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 REPLY BRIEF

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The Respondent City of Myrtle Beach ("the City") has filed the Respondent's Initial Brief. In its Initial Brief, the City contends that the trial court's judgment should be affirmed. The City does not assert any additional sustaining ground. Pursuant to Rule 208(a)(3), SCACR, Appellant Christine LeFont ("LeFont") submits this Appellant's Initial Reply Brief for purposes of replying to the City's arguments and clarifying the City's various misconstructions of LeFont's arguments on appeal. LeFont relies on and incorporates the statement of the case and facts in her Initial Brief.

ARGUMENT

Central to deciding any directed verdict motion, the evidence must be liberally viewed in the light most favorable to the non-moving party. Similarly, the court cannot determine credibility issues or resolve conflicts in the testimony or evidence. *See Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). The court must deny a directed verdict motion and the case must be submitted to the jury if the evidence presents more than one reasonable inference or if its inferences are in doubt. *See Hoover v. Broome*, 324 S.C. 531, 538, 479 S.E.2d 62, 66 (Ct. App. 1996). If the evidence in this case is viewed in a light most favorable to LeFont, the directed verdict motion should have been denied.

I. Contrary to the City's assertion, LeFont presented evidence establishing liability and no Tort Claims Act ruling exists which may be the law of the case.

In its Initial Brief, the City contends the trial court directed a verdict to the City based upon application of S.C. Code § 15-78-60(15). (Resp. Init. Br.

2). The City then asserts that the "trial court's ruling on this ground is the law of the case." (Resp. Init. Br. 5). A fair reading of the record indicates that the trial court did not rule on S.C. Code § 15-78-60(15) and, therefore, there is no ruling to become the law of the case.

While the parties and the trial court did discuss the motion for some time, that does not mean that the trial court ruled on every topic or issue discussed. Every question that the trial court asks during arguments on a motion does not thereby automatically become a basis for a ruling the trial court may issue. Nevertheless, it is of course elementary that the law of the case doctrine does not apply to *dicta*. *See White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 609 S.E.2d 811 (Ct. App. 2005). "The doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989).

Here, following a long discussion of numerous issues, the trial court specifically summarized its rulings as follows to LeFont's trial counsel:

> The Court: [S]o that creates a **twofold** -- a two barrel appeal if you want to take it. . . . **I'm finding in this particular factual situation my conclusion is these people meet the definition of being a – your lady, the Plaintiff met the definition of a licensee**, not an invitee, and was on the premises certainly not as a trespasser. . . . But primarily **I don't find that there's any evidence that would establish constructive notice** of the pothole.

(Tr. 341, ll. 2-3, ll. 10-14, and ll. 21-23) (emphases added). Thus, the trial court's "two barrel" ruling in granting the directed verdict was on the grounds

that LeFont's was a licensee and that there was no evidence of notice. Accordingly, the trial court did not grant a directed verdict to the City based upon or grounded upon S.C. Code § 15-78-60(15). This, therefore, cannot be the law of the case.

The discussion and arguments centered on the status of LeFont on the property, the dangerous condition on the property, and the City's knowledge—actual or constructive—of the condition. All of these were discussed at length in LeFont' briefs.

II. The record can certainly speak for itself, but the City's suggestions that LeFont's arguments are not preserved is inaccurate.

In its Initial Brief, the City contends that LeFont's arguments concerning constructive notice and her status as an invitee or business visitor are not preserved for appellate review. *See* (Resp. Init. Br. 1, Issue V; Arg. II; and Arg. III(C)). Specifically, the City believes that LeFont did not raise to the trial court the following: (1) that employees of the City are regularly in the employee parking lot (Resp. Init. Br. 9); (2) that the hole had possibly existed for a while before LeFont's incident (Resp. Init. Br. 10); and (3) that she was an invitee or business visitor (Resp. Init. Br. 13).

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop.*

Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). Here, LeFont raised each of these arguments to the trial court.

As to the first point, the record shows LeFont argued that the City's employees, who testified at trial, testified that they are employees of the City and that they are regularly in the employee parking lot. (Tr. 331, ll. 7-19; Tr. 338, ll. 18-20; Tr. 337, ll. 7-9). LeFont argued this again in her Motion for Reconsideration. (Motion for Reconsideration, pp. 5-8). The point raised and argued here is the same point LeFont argued below.

As to the second point, the record shows LeFont argued that the hole had possibly existed for a while before her incident. (Tr. 333, l. 25 – Tr. 334, ll. 9; Tr. 336, ll. 13-15). LeFont argued this again in her Motion for Reconsideration. (Motion for Reconsideration, pp. 5-8). The point raised and argued here is the same point LeFont argued below.

As to the third point, the record shows LeFont argued that she was an invitee or business visitor. (Tr. 338, l. 25 – Tr. 339, ll. 2; Tr. 339, ll. 13 – Tr. 340, ll. 1). The trial court understood that LeFont was arguing that she was an invitee or business visitor, as the trial judge specifically stated:

> The Court: You don't need to because your record supports your argument. You think they are invitees, and I'm ruling as a matter of law that I understand the rule of what an invitee is. And you don't have to argue to me because the record's going to support it."

(Tr. 339, ll. 15-19). LeFont argued this again in her Motion for Reconsideration. (Motion for Reconsideration, pp. 2-5). The point raised and argued here is the same point LeFont argued below.

South Carolina appellate courts repeatedly find an issue is preserved for appellate review when the nature of the issue is clear from the argument made in the record, even upon failure to use correct legal terminology. *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (finding argument in motion for directed verdict preserved for appeal even though movant omitted "corpus delicti" from argument); *State v. James*, 362 S.C. 557, 562, 608 S.E.2d 455, 458 (Ct. App. 2004) (finding argument in motion for directed verdict as preserved for appeal even though movant argued "insufficient evidence" instead of "substantial circumstantial evidence"); *State v. Guillebeaux*, 362 S.C. 270, 274 n.1, 607 S.E.2d 99, 101 n.1 (Ct. App. 2004) (finding argument improperly stated as "motion for mistrial" nevertheless preserved a "motion for a new trial" for appellate review). It seems clear that no specific or "magic language" is required to preserve an issue for appellate review.

The trial court had a "fair opportunity" to consider everything here. Indeed, the trial court *did* consider these arguments. The trial court's errors were rejecting them in the face of evidence yielding more than one inference and its failure to view the evidence and all reasonable inferences therefrom in the light most favorable to LeFont as the non-movant. The City's allegation that LeFont's arguments are not preserved for appeal is contrary to relevant South Carolina case law and meritless. Therefore, LeFont's issues and arguments are preserved for appellate review by this Court.

III. The City has failed to rebut LeFont's arguments as to her status on the property and the condition of the hole thereon.

The City improperly asserts a new argument for the first time on appeal. The City argued in its motion for directed verdict that it is entitled to directed verdict because LeFont was a licensee as a matter of law. No argument was presented by the City that it was entitled to directed verdict because LeFont lost her status as an invitee or business visitor by exceeding the scope of invitation when she entered the parking lot at issue. So, too, the trial court did not issue an order or finding on any such argument. Nevertheless, the City now argues for the first time in this case that directed verdict was appropriate because LeFont lost her invitee or business visitor status in the parking lot at issue. (Resp. Init. Br. 12). The City should not be permitted to add an argument on appeal that it had the opportunity to raise below to the trial court but did not.

Regardless, even if it had raised this issue and this argument below, it is still elementary that "[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 City has not argued, nor can it show, how this is anything other than a question for a jury. To the contrary, LeFont has argued throughout that her status on the property was, in fact, a question for the jury to determine.

Additionally, the City claims that LeFont would only be an invitee "while she was inside the Exhibit Hall where vendors are expected to be

present." (Resp. Init. Br. 12). The City has, again, overlooked testimony which plainly indicates that the City did in fact expect vendors, like LeFont, to be present in and traveling through the employee parking lot at issue. There was testimony that a City employee specifically let LeFont, a vendor, into the parking lot. (Tr. 66, ll. 3-6; Tr. 321, ll. 2-10). Significantly, there was testimony from the City's own employees clearly indicating that vendors, like LeFont, will be walking through the employee parking lot, and will use the employee parking lot for unloading and loading purposes. (Tr. 276, ll. 3-8). After all, as the City's own employee testified, the vendors "have to get in and move their stuff in. That's the area they do that in. The loading dock is in the back of the building where the employee lot is." (Tr. 276, ll. 14-17).

For these reasons, the Court should reverse the trial court's orders as the evidence viewed in the light most favorable to LeFont indicate and yield the inference that she was an invitee or business visitor.

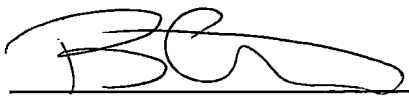
Finally, the City contends there is no evidence that the hole was concealed and that "[t]he photographic evidence shows the hole was in plain sight." (Resp. Init. Br. 13). Yet again, the City is overlooking evidence in the record and, further, failing to view the evidence and all reasonable inferences therefrom in the light most favorable to LeFont. LeFont would specifically note that she has showed in her briefing that there is conflicting evidence as to the openness, obviousness, or degree of concealment of the hole. (App. Init. Br. 10-13). Denial of the City's directed verdict motion was required in light

of the existence of conflicting evidence yielding more than one reasonable inference and, further, because inferences yieldable from that conflicting evidence are also in doubt. Accordingly, the trial court's ruling to the contrary should be reversed.

CONCLUSION

The trial court erred in granting the City's motion for a directed verdict and in denying LeFont's motion for reconsideration for the reasons stated in LeFont's briefs. LeFont requests that this Court reverse the trial court's decisions and remand this case for a new trial on the merits.

Respectfully submitted,



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January 24, 2018
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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

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Case No. 2015-CP-26-00034

Christine LeFont, ... Appellant,

v.

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 Reply Brief by hand delivery and e-mail to:

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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 Appellant's Initial Reply Brief, 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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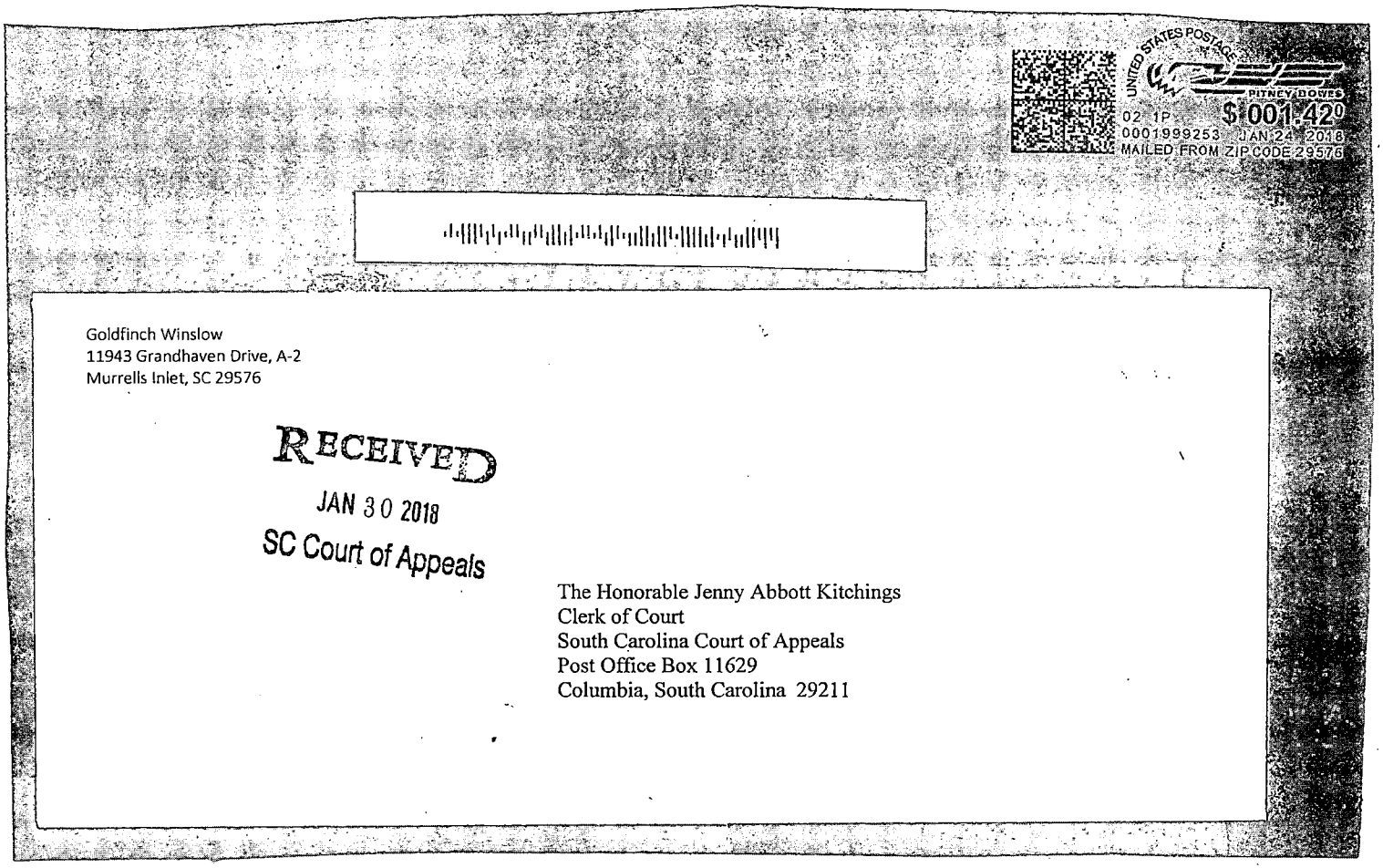

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