THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2017-001671

Lisa E. Crowe, Appellant,

v.

Fred's Stores of Tennessee, Inc., and NARA Properties, LLC, Defendants,

Of which Fred's Stores of Tennessee, Inc., is the Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER OR NOT THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

This is an action that was originally brought by Appellant against Respondent on February 10, 2016, stemming from a slip-and-fall incident. Specifically, Respondent alleged that on or about January 24, 2016, after having patronized Respondent's store, she exited the front doors while making her way to her vehicle. Upon exiting the store, as was indicated in the surveillance footage, Appellant passed over the sidewalk and into the parking lot when she slipped and fell on ice and/or packed snow. As a result of the incident fell backwards onto her back and wrist. Appellant was ultimately determined to have sustained a fracture in her wrist, which required surgical repair, to include placement of hardware. Appellant, upon learning of the existence of a lease agreement and having identified the landlord, amended her Complaint to include Nara Properties, LLC, as a Defendant. Nara Properties, LLC, failed to timely file an Answer and was held in Default with a judgment later entered against them. Nara Properties, LLC, did not proceed with any efforts to have either the entry or judgment set aside.

Specifically, as it pertains to Respondent, Appellant alleges that it: (A) failed to warn its customers of dangers then and there existing; (B) failing to properly monitor and maintain its premises; (C) failing to remedy a dangerous condition it had notice and/or should have had notice of; (D) failing to post proper signs alerting its customers of the unsafe condition on its premises; (E) had actual knowledge of a hazard on its premises; and (G) failing to use the degree of care that a reasonable and prudent entity would have used under the circumstances then and there prevailing.

Respondent, after completion of written discovery and having deposed Appellant, moved for summary judgment on January 11, 2017. The Trial Court entertained oral arguments and reviewed briefs submitted by the parties. On July 5, 2017, the Trial Court filed its Order granting the Motion for Summary Judgment and this appeal ensued. (R. pp. 2-8).

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

a. Appellant's fall occurred in the parking lot, which was owned, operated, and controlled by the landlord such that Respondent owed her no duty.

Appellant, in her Complaint, has alleged that "as Plaintiff was exiting the front doors of the store, she slipped on ice and/or packed snow under the store's awing and fell backwards...." (R. p. 12). Respondent, through written discovery, produced a copy of the surveillance video that shows Appellant pass through the entrance/exit doors as she departed the store once her shopping was complete. Upon crossing over the threshold Appellant is seen taking approximately seventeen (17) cautious steps before she slips and falls backwards. The surveillance video is clear and irrefutable and definitively shows Appellant clearly outside the entrance/exit doors and in the parking lot at the moment the fall occurs.

It is well settled law in the state of South Carolina that "[a] merchant is not an insurer of the safety of his customers but only owes the duty of exercising ordinary care to keep the premises in a reasonably safe condition. *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001), (*See also Pennington v. Zayre Corp.*, 252 S.C. 173, 165 S.E.2d 695 (1969). Likewise, a merchant "is not required to maintain the premises in such a condition that no accident could happen to a patron using them." *Denton v. Winn-Dixie Greenville, Inc.*, 312 S.C. 119, 120, 439 S.E.2d 292, 293 (Ct. App. 1993), (*See also Panoz v. Gulf & Bay Corporation,* 208

So.2d 297 (Fla. App.), *cert. denied,* 218 So.2d 166 (Fla. 1968); *Gavin v. City of Chicago,* 97 Ill. 66 (1880); *Overton v. Wenatchee Beebe Orchard Co.,* 28 Wash.2d 377, 183 P.2d 473 (1947)). Specifically, in a matter involving a purported dangerous or defective condition a plaintiff, to recover damages for injuries as a result of said condition, "must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it." *Garvin v. Bi-Lo, Inc.*, 343 S.C. at 625, (*See also Anderson v. Racetrac Petroleum Inc.,* 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington v. Zayre **833 Corp.,* 252 S.C. 176, 165 S.E.2d 695 (1969); *Hunter v. Dixie Home Stores,* 232 S.C. 139, 101 S.E.2d 262 (1957); *Cook v. Food Lion, Inc.,* 328 S.C. 324, 491 S.E.2d 690 (Ct. App.1998)).

Respondent, inarguably, was operating a retail store within a larger property that was owned and operated by a landlord. Respondent originally entered into a lease agreement on November 6, 2002, which was subsequently renewed on February 1, 2013, for a term that would expire January 31, 2018. Respondent's status as a lessee is of extreme importance in this case. On the date of the subject accident the Lease Agreement was in effect with Respondent regularly paying rent pursuant to the terms contained therein. Section 5 of the Lease Agreement deals with maintenance of the premises. Specifically, the applicable section states "the Lessor will keep and repair the exterior of the Demised premises, including the parking lot, ... , entrances and exits, sidewalks ...." Of additional significance is the language contained in Rider 2, which addresses removal of snow as being covered by the costs associated with common area maintenance. Appellant, in her Complaint, clearly references the cause of the incident being "ice and/or packed snow."

It is well settled that:

> One who operates a shopping center where stores are leased to merchants and the owner retains possession and control of the parking area and sidewalks, is not an insurer of the safety of those who use the parking lot and sidewalks as customers of the merchants leasing the stores, but the owner of the premises owes the customers the duty of exercising ordinary care to keep the passageways, sidewalks and such other parts of the premises as are ordinarily used by the customers in transacting business in a reasonably safe condition.

Bruno v. Pendleton Realty Co., 240 S.C. 46, 51, 124 S.E.2d 580 (1962). Respondent submits that the case at bar bears clear similarities to *Bruno* in that each involve falls that occurred in parking lots of shopping centers where the lots were possessed and controlled by owners who leased property to merchants. In each matter the responsibility for maintenance of the parking lot belongs to the "owner of the premises." In the instant case it is irrefutable that Respondent was not the owner of the premises and as such they had no duty to maintain the parking lot where Plaintiff's fall occurred.

An essential element in Appellant's case against Respondent, as is required in all negligence cases, is the existence of a legal duty of care. *McKnight v. South Carolina Dept. of Corrections*, 385 S.C. 381, 390-91, 684 S.E.2d 566, 571 (Ct. App. 2009) (*see also Pratt v. CSX Transp., Inc.*, 379 S.C. 249, 258, 665 S.E.2d 631, 635 (Ct. App. 2008). "Without such a duty, a Plaintiff cannot establish negligence." *Id.* It has long since been established that there is no common law duty to act though "an affirmative legal duty may be created by statute, contract relationship, status, property interest, or some other special circumstance." *Pratt v. CSX Transp., Inc.*, 379 S.C. 249, 258, 665 S.E.2d 631, 636 (Ct. App. 2008). Respondent contends that under the prevailing laws of this State there exists no duty between Respondent, as a lessor of solely the Demised premises, and Appellant when she entered property, the parking lot, that was not under Respondent's possession or control. In support of this contention Respondent directs this Honorable Court to the holding in *Bruno* as well as the landlord tenant act, specifically S.C.

Code Ann. § 27-40-440. Simply put Respondent owes Plaintiff no duty to maintain property it does not own, operate, or control.

Furthermore, pursuant to the South Carolina Residential Landlord and Tenant Act (hereinafter "RTLA") "a landlord shall ... (3) keep all common areas of the premises in a reasonably safe condition ...." S.C. Code Ann. § 27-40-440. The RTLA was also relied upon in the case of *Durkin v. Hansen*, 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). In *Durkin* the Court noted that the RTLA imposes certain duties upon a landlord relative to maintenance of the premises. *Durkin* is also pertinent to the instant case for a secondary reason. The Court established, in its findings in *Durkin*, that certain duties owed by a landlord were "non-delegable" and that while the landlord may employ contractors in the fulfillment of those duties they remain liable for injuries resulting from "the contractor's failure to exercise reasonable care to make the leased property reasonably safe." *Id.*, S.C. at 553-54. The issue of nondelegable duties was further expounded upon in *Rock Hill Telephone Co., Inc. v. Globe Communications, Inc.*, which notes "[a] landlord who undertakes to repair his property by use of a contractor has a nondelegable duty to see that the repair is done properly." 363 S.C. 385, 391, 611 S.E.2d 235, 238 (2005). The foregoing line of cases underscores Respondent's contention that the duty to maintain the premises, as founded in case law and statute, is under the exclusive purview of the landlord. In fact, in *Osborne v. Adams*, it was held that a landlord would even remain "vicariously liable for injuries caused by defective repairs." 364 S.C. 4, 12, 550 S.E.2d 319, 324 (2001).

It is irrefutable that the landlord was responsible for maintaining the parking lot in a reasonably safe condition for customers of the merchants leasing the stores, which included Respondents. Moreover, Appellant can point to no precedent that gives rise to the creation of any

duty on Respondent for the property where the subject accident occurred in light of Respondent's lack of possession or ownership of said property.

Appellant contends, in her brief, that Respondent "as an occupant in possession, are one and the same as an owner." *See P. 5*, Initial Brief of Appellant. However, Appellant's contention in this regard is wholly misplaced with respect to the subject accident. There is no dispute that Respondent is an "occupant" of the Demised premises, which it leases, subject to the terms and conditions of the Lease Agreement, from the landlord. Respondent does not refute that it has a duty to exercise due care in maintaining its premises, the Demised premises, in a reasonably safe condition for its invitees. Appellant's theory, if accepted, would extend beyond property "occupied" by Respondent considering there was no evidence presented indicating that Respondent "occupied" the parking lot where the incident occurred. To accept Appellant's theory could lead to scenarios where lessees are held responsible for incidents involving customers in parking lots if said customers are not even patrons of their establishment. Plainly, there is no premise relied upon or any that can be relied upon by Appellant to extend Respondent's liability beyond the premises that they occupy, which in the instant case does not include the parking lot.

Under an alternative theory Appellant seeks to have this Court hold Respondent liable for Appellant's fall under a contention that Respondent's voluntarily undertook a duty. Appellant in her brief directs the Court to photographs produced during written discovery showing a pathway cleared through the ice and snow. Importantly, Appellant acknowledges that the photograph depicts a cleared pathway that "was completed ... after Crowe fell." Appellant correctly notes that there are scenarios in which one has no duty to act but one may voluntarily undertake the act. As has been noted throughout, our Courts have repeatedly noted that "[a]n affirmative legal

duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003); (citing *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3 (1997)). The foregoing theory is expanded; however, when a party who is otherwise under no duty to act, voluntarily undertakes an act. In the scenario where an actor voluntarily undertakes an act they assume a duty to use due care, sometimes referred to as the "affirmative acts exception." *Id.*

Respondent submits that, even if this Court finds that the "affirmative acts exception" is applicable, their efforts to create a pathway does not supplant the landlord's duty to maintain the parking lot in a reasonably safe condition. Moreover, the act undertaken by Respondent does not somehow create a duty on them to have maintained the parking lot in a reasonably safe condition. This Court in *Creighton v. Coligny Plaza Ltd. Partnership* evaluated a similar scenario relative to a set of entrance steps. 334 S.C.96, 512 S.E.2d 510 (Ct. App. 1998). The initial question to be addressed in *Creighton* centered on who the responsibility for the maintenance of the entrance steps. The Court looked to the terms of a lease agreement and found that possession of the premises, which was found to include the steps, was surrendered to the lessee thus establishing their duty to maintain the entrance steps and relieving the partnership of any duty to maintain them. The issue of assumed duty was raised as a result of the assertion that the Partnership hired an independent contractor, D & M, to perform landscaping and maintenance at the premises. The Court clearly concluded that "[a] person who voluntarily undertakes to perform an act must use due care *in the performance of that act*." *Id.*, 334 S.C. at 116; (*see also Roundtree Villas Ass'n v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984); *Salvo v. Hewitt, Coleman & Assocs.*, 274 S.C. 34, 260 S.E.2d 708 (1979); *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985). Applying the same rational relied upon by this Court

in *Creighton* to the instant case the only duty that would have been assumed by Respondents in clearing a pathway would have been to utilize due care in performance of the act itself. There is no evidence that Appellant's injuries arose from Respondent's failure to use due care in the act of clearing the pathway thus there is no evidence of a breach of any duty, even an assumed one through the "affirmative acts exception."

b. Appellant had knowledge of the condition and thereby eliminating any duty owed to her.

The irrefutable evidence establishes one clear truth and that is that Appellant, well prior to the subject incident, was aware of the presence of the ice and/or packed snow that she ultimately fell on once she had exited Respondent's premises. "The entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injury. If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable." *Larimore v. Carolina Power & Light*, 340 S.C. 438, 448, 531 S.E.2d 535, 540 (Ct. App. 2000). Respondent understands that the open and obvious nature of the condition does not necessarily obviate all potential duties of a possessor of land. In *Callander v. Charleston Doughnut Corp.*, the Court adopted Section 343(a) of the Restatement (Second) *Torts* in holding that "an owner may be required to warn the invitee, or take other reasonable steps to protect him, if the 'possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, ... or fail to protect himself against it." 305 S.C. 123, 125, 406 S.E.2d 361, 362-63 (1991).

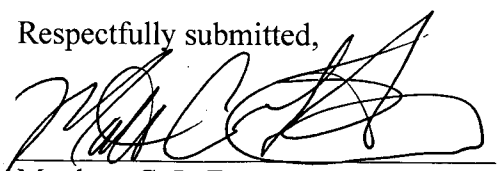
There are cases; however, where a possessor of land may be absolved from its duty to warn under Restatement (Second) *Torts* in certain circumstances. The instant case bears striking similarities to *Hackworth v. U.S.*, 366 F.Supp.2d 326. In *Hackworth* a patron of a store reportedly slipped and fell in water once she stepped from a rubber mat inside the entrance of a

"Mini-Mart." The evidence in *Hackworth* revealed that the plaintiff recalled "jumping puddles on the way from her car to the Mini-Mart entrance." *Id.*, 366 F.Supp.2d at 328. Moreover, the plaintiff "stopped to stomp her feet and shake water off herself before entering." *Id.* Finally, it was noted the plaintiff was reportedly "paying close attention to the floor when she came in due to the wet conditions outside." *Id.* 366 F.Supp.2d at 331. Based upon the evidence in *Hackworth* the Court ultimately concluded that the store had no duty to warn. In the instant case the surveillance video produced by Respondent clearly depicts Plaintiff walking across the ice and/or packed snow as she made her way from her vehicle to the entrance of Respondent's store. Likewise, the surveillance video shows Appellant walking across the same ice and/or packed snow after exiting the premises and while making her way back to her vehicle. In fact, it is clear that Appellant is walking with caution, as she is inarguably aware of the potentially hazardous condition she is walking over. Appellant, based upon the clear and irrefutable evidence, was aware of the presence of the ice and/or packed snow prior to her fall and as such Respondent, even if viewed as the possessor of the land, which they were not, owed her no duty.

CONCLUSION

For the reasons stated herein, this Court should affirm the Order and Judgment of the trial court in full.

Respectfully submitted,



April 9, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b).

April 9, 2018

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