THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Chief Judge

Case No.: 2016-000491

Crystal Faye Clark, ... Appellant,

v.

Housing Authority of The City of Columbia.....Respondent.

FINAL BRIEF OF RESPONDENT

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Shawn D. Eubanks (Bar No. 78370)
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II. WHETHER THE APPELLANT FAILED TO PRESERVE THE ISSUE OF ASSUMPTION OF RISK FOR APPELLATE REVIEW AND SHOULD BE PRECLUDED FROM PRESENTING THE ISSUE ON APPEAL.

STATEMENT OF THE CASE

This matter is on appeal from the Court of Common Pleas of the Fifth Judicial Circuit. On November 6, 2014, Crystal Faye Clark ("Appellant") filed a Summons and Complaint seeking actual and punitive damages, medical and incidental expenses, and costs associated with the action asserting negligence on the part of the Housing Authority of the City of Columbia ("Respondent"). The Respondent timely answered. Following discovery and depositions, the Respondent moved for Summary Judgment. On October 25, 2015, the Honorable Judge Alison Renee Lee granted the Respondent's Motion.

The Appellant filed a Motion for Reconsideration on November 6, 2015. The Appellant received notice of the Circuit Court's denial of the Motion for Reconsideration on February 10, 2016. Thereafter, on March 10, 2016, the Appellant filed her appeal of the Circuit Court Order to this Court.

STATEMENT OF THE FACTS

The Appellant rented an apartment from the Respondent and resided at that apartment from January 26, 2012, to July 30, 2013. (R. pp. 299-305). The Appellant was served with an eviction notice on March 11, 2013, because her son was arrested in her apartment with illegal drugs in violation of the terms of her lease. (R. p. 309). The Respondent subsequently evicted the Appellant on July 30, 2013. (R. p. 306).

The Appellant asserts that she was injured in her apartment on July 10, 2013, as a result of a fall down a staircase located within her apartment. The layout of the Appellant's apartment requires that after opening the door to the apartment, a person must ascend a flight of stairs to reach the living quarters. There is a railing on one side of the stairs and a wall on the other. The stairs are concrete, and each stair is covered by a large black protective mat with anti-slip tread

lines. (R. p. 221). The staircase is the only entrance into the living quarters of the apartment.

The Respondent has a notification procedure for all maintenance requests, which requires tenants to contact the Respondent's office with issues and to submit a formal request for maintenance. Each request is logged by the Respondent for assignment to the maintenance crew. The Appellant admitted that she knew of the procedures for maintenance requests as evidenced by several maintenance reports made by the Appellant in the past. (R. p. 55, lines 13-18; R. pp. 305-06).[1] Although, the Appellant alleges she made a maintenance call about the stairs, she could not provide any evidence of the time or date of the call or any evidence of any person to whom she may have spoken to about her stairs prior to July 10, 2013. (R. p. 251).

Shortly before the Appellant's alleged fall, on June 27, 2013, she made an unrelated maintenance repair request, which did not contain any reference to the stairway in the Appellant's apartment. (R. p. 305). The Respondent's standard work order form requires the maintenance technician to report other obvious maintenance issues in the apartment by notating such issues on the form. The Respondent made the repairs on June 28, 2013, and no damage to the stairs was noted on the work order. (R. p. 314). There is no evidence that the Respondent or its agents had any further access to the apartment prior to the alleged injury.

On the morning of July 10, 2013, the Appellant left her home via the stairs without incident to go grocery shopping. (R. p. 51, lines 8-10). She returned home and ascended the stairs without incident. When the Appellant used the stairs for the third time that morning, she asserts that she tripped and fell on the stairs because the mat was loose. (R. p. 315).

On July 11, 2013, the Respondent received a report from the Appellant's goddaughter that the Appellant had fallen down the stairs on July 10, 2013, and was injured. A representative

[1] The Appellant made a request on April 11, 2013, for the stairs in her home to be repaired, and the Respondent made the repairs on April 18, 2013. (R. p. 306; R. pp. 311-13).

of the Respondent reported to the apartment to take a photograph of the stairs. The photograph showed that one of the mats was pulled away from the stairs. (R. p. 316). On November 6, 2014, the Appellant initiated this action.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c)." Turner v. Milliman, 392 S.C. 116, 121, 708 S.E.2d 766, 769 (2011). An appellate court reviewing a grant of Summary Judgment "must consider the facts and inferences in the light most favorable to the nonmoving party." Estate of Cantrell v. Green, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990). "A party opposing a properly supported motion for summary judgment . . . must set forth or point to the specific facts showing that there is a genuine issue of material fact. The existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment." Thomas v. Waters, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994). "[The Court] is not required to single out some morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." Priest v. Brown, 302 S.C. 405, 408, 396 S.E.2d 638, 640 (Ct. App. 1990).

Summary Judgment is appropriate where "the pleadings, depositions, and 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." Rule 56(c), SCRCP; see also Tupper v. Dorchester Cty., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In opposing a motion for Summary Judgment, "the plaintiff cannot defeat the defendant's motion by relying upon the mere allegations of his complaint but must

disclose the facts he intends to rely on by affidavit or other proof." Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THERE WAS NO GENINUE ISSUE OF MATERIAL FACT AS TO NOTICE BECAUSE THE APPELLANT PROVIDED NO EVIDENCE THAT SHE NOTIFIED THE RESPONDENT OF ANY DEFECT IN THE STAIRCASE IN HER APARTMENT.

Plaintiffs who are seeking damages suffered because of a dangerous or defective condition on a defendant's property must demonstrate that the defendant "had actual or constructive knowledge of an existing dangerous condition and failed to correct it." Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 389, 701 S.E.2d 776, 780 (Ct. App. 2010). Actual notice means "all the facts are disclosed and there is nothing left to investigate." Strother v. Lexington Cty. Recreation Comm'n, 332 S.C. 54, 65, 504 S.E.2d 117, 123 (1998). "Constructive notice arises when a condition has existed for such a period of time that a . . . [defendant] in the use of reasonable care should have discovered the condition." Major v. City of Hartsville, 410 S.C. 1, 3–4, 763 S.E.2d 348, 350 (2014) (quoting Fickling v. City of Charleston, 372 S.C. 597, 609–10 n. 34, 643 S.E.2d 110, 117 n. 34 (Ct.App.2007)). Even if the plaintiff demonstrates that the defendant had actual or constructive notice of an existing condition, the South Carolina Tort Claims Act prevents governmental entities from being held liable for injuries resulting from the exercise of any "responsibility or duty . . . of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(25).

The Appellant has provided no evidence that she notified the Respondent of any alleged damage to the staircase except her vague, self-serving statement. During the discovery process, the Appellant could not establish either the date or time of her alleged telephone call making any

maintenance request regarding the staircase, or the identity of the person to whom she allegedly spoke about the request. When specifically asked through interrogatories and a request for production to provide information about the date she allegedly reported a defect in the stairs to the Respondent, the Appellant responded "date not available." (R. p. 252). The Appellant could not provide the identity of the person to whom she alleged she spoke about the request, testifying "I know there'd normally be a man or lady that answers. We can't—we don't really know who it is that's answering the phone. . . ." (R. p. 56, lines 11-15).

The Respondent maintains detailed maintenance logs for all apartment units, including the Appellant's apartment, which do not reflect a maintenance request for the alleged damage to the staircase which the Appellant asserts caused her injury. (R. p. 305; R. pp. 311-13). There is no evidence in the record that the Respondent entered the Appellant's apartment to complete any work on the staircase following the Appellant's last recorded maintenance call request on June 27, 2013. The repair work for that request was completed on June 28, 2013, the day following the request and approximately two weeks prior to the July 10, 2013, incident. When the Respondent completed the work on June 28, 2013, there was no damage noted on the stairs in the section on the work order form which requires the maintenance technician to report other obvious maintenance issues. (R. p. 314).

The Appellant's self-serving statement is not sufficient, in comparison to the entire record showing otherwise, to create a reasonable inference that the telephone call was made. The party opposing Summary Judgment may not:

> "create an inference which is not reasonable or an issue of fact that is not genuine, [and] [t]he judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine."

Priest v. Brown, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). Once the party

supporting Summary Judgment carries its burden, the party in opposition may not rely on unsupported allegations as to liability to create a genuine issue of material fact. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). During her deposition, the Appellant testified to having numerous witnesses who could corroborate her self-serving statements that Respondent knew of the defective condition at the time the injury occurred. (R. p. 113, lines 21-24). However, the Appellant never provided any affidavits from these witnesses in opposition to the Respondent's Motion for Summary Judgment. The Appellant instead relied solely upon the unsupported allegations in her complaint. Furthermore, even if the Appellant had presented sufficient evidence that the Respondent had notice of the defective condition, Appellant has failed to provide any evidence to overcome the limitation of liability that the Respondent is entitled under the Tort Claims Act.

In conclusion, the Appellant has failed to set forth specific facts showing there is a genuine issue for trial, having provided no evidence that she reported the issues with her staircase prior to the incident on July 10, 2013. The Respondent's maintenance records reflect no contact on the part of the Appellant regarding her staircase, and the Appellant has provided no evidence that she reported any issues prior to the incident on July 10, 2013. Without any knowledge on the part of the Respondent or notification to the Respondent of the alleged defect in the stairs, the Respondent could not have failed to act. Accordingly, the Circuit Court properly ruled that there was no genuine issue of material fact in this case and the Order should be affirmed.

II. APPELLANT FAILED TO PRESERVE THE ISSUE OF ASSUMPTION OF RISK FOR APPELLATE REVIEW AND SHOULD BE PRECLUDED FROM PRESENTING THE ISSUE ON APPEAL.

It is well-settled that "an issue cannot be raised for the first time on appeal, but must have

been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). A party must file a post-trial motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004); see also BMW of N. Am., LLC v. Complete Auto Recon Servs., Inc., 399 S.C. 444, 454–55, 731 S.E.2d 902, 908 (Ct. App. 2012). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the [appellate court] with a platform for meaningful appellate review." Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

Although the Appellant raised and argued against the issue of whether the Appellant assumed the risk of injury, that issued was not ruled upon by the Circuit Court. (R. pp. 3-5). The Circuit Court's Order did not address the issue of assumption of risk but relied solely on the notice argument in granting Summary Judgment to the Respondent. The Appellant subsequently filed a Motion to Reconsider. However, the Appellant's motion omitted any reference to the issue of assumption of risk. (R. p. 27). By limiting the scope of her motion to the issue of notice, the Appellant failed to preserve the issue of assumption of risk for appellate review. Because the Appellant failed to bring the issue to the Circuit Court's attention in her Motion to Reconsider, this Court now lacks the proper record to engage in a meaningful review of the issue. Accordingly, the Appellant failed to preserve the issue of assumption of risk for review and should be precluded from raising the issue before this Court on appeal. Further, in light of the lower court's findings regarding notice, a finding with regard to assumption of risk is unnecessary to dispose of this matter.

CONCLUSION

For the aforementioned reasons, the Circuit Court's Order granting Summary Judgment in favor of the Respondent should be affirmed by this Court.

Respectfully Submitted,

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February 21, 2017
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Honorable Alison Renee Lee, Presiding

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Final Brief of Respondent complies with the requirement of Rule 211(b), SCACR.

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