

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY SC
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate 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 a Respondent,

FINAL REPLY BRIEF OF APPELLANT

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Appellant received Respondent's Initial Brief on February 8, 2018. Appellant timely filed this Reply Brief. Rule 208(a)(3).

DISPUTED STATEMENT OF THE FACTS

Conclusions and determinations related to the existence of a duty to Appellant as well as the location of Appellant's fall and the close proximity of her fall to a Fred's store employee clearing ice and/or snow is a factual question which should be resolved by a jury.

Moreover, in its Brief, Respondent relies upon videotape surveillance which Respondent failed to enter into evidence in its Motion for Summary Judgment. Appellant does not deny that Appellant was outside of the store when she fell. However, Appellant believes that viewing the videotape would assist the factfinder in assessing whether a duty existed as Fred's undertook efforts to remove the ice within five (5) steps of where Appellant fell.

Additionally, Appellant argues that the contents of the videotape surveillance should not have been considered by the Circuit Court as the videotape was not played for the Court nor was it submitted into evidence during Respondent's Motion for Summary Judgment. For these same reasons, the videotape evidence is not available for inclusion in the Record on Appeal. "Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal." SCACR 210.

ARGUMENT

I. RESPONDENT OWED APPELLANT A DUTY OF CARE

In Respondent's Initial brief, Respondent cites several authorities in support of its Motion for Summary Judgment. However, Appellant avers that these authorities do not advance Respondent's position.

Respondent relies upon *Platt v. CSX Transportation, Inc.* to blanketly conclude that a duty cannot exist in this case. *Id.* 379 S.C. 249, 665 S.E.2d 631 (Ct. App. 2008), *aff'd in part, vacated in part sub nom. Platt v. CSX Transp., Inc.*, 388 S.C. 441, 697 S.E.2d 575 (2010). However, *Platt* concerns the public duty rule, which is not at issue in the case at bar. *See* Respondent's Initial Brief, p. 4. Moreover, "[u]nder common law, even where there is no duty to act but an act is voluntarily undertaken, the actor assumes the duty to use due care." *Russell v. City of Columbia*. 305 S.C. 86, 406 S.E.2d 338 (1991).

Respondent also cites the South Carolina Residential Landlord and Tenant Act (S.C. Code § 27-40-10 et seq.) and *Durkin v. Hansen* (313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993)), a case concerning maintenance of a condominium unit. Neither authority involves commercial properties. Appellant avers that the legal duties between residential landlords and tenants are not applicable to a commercial property.

The South Carolina Residential Landlord and Tenant Act was created in order to: "(1) to simplify, clarify, modernize, and revise the law governing rental of *dwelling units* and the rights and obligations of landlords and tenants; (2) to encourage landlords and tenants to maintain and improve the *quality of housing*." S.C. Code Ann. § 27-40-20 (emphasis added).

Appellant avers that it is undisputed that Appellant fell at a Fred's store which is a property being utilized solely for commercial use.

Additionally, Respondent cites *Rock Hill Telephone Co., v. Globe Communications, Inc.* (363 S.C. 385, 611 S.E.2d 235 (2005)) which concerns delegable duties for contractors and independent contractors. Respondent further cites, *Osborne v.*

Adams, a case where a Mother sued a hospital and doctors for ailments her son developed while in hospital's neonatal care unit. In quoting *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 42–43, 533 S.E.2d 312, 317–18 (2000), *Osborne v. Adams* states the following: “[a] landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs. *Id.*, 346 S.C. 4, 12, 550 S.E.2d 319, 323 (2001). These cases lack any relevance to the facts and law at issue here.

Lastly, Respondent cites *Carson v. Adgar* (326 S.C. 212, 486 S.E.2d 3 (1997)) which is a wrongful death action concerning the imposition of a duty upon an employer who left an intoxicated employee on the side of the road after fishing and drinking beer. The existence of a legal duty in this case is incomparable to these set of facts.

Lastly, while Respondent cites *Hackworth v. U.S.* to support the premise that Respondent had no duty to warn Appellant due to the alleged “open and obvious” nature of the condition, the Court in *White v. Renaissance Hotel Mgmt. Co., LLC* resolves the critical difference between *Hackworth* and the case at bar.

This case is easily distinguishable from *Hackworth* because there was absolutely no evidence in *Hackworth* that the Mini-Mart, unlike the Hotel, was aware of the puddle, much less aware of the puddle for ten days but refused to do anything to clean it up despite continuous requests to do so. *White v. Renaissance Hotel Mgmt. Co., LLC*, No. 2:14-CV-02866-DCN, 2016 WL 234987 (D.S.C. Jan. 20, 2016).

Respondent’s counsel, at the summary judgment hearing conceded that he is not “argu[ing] that Fred’s was not aware of the existence of ice.” (R. p. 22, l. 3-4).

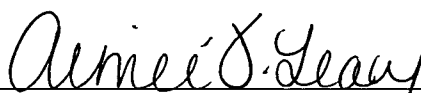
The basis of Respondent’s Motion for Summary Judgment was that Appellant “failed to present any tangible evidence to establish any of the requisite elements for the claim of premises liability/negligence.” (See R. p. 24). Appellant avers that it has

successfully argued the existence of a duty and that Fred's has failed to present relevant facts or caselaw sufficient for this Court to affirm the Order for Summary Judgment.

CONCLUSION

For the reasons set forth above and in Appellant's Initial Brief, the Order granting Respondent's Motion for Summary Judgment was in error and should have been denied. Wherefore, Appellant prays that this Court reverse the ruling of the Circuit Court and remand this matter for further proceedings.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned, Aimee V. Leary, certifies that this Final Reply Brief of Appellant complies with Rule 211(b).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Final Reply Brief of Appellant and this Certificate of Service were served upon counsel on **March 27, 2018** by First Class Mail as follows:

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