The State of South Carolina
In the Court of Appeals

Appeal from Horry County
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2017-001258
Case No. 2015-CP-26-00034

Christine LeFont,.....Appellant,

v.

City of Myrtle Beach; Myrtle Beach
Convention Center Hotel Corporation, ...Respondents.

APPELLANT'S INITIAL BRIEF

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1. Did the circuit court err in granting a directed verdict to the City on the grounds that LeFont was a licensee as a matter of law even though there was conflicting evidence from which a jury could reasonably infer that she was an invitee?

2. Did the circuit court err in granting a directed verdict to the City on the grounds that, based on the licensee classification, there was no evidence the City breached a duty to LeFont even though there was conflicting evidence from which a jury could reasonably infer that the condition was not open nor obvious and was in fact a hazard?

3. Did the circuit court err in granting a directed verdict to the City on the grounds that there was no evidence that could establish any constructive notice of the condition even though there was evidence from which a jury could infer that the City should have known of the existence of the condition?

STATEMENT OF THE CASE

On January 5, 2015, Christine LeFont filed a civil action against the City of Myrtle Beach and the Myrtle Beach Convention Center Hotel Corporation. She filed this action in the Horry County Court of Common Pleas. (Complaint). LeFont alleged a premises liability action against the defendants and sought to recover damages. (Complaint).

The City filed an Answer on March 20, 2015, denying liability and raising affirmative defenses generally alleging, in part, that LeFont action was subject to certain provisions of the South Carolina Tort Claims Act, S.C. Code §§ 15-78-60 (1), (4), (5), (8), (9), (13), (15), (16), and (20). (Answer, ¶ 26).

Prior to trial, the parties stipulated to dismissal of Myrtle Beach Convention Center Hotel Corporation as a defendant. The City was the sole Defendant which proceeded to jury trial before the Honorable R. Markley Dennis, Jr. on September 6, 2016.

At trial, following the close of the Plaintiff's evidence, the City orally moved for directed verdict. Judge Dennis denied these motions from the bench. (Tr. p. 190, ll. 12-13) (Tr. p. 192, ll. 1-6) (Tr. p. 193, ll. 3-7, 14-15; p. 194, ll. 16-17, 23-24; p. 195, ll. 4-7) (Tr. p. 196, ll. 6-10) (Tr. p. 196, ll. 18-20; p. 197, ll. 6-8).

Subsequently, following the close of the evidence at trial, the City orally moved for directed verdict, arguing in relevant part the same grounds from its earlier motions. (Tr. p. 323, l. 21 – p. 330, l. 9). Judge Dennis granted, from the bench, directed verdict to the City ruling that: (1) LeFont

was unquestionably a licensee; (2) there was no evidence that established City breached its duty owed to LeFont as licensee; and (3) there was no evidence that the City had constructive notice. (Tr. p. 339, ll. 4-6, 16-18; p. 340, ll. 10-15, 23-25; p. 341, ll. 10-14) (Tr. p. 341, ll. 1-2) (Tr. p. 341, ll. 21-24). Then, by written Form 4 Order filed September 7, 2016, Judge Dennis ordered verdict for the City. (Form 4 Order).

Thereafter, on September 20, 2016, LeFont timely filed a Motion for Reconsideration and/or Alter or Amend Order Granting Defendant's Motion for Directed Verdict and New Trial ("Plaintiff's Motion for Reconsideration" hereinafter). (Plaintiff's Motion for Reconsideration). The City did not file in opposition to LeFont's Motion. More than seven months later, Judge Dennis denied Plaintiff's Motion for Reconsideration, without oral argument, by Order filed April 27, 2017. (Order Denying Plaintiff's Motion for Reconsideration).

On May 26, 2017, LeFont filed and served her Notice of Appeal of the circuit court's orders and rulings in the instant case. (Notice of Appeal).

STATEMENT OF FACTS

The instant case is a premises liability matter involving a static defect in the paved rear parking lot at the City of Myrtle Beach's Convention Center. On August 13, 2014, Christine LeFont and her husband, John Gambelli, went to the City of Myrtle Beach's Convention Center for a trade show being held there. (Tr. p. 62). They were vendors of a product. (Tr. p. 61,

ll. 17-20). As vendors, LeFont and her husband had paid money in order to be able to be there to present their products. (Tr. p. 320, l. 23 – p. 321, l. 1).

LeFont parked her vehicle in the small parking lot in the rear of the City's convention center. (Tr. p. 65, l. 14 – p. 66, l. 22). She exited her vehicle and walked towards the convention center when she unexpectedly encountered a hole in the parking lot surfacing that her foot dipped into. (Tr. p. 67, ll. 21-22; p. 73, ll. 9-21). The hole was approximately four to six inches in diameter and one and one half inches deep – the thickness of a full layer of asphalt. (Plaintiff's Exhibits 4, 5, 6, and 7; Tr. p. 166, ll. 13-25). Upon her foot dipping into the hole, LeFont stumbled and ultimately fell down onto the parking lot. (Tr. p. 73, l. 23 – p. 74, l. 2). In the fall, LeFont sustained personal injuries, including fractures to both of her arms. (Tr. p. 74, l. 24 – p. 75, l. 2; pp. 80-84).

ARGUMENT

On appeal the grant of a directed verdict motion, this Court must reserve the judgment when there is no evidence to support the ruling or when the ruling is governed by an error of law. *See Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005).

In making this determination, this Court applies the same standard of review as the trial court and is required to "view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). This Court is not to

weigh the evidence, but must instead determine if there is *any* evidence from which the jury is warranted in making a finding. *See Washington v. Whitaker*, 317 S.C. 108, 113-14, 451 S.E.2d 894, 897-98 (1994).

The Court may grant the directed verdict only when the evidence yields but one inference. *See The Huffines Co. v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2006). However, the Court must deny the motion when either the evidence yields more than one inference or the inferences are in doubt. *See Law v. South Carolina Dep't. of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). In doing so, the Court does not have the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *See Hoover v. Broome*, 324 S.C. 531, 538, 479 S.E.2d 62, 66 (Ct. App. 1996).

A directed verdict must be denied if a verdict against the City was reasonably possible when the facts are "liberally construed" in Appellant's favor. *Padgett v. Colleton County*, 383 S.C. 431, 435, 679 S.E.2d 533, 536 (Ct. App. 2009). When these standards are applied properly, they yield the conclusion that the circuit court erred in granting the City's directed verdict motion and in denying the Plaintiff's motion for reconsideration and for a new trial.

In granting directed verdict to the City, the circuit court ruled from the bench that: (1) LeFont was a licensee as a matter of law; (2) based on this classification, the City's limited duty to her was to "take care of things that

are known to be actual dangers or hazardous situations that they knew or should have known somebody else would have been" (Tr. p. 340, ll. 11-14); and (3) there is no "evidence that would establish constructive notice of the pothole and therefore require that the City to take any action independent of what was done." (Tr. p. 341, ll. 21-24).

The circuit court committed reversible error by: (1) classifying LeFont's status as a licensee as a matter of law; (2) based upon the erroneous licensee classification, further compounding that error in applying solely the standard of care owed a licensee to then find, as a matter of law, no evidence that the City breached that duty of care.

I. The circuit court erroneously granted directed verdict that LeFont was a licensee as a matter of law despite evidence reasonably yielding the inference that she was an invitee.

The circuit court directed a verdict in favor of the City concluding that LeFont was a licensee as a matter of law. (Tr. p. 339, ll. 5-6; p. 341, ll. 10-14). The circuit court reasoned that LeFont was a licensee as a matter of law and could not be an invitee because: (1) "the convention center leases to somebody for their benefit, and the benefit is certainly indirectly;" and (2) "because they don't control who comes or goes or who's asked to come or go." (Tr. p. 339, ll. 7-8, 9-10).

Of course, the correct classification of persons who come onto a premises is of absolute importance in South Carolina premises liability cases because "[t]he level of care owed is dependent upon the class of the person

present." *Larimore v. Carolina Power & Light*, 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct. App. 2000).

"Ordinarily, when conflicting evidence is presented as to whether someone is a licensee or invitee, the question becomes one of fact and as such, is properly left to the jury." *Vogt. v. Murraywood Swim and Racquet Club*, 357 S.C. 506, 511, 593 S.E.2d 617, 620 (Ct. App. 2004) (citing *Hoover v. Broome*, 324 S.C. 531, 537-38, 479 S.E.2d 62, 66 (Ct. App. 1996); *see also Harris v. Univ. of S.C.*, 391 S.C. 518, 523-24, 706 S.E.2d 45, 47-48 (Ct. App. 2011) (finding whether plaintiff is an invitee or licensee is a jury issue); *see also Nesbitt v. Lewis*, 335 S.C. 441, 448, 517 S.E.2d 11, 15 (1999) (citing *Hoover* for the proposition that it is a factual determination whether an individual acted as a licensee or invitee). Similarly, "[t]he loss of invitee status is usually a question for the jury." *Sims v. Giles*, 343 S.C. 708, 733, 541 S.E.2d 857, 870 (Ct. App. 2001).

The circuit court erred in granting a directed verdict on the ground that LeFont was licensee as a matter of law at the time of her injury because: (1) there was evidence that LeFont's entry to the City's premises was to the benefit of both LeFont and the City; (2) there was evidence that LeFont entered the City's premises, and specifically into the parking lot at issue, through an express invitation and implied invitation; and (3) there was evidence that LeFont came to and entered the City's premises for her own

business connected to the purpose for which the City's convention center was held open.

Of course, "[i]nvitees include patrons of stores, patients in a physician's office, persons visiting a filling station to use the restroom or vending machine or to ask directions, and workmen invited to work on the premises." *Sims v. Giles*, 343 S.C. 708, 717, 541 S.E.2d 857, 862 (Ct. App. 2001). "However, the class of persons qualifying as business visitors ***is not limited to*** those coming upon the land for a purpose directly or indirectly connected with the business conducted thereon by the possessor, ***but includes as well*** those coming upon the land for a purpose connected with their own business, which itself is directly or indirectly connected with a purpose for which the possessor uses the land." *Id.* (emphases added).

A. There was evidence of mutual benefit.

There was evidence from which the jury could reasonably infer that LeFont provided a benefit to the City.

First, testimony indicated that LeFont's purpose for coming to the City's convention center was a result of the City's convention center being paid money for rent. (Tr. p. 97, ll. 6-9, 17-20; Tr. p. 320, ll. 19-21). LeFont testified that her and her husband paid between $1,800.00 and $2,500.00 in order to be able to be there at the City's convention center. (Tr. p. 320, l. 22 – p. 321, l. 1).

Second, the City's employee, Perez, testified that she believed vendors do in fact pay for the booths when coming to the show held at the City's

convention center. (Tr. p. 275, ll. 7-10). Third, the City's employee, Skellett, similarly testified that she believed vendors do pay in order to be a vendor at the show. (Tr. p. 301, l. 24 – p. 302, l. 22).

B. There was evidence of express invitation and implied invitation.

There was evidence in the record below from which the jury could reasonably infer that LeFont's presence on the convention center premises was the product of express invitation and implied invitation.

1. Express invitation.

There was evidence in the record below from which the jury could reasonably infer that LeFont's presence on the convention center premises was the product of express invitation. The City's employee, Skellett, testified that vendors are invited to the convention center to display their wares and goods. (Tr. p. 302, l. 23 – p. 303, l. 4).

2. Implied invitation.

There was evidence in the record below from which the jury could reasonably infer that LeFont's presence on the convention center premises was the product of implied invitation. Testimony from the City's own employee, Perez, explained that vendors may walk through the employee parking lot. (Tr. p. 276, ll. 3-5). She also testified that vendors may also use the lot for unloading and loading purposes and that it is expected that vendors may be walking back and forth from the lot and the convention center. (Tr. p. 276, ll. 6-12). LeFont testified that, on the day of her fall, she was specifically permitted into the parking lot by a guard working in the lot.

(Tr. p. 66, ll. 3-6; p. 321, ll. 2-10). The guard in the lot opened the gate to let LeFont into the parking lot. *Id.*

C. There was evidence that her entry was for business connected to the purpose for which the premises were held open.

There was evidence in the record below from which the jury could reasonably infer that LeFont's whole reason for entering the premises was for her business connected to the purpose for which the City's convention center premises was held open. Again, the purpose for which the City's convention center was held open that day was for the trade show being held that weekend. The record is replete with testimony that LeFont and her husband came onto the premises specifically for their business which was connected to the enter purpose for which the City's convention center was held open.

II. Applying the improper licensee classification, the circuit court erroneously granted directed verdict finding the City, as a matter of law, did not breach its duty owed to LeFont.

After erroneously ruling that LeFont was unquestionably a licensee as a matter of law, the circuit court then ruled that the City, as a matter of law, did not breach its duty owed to LeFont. (Tr. p. 341, ll. 1-2).

A. The circuit court erred by finding that the condition complained of was open and obvious as a matter of law.

In granting directed verdict to the City, the circuit court applied the incorrect licensee classification and implicitly ruled, as a matter of law, that the hole in the parking lot was open and obvious. (Tr. p. 341, ll. 18-20). This ruling was in error because the record is replete with testimony and evidence

that is conflicting as to the openness and obviousness of the hole and, furthermore, the inferences yieldable from said conflicting evidence are also in doubt.

First, LeFont testified that she did not see the hole. (Tr. p. 90, ll. 10-11). She further testified that if you are walking and looking straight down while doing so, that you may see the hole. (Tr. p. 90, l. 15). Second, Therese Perez, an employee of the City's Convention Services Department, testified that she "didn't see anything obvious that she could have fallen on." (Tr. p. 252, ll. 8-9). Third, Dr. Durig testified that, in the photographs depicting the hole, the hole was easy for him to see when he was looking for what shouldn't be here. (Tr. p. 177, ll. 7-16). The testimony and the exhibits depicting the hole present conflicting positions from which a jury, not the circuit court, should be permitted to determine whether the hole was in fact open and obvious. The circuit court's finding otherwise was in error.

B. The circuit court erred by finding that the condition complained of was not a hazardous condition.

In directing a verdict to the City, the circuit court appears to have implicitly found, or at least reasoned that, the hole in the parking lot was not a hazard. (Tr. p. 336, ll. 24-25; p. 337, ll. 1-6). This was in error. There was clear evidence in the record that the hole was in fact a hazardous condition.

At trial, Bryan R. Durig, Ph.D., P.E. testified as an expert witness in the field of engineering. Dr. Durig testified regarding his investigation into the condition in the parking lot and his opinions regarding the condition. Dr.

Durig testified that the hole was between 4 to 6 inches in diameter and approximately 1.5 inches deep. He specifically testified that the hole was the depth of a full layer of asphalt. (Tr. p. 166, ll. 23-25). Dr. Durig testified that the hole is located "right behind" the "first parking spot" in the City's employee parking lot. (Tr. p. 169, ll. 4-5).

Dr. Durig opined that there are both codes and standards applicable to the City's parking lot. (Tr. p. 169, ll. 9-10). First, Dr. Durig testified that the International Property Maintenance Code (IPMC)—which is typically a permissive code in South Carolina—has been adopted by the City of Myrtle Beach as mandatory code and is therefore "part of their ordinances." (Tr. 169, ll. 14-21). Dr. Durig opined that the hole LeFont tripped in was violative of Section 302.3, IPMC, which requires that "all sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair . . . and maintained free from hazardous conditions." (Tr. p. 169, l. 23 – p. 170, l. 2). Second, Dr. Durig testified that the American Society of Testing and Materials (ASTM) provides an applicable industry standard—ASTMF 1637 entitled Standard Practice for Safe Walking Surfaces. (Tr. p. 170, ll. 7-18). Dr. Durig opined that the hole LeFont tripped in was violative of ASTMF 1637. Together, Dr. Durig testified that ASTMF 1637 "will help you defined what is a hazardous condition. When the IPMC says you need to maintain it free of hazards, this helps define some of what those hazards will be or can be." (Tr. p. 170, ll. 21-24).

Dr. Durig testified that "[t]here's several sections of the standard that it [the hole in the City's parking lot] would violate. (Tr. p. 171, ll. 13-14). Furthermore, he testified that the City's parking lot where LeFont fell was not being maintained in accordance with industry standards. (Tr. p. 171, ll. 15-21).

In the face of this clear evidence in the record, for the circuit court to find that the hole was not a hazardous condition, is patently in error. The circuit court decided a question which was squarely for the jury's determination.

III. The circuit court erroneously granted directed verdict finding there was no evidence that would establish constructive notice.

The circuit court ruled that it did not "find that there's any evidence that would establish constructive notice of the pothole and therefore require that the City to take any action independent of what was done." (Tr. p. 341, ll. 21-24). This was reached and decided in error as a result of the circuit court's erroneous ruling that the Plaintiff was a licensee as a matter of law. Then, as a result of that ruling, the circuit court applied a licensee analysis, further compounding the error to then conclude, as a matter of law, that there was no evidence that the City had notice of the condition in the center of its own employee parking lot. The circuit court erroneously overlooked the existence of evidence and failed to view the evidence and all reasonable inferences from the evidence in the light most favorable to LeFont.

Constructive notice is a legal inference which substitutes for actual notice. It is notice imputed to a person whose knowledge of facts is sufficient to put him on inquiry; if these facts were pursued with due diligence, they would lead to other disclosed facts. *See Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 64, 504 S.E.2d 117, 122 (1998).

Here, there was conflicting evidence presented as to whether the City had constructive notice of the hole in the City's convention center employee parking lot. In the light most favorable to LeFont, there was at least some evidence that: (1) there were numerous City personnel, regularly and continuously, within this area of the hole who could have seen and reported the hole; (2) the hole condition had possibly existed for a while; and (3) the City had an established practice to deal with unsafe conditions on its premises.

First, the record is replete with testimony reflecting that City employees, such as the City's convention center personnel, was very frequently and regularly in this very area. Multiple employees of the City testified that this is in the center of the very parking lot in which they have parked for years and do park as employees of the City. (Tr. p. 298, ll. 4-7). Furthermore, testimony established that the City's employees actually cordon off the center portion of the employee parking lot for these trade shows, and specifically including this one. (Tr. p. 257, l. 19 – p. 258, l. 13) (Tr. p. 66, ll. 4-6, 8-10) Significantly, this testimony establishes that City employees used

either cones or tape around these 14 parking spaces in the City's employee parking lot, specifically including the parking space at the edge of which the hole is located. This means that the City's employees were right at the hole, and could have seen and reported it, when they cordoned off these parking spaces for this show or at least when they parked their vehicles in these parking spaces on a daily basis. City employees also testified that they had video cameras which covered this parking lot. (Tr. p. 263, ll. 11-19; p. 293, ll. 2-11). Finally, the City's employees testified that the City has "24/7 security", called convention services, for the entire premises. (Tr. p. 298, ll. 19-22).

Second, Dr. Durig testified that this parking lot is in the loading zone and thereby receives frequent traffic from tractor trailers which, due to the heavier loads, will cause more wear and tear on the parking lot surfacing. (Tr. p. 173, ll. 12-13, 22-24).

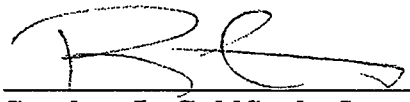
Third, testimony from the City indicated that they had an established practice to deal with unsafe conditions on its premises. (Tr. p. 299, l. 5 – p. 301, l. 19). In fact, Dr. Durig's testimony established that when he personally visited the parking lot on the morning of his trial testimony, the hole in the parking lot had been patched. (Tr. p. 164, ll. 18-23).

In light of the testimony and evidence presented, the circuit court erroneously overlooked the existence of evidence and failed to view the evidence and all reasonable inferences from the evidence in the light most favorable to LeFont.

CONCLUSION

This Court should reverse the circuit court's directed verdict and remand this case for a new trial.

Respectfully submitted,



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City of Myrtle Beach; Myrtle Beach
Convention Center Hotel Corporation, ... Respondents.

PROOF OF SERVICE

I, the undersigned employee of Goldfinch Winslow, LLC, attorneys for Appellant Christine LeFont, certify that on the date indicated below, I served all counsel in this action with a copy of Appellant's Initial Brief and Appellant's Designation of Matter to be Included in Record on Appeal by hand delivery and e-mail to:

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August 21, 2017

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Re: *Christine LeFont v. City of Myrtle Beach; Myrtle Beach Convention Center Hotel Corporation*
Appellate Case No.: 2017-001258
Lower Court No.: 2015-CP-26-00034
GW File: 17.385

Dear Madam Clerk:

Pursuant to Rule 262(a)(2), SCACR, I am enclosing for filing one (1) original of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in Record on Appeal, via facsimile copy for filing and am also immediately sending same by U.S. Mail. I have also enclosed a proof of service of these documents upon counsel for Respondent.

I am providing a copy of the enclosed to opposing counsel by copy of this letter via hand delivery and e-mail. Thank you for your attention to this matter. If you have any questions or need any information, please do not hesitate to contact me.

Respectfully yours,

GOLDFINCH WINSLOW, LLC

Ryan P. Compton (SC Bar No. 101152)

Enclosures: As Stated
cc: William A. Bryan, Esquire
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(via hand delivery and e-mail)