IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No: 2017-000167

Cedric Young, Appellant,

v.

Valerie Poole, Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **The Circuit Court correctly applied the Landlord-Tenant Act to Appellant's claim and properly held that because Appellant tenant failed to give Respondent landlord notice of any alleged dangerous condition, Appellant's claim is barred by the Landlord-Tenant Act.**

STATEMENT OF THE CASE

This appeal follows an Order of the Circuit Court correctly applying the South Carolina Residential Landlord-Tenant Act (hereinafter "Landlord-Tenant Act" or "the Act") – as it has been applied for over twenty-five years in South Carolina – requiring the tenant to put the landlord on notice of an allegedly defective condition before liability may be triggered under the Act. (R. p. 272). Appellant Cedric E. Young ("Young" or "Appellant") lived as a tenant in a residential rental home in Richland County, which he leased from owner and Respondent Valerie Poole ("Poole" or "Respondent"). (R. p. 23, lines 9-25). On August 12, 2012, Appellant, weighing approximately two hundred and twenty pounds, elected to walk directly on the insulation of the unfinished attic of the rental home wearing steel toed boots and carrying garden equipment and a rolled up extension cord. (R. p. 90B, lines 20-22; p. 49, lines 6-14; p. 54, lines 10-14). Appellant testified that his boot pushed through the sheetrock of the second-floor ceiling and that he suffered a foot injury. (R. p. 59, lines 3-9; p. 68, lines 14-17). As a result, Young filed a complaint in the Richland County Court of Common Pleas against Respondent on June 1, 2015.

Discovery revealed the following undisputed facts: (1) Appellant tenant lived in the rental home for over two months before the date of his alleged injury; (2) during that time, Appellant tenant walked directly on the insulation of the attic more than ten times, rather than on the wooden joists; and (3) at no time prior to the alleged injury did Appellant tenant request that Respondent landlord modify or repair the attic space in any way. (R. pp. 101-

104; p. 41, line 12-p. 42, line 21). Relying on application of the Landlord-Tenant Act to these facts, Poole moved for summary judgment on August 19, 2016. (R. p. 13; pp. 207-2011). Young filed an opposing memorandum on August 22, 2016. (R. pp. 255-264).

The Honorable Judge Clifton Newman held a hearing on Poole's motion on August 22, 2016. After considering the arguments of both parties, Judge Newman granted Poole's Motion for Summary Judgment in a written Order dated October 24, 2016. (R. p. 272). In its Order, the Circuit Court held that: (1) Young's action was barred under the Landlord-Tenant Act because he failed to give the landlord notice of the alleged dangerous condition and a reasonable time to repair; and (2) even if Young's action was not barred by the Act, the landlord had no duty to warn Young that the attic was unfinished, a condition that is "open, obvious and generally known and recognized." (R. pp. 271-272).

Appellant filed his Motion to Alter or Amend Judgment on November 18, 2016, which was denied on January 18, 2017. Appellant filed his Notice of Appeal on January 26, 2017.

STATEMENT OF FACTS

A. Events Prior to August 17, 2012

Appellant moved into the rental home on June 8, 2012, and testified that he first accessed the attic space on that date. (R. p. 41, lines 2-8). Appellant testified that thereafter he accessed the attic space "more than ten times" before the alleged injury on August 17, 2012. (R. p. 41, lines 19-22). Appellant testified that every time he accessed the attic, he walked directly on the insulation and not on the wooden joists. (R. p. 63, lines 1-3). Appellant also testified that he found nothing different about Respondent's attic than any other attic he had ever been in, that he found nothing wrong with his practice of walking

directly on the insulation rather than on the wooden joists, and that he would do it again today. (R. p. 55, lines 4-6; p. 82, lines 5-10; p. 84, lines 11-21). In contrast, Respondent landlord testified that she had never stepped inside the unfinished attic. (R. p. 129, lines 16-18). Appellant testified that despite regular access between June 8 and August 17, he did not call to request that Respondent landlord modify or repair the attic space in any way prior to the alleged injury. (R. p. 42, lines 1-21; p. 151, lines 1-3).

B. Events of August 17, 2012

On the date of the alleged injury, Appellant accessed the attic by ladder. (R. p. 38, lines 13-18). Once inside the attic, Appellant – weighing approximately two hundred and twenty pounds, wearing steel toe boots, and carrying garden equipment – elected to walk directly on the insulation of the unfinished attic rather than the wooden joists. (R. p. 90B, lines 20-22; p. 49, lines 6-14; p. 54, lines 10-14). After Appellant picked up two hedge clippers and one rolled up extension cord, Appellant walked directly on the insulation towards the attic hatch door with the lawn equipment in hand. (R. p. 56, lines 5-20). Appellant began to throw the equipment down to the second-floor carpet through the attic hatch door, and as he continued to walk on the insulation, Appellant testified that his boot pushed through the sheetrock of the second-floor ceiling and that he suffered a foot injury. (R. p. 56, line 23-p. 57, line 2; p. 59, lines 3-9; p. 68, lines 14-17).

C. Appellant's Lease with Respondent

Appellant executed a Lease prior to moving in to the rental property. (R. pp. 101-104). By the terms of the Lease, Appellant agreed to "properly use the premises." (R. p. 102, ¶ 14(i)). Appellant testified that he believed walking directly on the insulation was "properly using the premises." (R. p. 84, lines 11-18). Under the terms of the Lease,

Appellant also agreed to "notify the landlord in writing upon discovery of any dangerous condition on the premises." (R. p. 102, ¶ 14(iv)). Appellant admitted that he failed to provide notice of any "dangerous condition" to the landlord any time before the alleged injury. (R. p. 41, line 12-p. 42, line 21). Further, Appellant testified that he inspected the "entire interior and exterior of the premises" prior to moving in, and that he found the premises to be in "good, safe, and clean condition and repair." (R. p. 86, line 8-p. 87, line 11).

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard that governs the circuit court under Rule 56(c), SCRCP. *Nelson v. Piggly Wiggly Center, Inc.*, 390 S.C. 382, 387-88, 701 S.E.2d 776, 779 (Ct. App. 2010). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP.

"The plain language of Rule 56(c), SCRCP, 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." *Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). "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." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT LANDLORD JUDGMENT AS A MATTER OF LAW BECAUSE APPELLANT TENANT FAILED TO PLEAD AN ACTIONABLE CLAIM UNDER THE COMMON LAW.

Under the common law, a landlord had no duty to turn over a rental property in a safe condition or to maintain the property. *See e.g.*, *Williams v. Salmond*, 79 S.C. 459, 61 S.E. 79, 79 (1908) ("The lessor turns over the property, and the lessee takes it as it is turned over to him."). Prior to the enactment of the Act, "the courts of this state have held that the relationship of landlord and tenant, by itself, imposes no legal duty on the part of the landlord to keep in repair leased residential premises under the control of the tenant." *Watson v. Sellers*, 299 S.C. 426, 433, 385 S.E.2d 369, 372 (Ct. App. 1989). As this Court recognized in *Watson*, "This has been the long-standing law of this state." *Id.*

Under South Carolina law, a plaintiff must prove four elements to recover under a negligence theory: "(1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (emphasis added). "An essential element of the cause of action for negligence is the existence of a legal duty of care owed by the plaintiff to the defendant." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78, 81 (1998).

South Carolina did not recognize a common law cause of action against a landlord for conditions on the rental dwelling. "**Traditionally, under the law of South Carolina, a landlord owes no duty to maintain leased premises in a safe condition.**" *Young v. Morrisey*, 285 S.C. 236, 329 S.E.2d 426, 428 (1985) (emphasis added). In his Brief, Appellant cites a single case handed down in 1932 for the proposition that at common law

in South Carolina a landlord has a duty to discover and warn of dangerous latent conditions on its premises, but the Court in that case did not hold there was such a duty.[1] *See Timmons v. Williams Wood Products Corp.*, 164 S.C. 361, 162 S.E. 329 (1932). Appellant misinterprets that case.

In *Timmons*, the landlord and tenant contracted under the lease for the landlord to make repairs to the premises. 164 S.C. 361, 162 S.E. at 330. Even though the tenants twice requested for the landlord to repair the defective condition of a door hinge on the premises pursuant to the landlord's lease agreement, the landlord did not do so. *Id.* When the door eventually injured one of the tenants, the tenants brought suit for personal injuries. *Id.* The court held that tenants could not recover personal injury damages and could only recover contractual damages because the landlord's duty to repair arose only under the lease contract. 164 S.C. 361, 162 S.E. at 333. With regards to a landlord's duties at common law, the Court stated:

> [I]n the absence of a contract to repair, the tenant takes leased premises for better or for worse, with no positive, legal duty on the part of the lessor to make repairs; that such an obligation or duty must be imposed by some contract apart from the mere lease of the land for a given term... While not directly in point here, these decisions firmly establish the principle that **there is no legal duty imposed upon a landlord merely by reason of the creation of the relationship of landlord and tenant**...

164 S.C. 361, 162 S.E. at 331-332 (citations omitted) (emphasis added).

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[1] Further demonstrating the absence of support under South Carolina law for Appellant's common law duty argument, Appellant's only other citations in support of his primary argument, that there is a landlord duty to discover and warn of latent conditions, are: (1) a Corpus Juris section from an edition that is out of print and that does not state there is such a duty; and (2) a treatise that incorrectly cites the case of *Timmons v. Williams Wood Products Corp.*, 164 S.C. 361, 162 S.E. 329 (1932) (discussed in greater detail below). (*See* Appellant Initial Brief, p. 5 (citing 36 C.J. 204 § 874 and F.P. Hubbard & R.L. Felix, THE SOUTH CAROLINA LAW OF TORTS (4th Ed. 2011)).

Here, Appellant's attempt to reach back to the common law as it existed before the Landlord-Tenant Act is without merit because the common law rule before the Act was landlord immunity. *See also Thompson v. CDL Partners LLC*, 378 F. App'x 288, 293 (4th Cir. 2010) (affirming summary judgment against tenant on common-law negligence claim "because [tenant] cannot establish a duty on the part of [landlord]" apart from the Act). That is, there was no common law cause of action under which Respondent here would be liable.

Moreover, Appellant failed to preserve this question for appellate review. Appellant did not plead common law negligence, but rather a single cause of action under "SC Code Ann. § SC Landlord Tenant Act," and only attempted to amend his Complaint at motion argument after it became clear the Circuit Court was granting Respondent's Motion for Summary Judgment. Even if Appellant had properly preserved the issue, the Circuit Court properly refused his oral motion to amend on futility grounds because South Carolina does not recognize a common law duty: "I don't see how you can sue under common law." (R. p. 4; p. 200, line 14-p. 201, line 12). Accordingly, any attempt to reach back to the common law as it existed is futile and without merit and this court should affirm the Circuit Court's grant of judgment as a matter of law in Respondent's favor.

II. THE CIRCUIT COURT PROPERLY GRANTED RESPONDENT LANDLORD JUDGMENT AS A MATTER OF LAW BECAUSE APPELLANT TENANT FAILED TO GIVE LANDLORD NOTICE OF THE ALLEGED DANGEROUS CONDITION, THEREBY BARRING ANY ACTION UNDER THE LANDLORD-TENANT ACT.

The Landlord-Tenant Act, enacted in 1986, "abrogated the well-defined and established [Landlord-Tenant] common law" and "was passed "to simplify, clarify, modernize, and revise the law governing rental of dwelling units and the rights and obligations of landlords and tenants." *Watson* at 433; S.C. Code Ann. § 27-40–20(b)(1)

(2007). The Act "requires a landlord to comply with applicable housing codes materially affecting health and safety," and it creates, as a matter of statute, particular duties and obligations owed by tenants and landlords in the residential rental context. S.C. Code Ann. § 27–40–440(a)(1)–(2) (2007). However, the Act balanced the landlord's obligations as the owner of the rental dwelling with the fact that the tenant is in possession of the property and is in the best position to discovery any defective conditions. Therefore, the Act does not create any liability on the part of the landlord unless the tenant has provided written notice of the alleged defect and a reasonable opportunity for the landlord to repair the condition.[2]

At issue here, Section 27-40-610 of the Act creates a cause of action on behalf of a tenant who provides written notice to the landlord of an alleged defect if the landlord fails to remedy the defect in a reasonable time. Section 27-40-610 provides in pertinent part:

> (a) Except as provided in this chapter, if there is a material noncompliance by the landlord with the rental agreement or a noncompliance with Section 27-40-440 materially affecting health and safety or the physical condition of the property, the tenant may deliver a ***written notice*** to the landlord specifying the acts or omissions constituting the breach and that the rental agreement will terminate upon a date ***not less than fourteen days after receipt of the notice*** if a breach is not remedied within fourteen days. The rental agreement shall terminate as provided in the notice except that:
>
> * * *
>
> (b) Except as provided in this chapter, the tenant may recover actual damages and obtain injunctive relief in a magistrate's court or circuit court, without posting bond, for any noncompliance by the landlord with the rental agreement or Section 27-40-440. If the landlord's

[2] As discussed below in Part III., there was no defective condition on the property. The attic was an unfinished, insulated attic, which is common in South Carolina. A landlord does not owe any duty to finish an attic space.

> noncompliance is willful, the tenant may recover reasonable attorney's fees. . . .

S.C. Code Ann. § 27-40-610 (emphasis added).

Importantly, under the Act, "[a]s with any negligence action, plaintiff must establish (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Pryor v. Northwest Apartments, Ltd.*, 321 S.C. 524, 528, 469 S.E.2d 630, 633 (1996). Any duty to repair is not triggered under the Act until a tenant gives written notice to its landlord. *Id.* The same statute that creates the cause of action establishes the procedure that a tenant must follow to trigger the landlord's liability: A tenant must give the landlord written notice of a condition affecting the safety or physical condition of the property, and the landlord generally has at least fourteen days to remedy or begin repairs. Because the statute that creates the cause of action includes a written notice procedure, that procedure must be followed by a tenant before the tenant can have a cause of action under the Act. *Id.*

Because Appellant tenant failed to give Respondent landlord notice of the alleged dangerous condition, his negligence action is barred by the Act. The Landlord-Tenant Act has been consistently applied to "require that the tenant provide the landlord notice of a defective condition before liability attaches under the SCRLTA." *Thompson*, 378 F. App'x at 292. In applying the Act, the Fourth Circuit looked to consistent rulings from the South Carolina Court of Appeals, which:

> pointed to two provisions of the SCRLTA that buttress such a conclusion. First, the Act mentions the delivery of 'a written notice to the landlord specifying the acts and omissions constituting the breach.' S.C. Code Ann. § 27–40–610(a). In addition, **the SCRLTA states that the tenant's rights 'do not arise until he has given notice to the landlord and the landlord fails to act within a reasonable time.**' S.C. Code Ann. § 27–40–630(d).

Id. Because the courts have consistently required notice of defective conditions before landlord liability is triggered under the Landlord-Tenant Act, lack of notice is fatal to Appellant's claim. Because Appellant admittedly failed to give Respondent notice of any alleged dangerous condition and an opportunity to repair, Appellant's claim is barred as a matter of law under the Act.

A. Since its enactment, courts have consistently recognized and applied the Landlord-Tenant Act's notice requirement, barring actions where notice is lacking.

In 1989, three years after the Act's passage, the South Carolina Court of Appeals held that the Act "by express words creates a cause of action in tort in favor of a tenant of residential property against his landlord for failure, **after notice**, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition." *Watson*, 299 S.C. at 432, 385 S.E.2d at 372. This court in *Watson* was clear in its emphasis on the notice requirement:

> We hold that the preamble and the Act clearly convey an intent on the part of the Legislature to provide for a cause of action for injuries resulting from the failure of the landlord, **after notice**, to keep rented residential premises in repair.

Id. at 436, 385 S.E.2d at 374 (emphasis added). The *Watson* reading of the Act has been applied without exception in South Carolina courts for more than twenty-five years.

In 2009, this court again affirmed the requirement that a tenant must notify its landlord of an alleged defective condition before a claim for negligence is actionable under the Act. *Robinson v. Code*, 384 S.C. 582, 586, 682 S.E.2d 495, 496 (Ct. App. 2009). In *Code*, the death of a tenant was allegedly attributable to a landlord's failure to install smoke detectors, a violation of state law. *Id.* at 585, 682 S.E.2d at 496. This court nonetheless concluded that "because the plaintiffs failed to allege that they notified the owner of the

lack of smoke detectors, they could not state a claim under the SCRLTA." *Thompson*, 378 F. App'x at 292 (citing.*Code*, 384 S.C. at 588, 682 S.E.2d at 498). In *Code*, the trial court granted the landlord summary judgment and this court affirmed.

More recently, the Fourth Circuit, in applying the Landlord-Tenant Act, cited the consistency of decisions handed down by South Carolina courts in determining that "the South Carolina Supreme Court would require that a landlord have notice of a defect before being liable to the tenant under the SCRLTA." *Thompson*, 378 F. App'x at 292 (4th Cir. 2010) (*emphasis added*). In *Thompson*, a tenant was severely injured after falling from a second-floor balcony when he leaned against a defective. *Id.* at 290. The United States District Court, applying the Act, granted summary judgement in favor of the landlord without a hearing because the tenant failed to provide notice to the landlord prior to the alleged harm. *Id.* The Fourth Circuit affirmed. *Id.*

B. Appellant tenant failed to provide notice to Respondent landlord of the allegedly dangerous condition.

In this case, it is undisputed that Appellant tenant failed to provide notice of the alleged condition to the Respondent landlord at any time prior the alleged injury. Appellant testified that he visited the attic space more than ten times before his alleged injury and that he did not notify the Respondent landlord orally or in writing of any dangerous condition or any need to repair the attic. (R. p. 41, line 12-p. 42, line 21). A plausible reason Appellant failed to provide notice to the Respondent is that Appellant testified the unfinished attic at issue appeared the same as any other attic Appellant had been in and it did not appear to be in any dangerous condition. (R. p. 85, line 7-p. 86, line 2).

The Respondent landlord, Ms. Valerie Poole, also testified that Appellant failed to provide notice to of any condition that needed repair:

Q [W]e heard from the plaintiff earlier today that he had been in the attic at least ten times before the day that he fell. After any of those ten visits to the attic, had he ever told you that the attic was in dangerous condition?

A No, he did not.

Q At any time before the date that the plaintiff fell, did he notify you verbally that there was any condition in the attic that he wanted you to repair?

A No, he did not.

Q At any time before the date that he was injured, did the plaintiff notify you in writing that there was anything wrong with the attic or that there was anything in the attic that he wanted you to repair?

A No, he did not.

(R. p. 146, lines 4-7; p. 151, lines 6-15). It is undisputed that the Appellant tenant failed to provide notice, as required for liability to trigger under the Act, of the condition he alleges is dangerous.

C. The Act's notice requirement places the burden to notify on the party in the best position to discover a defect in the leased premises.

There are strong policy considerations that support the Act's notice requirement: a tenant in possession and control of the premises has the best opportunity to discover and inform the landlord of any dangerous conditions on the property. *See Dunbar v. Charleston & W.C. Ry. Co.*, 211 S.C. 209, 44 S.E.2d 314 (1947) ("[W]hen land is occupied by the lessee, as in this case, the law of property regards the lease as equivalent to a sale of the premises for the term of the lease... the lessor surrenders possession and control of the land to the lessee."). These policy considerations are buttressed by the facts here, where Respondent landlord had never set foot in the attic, but Appellant tenant had walked in the attic "more than ten times" including "many times the same way" that he walked on the date of the alleged injury. (R. p. 41, lines 19-22; p. 63, lines 1-6; p. 136, lines 2-5).

Because Appellant failed to report any condition to the Respondent landlord at any time prior to the alleged injury, Appellant's claim is barred under the Landlord-Tenant Act. As state and federal courts in South Carolina have held without exception, the Landlord-Tenant Act requires tenants provide a landlord notice of a defective condition and a reasonable opportunity to repair the same before liability attaches under the Landlord-Tenant Act. Because Appellant failed to provide notice and failed to provide Respondent a reasonable opportunity to repair, as courts in South Carolina have consistently held, Appellant has not pled an actionable claim under the Act, and the Respondent landlord Ms. Valerie Poole is entitled to judgment as a matter of law.

III. THE CONDITION OF AN UNFINISHED ATTIC IS OPEN AND OBVIOUS, THEREBY NEGATING ANY DUTY RESPONDENT MAY HAVE TO WARN OF ITS CONDITION.

South Carolina courts have consistently held that there is no duty to warn of dangers that are open and obvious. *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 42, 674 S.E.2d 500, 504 (Ct. App. 2009); *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 271-72, 471 S.E.2d 708, 710 (Ct. App. 1996); *Dema v. Shore Enterprises, Ltd.*, 312 S.C. 528, 530, 435 S.E.2d 875, 876 (Ct. App. 1993). As a result, a property owner is "not required to warn of dangers or potential dangers that are generally known and recognized." *Anderson*, 322 S.C. at 270, 471 S.E.2d at 710. Further, in the landlord-tenant context, a landlord has no duty to warn of an open and obvious condition on his property. *Pryor v. Nw. Apartments, Ltd.*, 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (*citing Meadows v. Heritage Village Church & Missionary Fellowship, Inc.,* 305 S.C. 375, 378, 409 S.E.2d 349, 351 (1991) (affirming a landlord's grant of summary judgement because "mud was open and

obvious natural condition and owners could not foresee tenant would choose to walk on mud rather than taking other routes.") (emphasis added).

Here, even if Appellant did have an actionable claim under the common law or the Landlord-Tenant Act (which he does not) the danger of walking directly on insulation in an unfinished attic is a danger that is "generally known and recognized."[3] As in *Pryor*, an unfinished attic is an ordinary, open, and obvious condition. Landlords cannot foresee that a tenant would choose to walk directly on the insulation – much less at two hundred twenty pounds with steel toed boots and lawn equipment – rather than taking the safer route of walking on the joists.

Further, Appellant admitted to accessing the attic "more than ten times" prior to the date of the alleged injury, demonstrating Appellant's full knowledge that the attic was unfinished. Moreover, Appellant could not articulate any dangerous condition in the attic, but rather he testified that it appeared no different from any other attic he had ever been in. (R. p. 85, lines 11-13; p. 55, lines 4-6). Accordingly, even if Appellant's claim was actionable under the common law or the Landlord-Tenant Act, Respondent would be

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[3] *See Meyer v. Tyner*, 709 N.Y.S. 2d 618, 620, 273 A.D.2d 364 (N.Y.A.D. 2 Dept. 2000) (holding, on summary judgment, that "[p]oor illumination and similarity of color between the insulation and the attic floor were insufficient to raise a triable issue of fact as to whether the unfinished nature of an attic floor was a dangerous condition" because the "unfinished floor was readily observable, in plain view, and easily discoverable by those employing the reasonable use of their senses"); *Scott v. Norman*, 391 S.W.2d 890, 895–96 (Mo. 1965) (finding that an attic with unfinished flooring and joists spaced twenty-four inches apart was an "open and obvious" condition and that "[t]he risk involved in going upon them was that a person would slip therefrom and fall through the thin plasterboard ceiling"); *Tracy v. Petrenas*, 2005 WL 1812671, p. *2 (Mich. Ct. App. 2005) (unpub.) (holding "the potential danger of walking in a darkened garage attic without a load-bearing floor should be apparent to an average person of ordinary intelligence").

entitled to judgement as a matter of law because the Respondent landlord owed no duty to warn the Appellant that the attic was unfinished.

CONCLUSION

Courts in South Carolina have consistently recognized there is no duty under the common law for a landlord to maintain the premises in a safe condition outside of the provisions of the Landlord-Tenant Act. Further, courts in South Carolina have consistently applied the Act to require that tenant notify landlord in writing of any alleged defect before landlord liability attaches under the statute. Appellant admits he did not give Respondent the required notice. Accordingly, Appellant failed to present evidence necessary to support an essential element of his claim. Further, even if the Appellant's claim were not barred by the statute, Respondent owed no duty to warn that the attic was unfinished, a condition that was open, obvious, and apparent to Appellant.

Therefore, the Respondent landlord Ms. Valerie Poole respectfully requests that this Court affirm the Circuit Court's grant of summary judgment in Respondent's favor.

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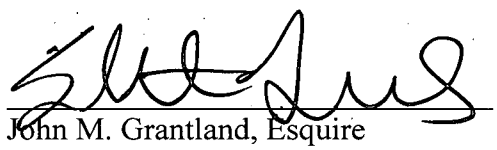
CERTIFICATE OF COMPLIANCE

I, Elliott B. Daniels, Esquire, attorney for Respondent, certify that the Respondent's Brief and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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