STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
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 BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CAUSE OF ACTION FOR PREMISES LIABILITY/NEGLIGENCE?

STATEMENT OF THE CASE

On Sunday, January 24, 2016, Lisa E. Crowe (hereinafter "Appellant" and/or "Crowe") visited a store owned and operated by Fred's Stores of Tennessee, Inc. (hereinafter "Fred's" and/or "Respondent"), Store # 2208, located at 200 Spartanburg Hwy Lyman, South Carolina 29365. Three days prior, on or about Thursday, January 21, 2016, there was inclement weather during which it snowed, causing snow and ice to accumulate in the entrance and exit of the store. Prior to Appellant's visit, Appellant asserts it is undisputed that no efforts were made to remove the snow and/or ice from the store's entrance and exit. On the day of the incident, Crowe entered the store and purchased several items. While Crowe was in the store, as evidenced by surveillance video produced by the Respondent, a store employee, presumably noticing the dangerous condition, began to clear the untouched snow and ice. Approximately three minutes later, upon exiting the store, Appellant slipped on the ice and/or packed snow falling onto her back and left wrist near where the employee was clearing.

During discovery, Respondent produced a photograph of the area after Appellant's fall. The photograph shows the presence of ice and snow outside of the store as well as the cleared pathway that was completed by the employee after Crowe fell. (See R. p. 86).

After Crowe's fall, the manager of the store and a male employee assisted Crowe to a walk in medical facility to seek medical treatment. Appellant was unable to drive herself due to her injuries. After examination, it was determined that she had several broken

bones in her left wrist that required surgical repair. Crowe also sustained a bruised back as well as some other minor bruising from the fall.

Appellant filed the present action on or about February 10, 2016. Respondent filed the herein Motion for Summary Judgment on or about January 11, 2017 alleging *in summary* that "[Fred's] is entitled to judgment as a matter of law as [Appellant] has failed to present any tangible evidence to establish any of the requisite elements for the claim of premises liability/negligence brought as to this [Respondent]..." (See R. p. 24). Respondent also presented the following arguments: (1) "the fall occurred in an area that is not controlled or otherwise maintained by this Defendant and as such they owe Plaintiff no duty relative to the location of the fall"; and (2) "the surveillance video clearly depicts Plaintiff traversing the same course in entering Defendant's store as she did upon her exit." (R. pp. 24-25).

A hearing on Respondent's Motion for Summary Judgment was held before the Honorable R. Keith Kelly on or about June 1, 2017. After oral arguments and memoranda were presented by the parties, the motion was taken under advisement. Judge Kelly granted Respondent's Motion and issued an Order on July 3, 2017 which was entered by the Clerk of Court for Spartanburg County on July 5, 2017 (hereinafter the "**Order**").

The Order provides as follows: "[u]pon conclusion and consideration of the oral arguments of the parties ... the undersigned finds that Plaintiff stepped over the same patch of ice when she entered the building thereby relieving Defendant of a duty to warn her of the condition as she was already aware of its presence. Furthermore, the undersigned finds Defendant owed Plaintiff no duty to maintain the parking lot, which was where the subject incident occurred." (R. p. 7).

The Order was received on July 5, 2017. Appellant filed and served its Notice of Appeal on August 4, 2017. (**Notice of Appeal**). The transcript was received on or about November 27, 2017.

LEGAL STANDARD

In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. *Quail Hill,* 387 S.C. at 234, 692 S.E.2d at 505. Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Quail Hill,* 387 S.C. at 235, 692 S.E.2d at 505.

Summary Judgment should be granted only if there is no genuine issue as to any material fact of the litigation. Rule 56, SCRCP. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembree,* 364 S.C. 316, 613 S.E.2d 533 (2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Montgomery v. CSX Transp., Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2007) (Shearouse Adv. Sh. No. 1 at 11); *Bargus v. Wessinger,* 303 S.C. 412, 401 S.E.2d 169 (1991); *Nelson v. Charleston County Parks & Recreation Comm'n,* 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004).

The purpose of summary judgment is to expedite disposition of cases which ***do not*** require the services of a fact finder. *Dawkins v. Fields,* 354 S.C. 58, 580 S.E.2d 433 (2003);

Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004). Because it is a drastic remedy, summary judgment should be ***cautiously invoked*** to ensure that a litigant is ***not improperly deprived of a trial on disputed factual issues***. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.,* 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins,* 358 S.C. at 289, 594 S.E.2d at 561-62; *Murray v. Holnam, Inc.,* 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001) (emphasis added).

ARGUMENT

In the Second Amended Complaint, Appellant plead a premises liability/negligence cause of action against Fred's for failing to keep the premises safe for Plaintiff as an invitee/business visitor of the store.

> Generally, the owner of property ***owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from the breach of such duty***. *Larimore v. Carolina Power & Light,* 340 S.C. 438, 444, 531 S.E.2d 535, 538 (Ct.App.2000). Thus, unlike a licensee, an invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there. *Landry,* 317 S.C. at 203, 452 S.E.2d at 621; *Bryant v. City of North Charleston,* 304 S.C. 123, 125, 403 S.E.2d 159, 161 (Ct.App.1991).

To establish negligence in a premises liability action, a plaintiff must prove the following elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Hurst v. East Coast Hockey League, Inc.,* 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006).

In Respondent's Memorandum in Support of its Motion for Summary Judgment, Respondent states, "based upon the absence of any evidence sufficient to establish a genuine issue of material fact as to Defendant owing a duty to Plaintiff given the location

of the incident this Court must grant Defendants' Motion for Summary Judgment." (R. p. 32).

In response, Appellant avers that the court erred in determining that a duty did not exist and for the reasons outlined herein below, Appellant prays that the court reverse the Circuit Court's Order granting Respondent's Motion for Summary Judgment.

i. RESPONDENT OWED APPELLANT A DUTY OF CARE

Despite the fact that Fred's is only a lessee/occupant of the premises, Appellant avers that the obligations of Fred's, as an occupant in possession, are one and the same as an owner.

> The ***occupant*** owes a duty to an invitee to exercise due care to keep the premises to which the invitation extends in a reasonably safe condition for his use. Typically, this duty is owed to a customer in a store or to a patron upon the premises of any other business open to the public. Bruno v. Pendleton Realty Co., 240 S.C. 46, 124 S.E.2d 580, 95 A.L.R.2d 1333; West's South Carolina Digest, Negligence; Prosser on Torts, 3rd Edition, Sec. 61; 38 Am.Jur., Negligence, Sec. 131; 65 C.J.S. Negligence §§ 43(1), 44. *Parker v. Stevenson Oil Co.*, 245 S.C. 275, 280–81, 140 S.E.2d 177, 179 (1965) (emphasis added).

Respondent, in its Memorandum in Support of its Motion for Summary Judgment, cited caselaw which relates to a purported dangerous or defective condition. Respondent provided that in order to recover damages for injuries, a party "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.***" (**Memorandum in Support**, p. 4-5, *citing Garvin c. Bi-Lo, Inc.*, 343 S.C. at 625) (emphasis added).

With respect to Fred's knowledge of the condition, 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).

Moreover, Appellant avers it is undisputed that an employee of Fred's began efforts to clear a pathway through the snow and ice three minutes before Crowe fell. Therefore, even without a preexisting duty of care, Fred's undertook efforts to remediate the snow/ice three minutes prior to Appellant's fall which Appellant argues imposes a duty of care upon Fred's.

In Fred's Motion for Summary Judgment, Fred's asserts that the area Appellant fell is not "controlled or otherwise maintained by this Defendant." (R. p. 24). However, "[u]nder the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, ***the defendant assumes a duty to use due care***. *Russell v. City of Columbia,* 305 S.C. 86, 406 S.E.2d 338 (1991); *Sherer v. James,* 290 S.C. 404, 351 S.E.2d 148 (1986) (emphasis added). Appellant opines that Fred's breached its duty of care by failing to place the store's entrance and exit in a safe condition several days after a snow storm.

In further support of this position, the Restatement (Second) of Torts § 323 (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 444, 494 S.E.2d 827, 832–33 (Ct. App. 1997).

For the reasons stated herein, at a minimum, when Fred's undertook efforts to remove the snow and ice from the store's entrance, they likewise assumed a duty to use due care. Wherefore, Appellant avers that the Circuit Court should have denied Respondent's Motion for Summary Judgment.

ii. APPELLANT'S ALLEGED KNOWLEDGE OF THE CONDITION DOES NOT ELIMINATE RESPONDENT'S DUTY

The Circuit Court held that "Plaintiff stepped over the same patch of ice when she entered the building thereby relieving Defendant of a duty to warn her of the condition as she was already aware of its presence." (R. p. 7). However, Appellant avers that despite her ***alleged*** knowledge of the condition, the Respondent still owed her a duty of care to maintain the premises in a reasonably safe condition. Also, Appellant did not "step over" the same patch of ice on her way into the store. Rather, the entire entrance was a sheet of ice, as shown in Exhibit A of Appellant's Memorandum in Opposition of its Motion to Dismiss. Respondent argued that "there's no duty for [Fred's] to warn" (R. p. 23, l. 22) and because "[Appellant's] knowledge of the condition was equal to the knowledge possessed by the store thus there is no warning required nor is there any liability given..." (R. p. 25).

However, the general rule that a shopkeeper does not have a duty to warn others of an open and obvious condition is abandoned when the condition is one where the shopkeeper should have ***anticipated the resulting harm***. In such a case, ***a duty arises***. Moreover, Fred's status as a lessee of the property does not obviate Fred's duty to invitees of the store.

> [W]hen land is occupied by a 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. In the absence of an agreement to the contrary, the lessor surrenders possession and control of the land to the lessee. After the premises are surrendered in good condition, the lessor typically is not responsible for

> hazardous conditions which thereafter develop or are created by the lessee. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 434 (5th ed. 1984). *See also Young v. Morrisey,* 285 S.C. 236, 329 S.E.2d 426 (1985) (landlord owes no duty to maintain leased premises in a safe condition). *Byerly v. Connor*, 307 S.C. 441, 443–44, 415 S.E.2d 796, 798 (1992).

Wherefore, Fred's as the lessee of the property, stands in the shoes of the property owner and thus owes Appellant a duty of care.

> A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct.App.2004). "The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge." *Id.* "A property owner generally does not have a duty to warn others of open and obvious conditions, ***but a landowner may be liable if the landowner should have anticipated the resulting harm.*** *Id. Peterson v. Porter*, 389 S.C. 148, 153, 697 S.E.2d 656, 658 (Ct. App. 2010) (emphasis added).

Appellant asserts that Fred's should have anticipated the likelihood that the presence of ice and/or snow could cause an invitee to slip and fall, thereby causing the invitee injury. It is foreseeable that an invitee would have to cross over the ice and snow to enter the store.

The Court in *Hancock v. Mid-S. Mgmt. Co.* reversed the court of appeals decision holding as follows: "we hold the that the court of appeals erred in affirming the trial courts grant of summary judgment because ***a genuine issue of material facts exists regarding whether Petitioners injuries resulted from a dangerous condition and, if so, whether Respondent should have anticipated this type of harm.***" *Id.*, 381 S.C. 326, 332, 673 S.E.2d 801, 803 (2009) (emphasis added). The court further reasoned as follows:

> Even if the parking lot contained a dangerous condition it was open and obvious. While a parking lot's state of disrepair may be considered open and obvious, ***a jury could determine that Respondent should have anticipated that such a condition may cause an invitee to fall and injure themselves.***

> *See Creech v. South Carolina Wildlife and Marine Resources Dept.*, 328 S.C. 24, 491 S.E.2d 571 (1997) (holding that a dock without a guard rail on one side was an open and obvious condition, ***but that the defendant should have anticipated the harm***); *Callander,* 305 S.C. at 126, 406 S.E.2d at 363 (holding that although a missing seat on a stool was an open and obvious condition, ***the owner should have anticipated the harm***). *Id.* 381 S.C. 326, 331–32, 673 S.E.2d 801, 803 (2009) (emphasis added).
>
> In the case of *Sims v. Giles*, the court goes one step further:
>
> It is not necessary that the precise manner in which the injuries were sustained be foreseeable. *Hughes,* 269 S.C. at 397, 237 S.E.2d at 757; *Orr v. First Nat'l Stores, Inc.,* 280 A.2d 785 (Me.1971). Rather, ***"[i]t is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range.... It was, therefore, a jury question whether the defendant had provided reasonably safe premises ... for the use of the ... invitee.***" *Hughes,* 269 S.C. at 397-98, 237 S.E.2d at 757 (quoting *Orr,* 280 A.2d at 794). *Id.*, 343 S.C. 708, 718–19, 541 S.E.2d 857, 863 (Ct. App. 2001) (emphasis added).

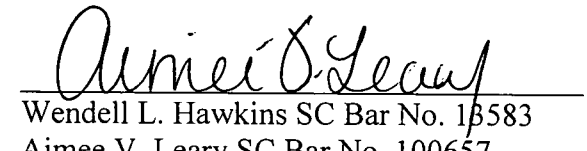
For these reasons, Appellant avers that Respondent's duty remained, despite the alleged open and obvious nature of the dangerous condition.

CONCLUSION

As outlined herein, the Respondent owed Appellant, as an invitee, a duty of care. Moreover, the alleged open and obvious nature of the condition does not insulate Respondent from liability. Therefore, the Court's finding that Appellant's knowledge of the condition relieved Respondent's duty to warn and the Court's finding that Respondent owed Appellant no duty to maintain the store's entrance, is improper.

Based upon the preceding facts and argument, Appellant respectfully prays that the Court reverse the Order of the Circuit Court and remand for further proceedings.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned, Aimee V. Leary, certifies that this Final 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 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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