Post Office Box 747
Charleston, SC 29402-0747
(803) 577-5200

Attorneys for Respondent Gary McCombs

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

December 31, 2015

ANDREW S. HALIO
S.C. Bar No.: 02459
13 North Adgers Wharf-Box 747
Charleston, SC 29402-0747
(843) 577-5200

Attorneys for Respondent Gary McCombs