THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2010-CP-21-2170

Susan Anne Bell Lynch, ... Appellant/Respondent,

v.

Carolina Self Storage Centers, Inc., ... Respondent/Appellant.

INITIAL APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

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II. EVEN IF DEFENDANT OWED A DUTY TO WARN TO PLAINTIFF AND DEFENDANT BREACHED THAT DUTY, DID PLAINTIFF'S OWN NEGLIGENCE EXCEED ANY NEGLIGENCE ON THE PART OF DEFENDANT AS A MATTER OF LAW?

STATEMENT OF THE CASE

Plaintiff commenced this action by the filing of a Summons and Complaint on July 26, 2010. Plaintiff sought damages arising from an injury she sustained while an invitee upon Defendant's premises on July 31, 2008. Defendant filed an answer on August 23, 2010, and interposed the defenses of comparative negligence, assumption of the risk, waiver, and estoppel. Defendant also asserted counterclaims for breach of contract and indemnification. The case was called to trial on March 5, 2012. After a jury was empaneled, the presiding judge *sua sponte* struck Defendant's defense and its counterclaims that were based upon an exculpatory clause found in the lease agreement between the parties. The case proceeded trial on Plaintiff's negligence claim and Defendant's affirmative defense of comparative negligence.

Defendant moved for a directed verdict at the close of Plaintiff's case on the grounds that: (1) Plaintiff presented no evidence giving rise to a particular duty owed by Defendant to Plaintiff and the doctrine of primary implied assumption of the risk applies; (2) even if a duty exists, Plaintiff presented no evidence of breach; and (3) even if there was a particular duty that was breached by the Defendant, Plaintiff's negligence exceeded Defendant's negligence, if any, as a matter of law. That motion was denied. Defendant

renewed its motion at the close of all the evidence, but the trial court denied it again. The case was submitted to the jury, which brought back a verdict for the plaintiff that was reduced by fifty percent (50%) as a result of the jury's comparative negligence determination. Plaintiff made several post-trial motions, and Defendant moved for judgment notwithstanding the verdict on the same grounds as Defendant's prior dispositive motions. That motion was again denied by order filed May 18, 2012.

Plaintiff appealed from the denial of her post-trial motions and Defendant timely cross-appealed the denial of its motion for judgment notwithstanding the verdict on June 5, 2012.

FACTS

This is a premises liability case arising from an accident that occurred on July 31, 2008, at Defendant's self-storage facility in Florence, South Carolina when a door closed and struck Plaintiff's heel.

Plaintiff began leasing a storage unit from Defendant on or around May 21, 2008. (Trial Tr. p. 116, lines 6-7.) She rented this particular unit because she wanted a space that was climate-controlled, as she planned to store a piano and other temperature-sensitive furniture. (Trial Tr. p. 117, lines 14-22; p. 187, lines 16-24.) Plaintiff took a tour of Defendant's facility and then entered into a lease agreement with Defendant for unit D-917. (Trial Tr. p. 125, lines 18-25.) Unit D-917 was located within an enclosed building on Defendant's premises and was accessible by entering an unlocked exterior door and walking down a hallway to the unit, which had a roll-down door of its own. (Trial Tr. p. 118, lines 9 – 14, p. 119, lines 10 – 22.)

After entering into a lease agreement with Defendant, Plaintiff visited her storage

unit to move belongings in and out of the unit on eight to ten occasions prior to the accident at issue in this case. (Trial Tr. p. 129, line 25 – p. 130, line 3.) On most of these previous occasions, Plaintiff brought another person to help her move her belongings in and out of the unit. (Trial Tr. p. 128, line 18 – p. 130, line 10.) On at least a few occasions, however, Plaintiff did not bring another person to help her move, and during these trips, she used a piece of furniture to prop open the exterior door. (Trial Tr. p. 129, lines 18-21.) Plaintiff was aware that the door would close if it was not being held open by someone or something. (Trial Tr. p. 129, lines 18-21; p. 130, lines 7-10.)

On July 31, 2008, at around 9:00 or 9:30 in the morning, Plaintiff was moving furniture out of her storage unit and into her car when she sustained the injury that gave rise to this lawsuit. (Id. at lines 23-25; p. 131, lines 15-21.) She was not accompanied by anyone to help her move. Upon arrival at the storage unit, she first propped the exterior door open with a small table, knowing that without a prop, the door would have to be continuously opened because it closed automatically. (Trial Tr. p. 131, lines 2-3; p. 188, lines 6-14, 18-20.)

Plaintiff took several trips from her storage unit to her car, each time carrying a handful of items and then walking back to the storage unit empty-handed for another load. (Trial Tr. p. 131, line 23 – p. 132, line 2.) Approximately thirty to forty-five minutes later, after finishing the process of loading her vehicle, she retrieved the small table she had placed in front of the exterior door to prop it open. (Trial Tr. p. 132, lines 22-25; p. 189, lines 12-16.) Plaintiff picked up the table and made a turn to put it in her car. As she did so, she became aware that the door was closing, just as she expected it would without the prop. (Trial Tr. p. 132, line 25 – p. 133, line 1; p. 189, lines 21-23.)

Instead of moving away from the door or stopping it with a different part of her body, Plaintiff put her foot back to stop the door. (Trial Tr. p. 133, lines 1-3.) Plaintiff intended for the door to hit the sole of her shoe, but she failed to pick her leg up far enough and the bottom of the door hit her heel. (*Id.* at line 15; p. 190, lines 5-10.)

Plaintiff carried the table to her car, wrapped up her ankle with paper towels, and drove home. (Trial Tr. p. 134, lines 12-22; p. 135, line 6.) When she arrived at her house, approximately two miles away, Plaintiff's friend and neighbor, Carol Dawson, saw Plaintiff and suggested that she be treated by Mrs. Dawson's husband, Dr. Al Dawson, an orthopaedic surgeon. (Trial Tr. p. 136, lines 18-22.) Plaintiff and Mrs. Dawson went to Dr. Dawson's office where he took an x-ray of Plaintiff's ankle and stitched up the wound. (Trial Tr. p. 137, lines 15-18.) At that time, Dr. Dawson indicated that Plaintiff sustained a "jagged cut" on her ankle, "basically like a scrape" to Plaintiff's peritendon. (Trial Tr. p. 375, lines 14-20; p. 377, lines 9-12.) Dr. Dawson instructed Plaintiff to keep off of her foot for the weekend and to keep the bandage dry. (Trial Tr. p. 138, lines 20-24; p. 191, lines 9-16; p. 192, line 17 – p. 193, line 1.)

However, contrary to Dr. Dawson's instructions, Plaintiff went to her sons' houses to feed their dogs on Friday and Saturday, even though she testified that she could have asked someone else to feed the dogs because she was injured. (Trial Tr. p. 142, lines 11-21.) On Saturday evening, Plaintiff went to her sons' houses to feed their dogs as she had done the previous night, even though on Saturday it had been raining for most of the day. (Trial Tr. p. 194, lines 2-6.) At her second son's home, Plaintiff put down her crutches so that she could hop up the wet stairs to the door. (Trial Tr. p. 194, lines 7-9.) While ascending the stairs, Plaintiff lost her balance, slipped, and fell. (*Id.* at lines 9-11.)

Upon falling, Plaintiff heard a "pop pop" in her ankle. (*Id.* at lines 10-11; p. 144, line 3.) Despite the fall, Plaintiff continued up the stairs and into her son's house where she fed the dog. (Trial Tr. p. 144, lines 14-16.) After doing so, Plaintiff went home. (*Id.* at line 17.)

When Plaintiff arrived at her home, she called a friend who was employed as a nurse to come over and take a look at her ankle. (*Id.* at lines 21-25.) Her friend came to the house, put sterile strips over the stitches, and told her to call Dr. Dawson. (Trial Tr. p. 145, lines 10-12.) When Plaintiff called Dr. Dawson, he told her to come to his office at 9:00 on Monday morning and not to feed the dogs for the remainder of the weekend. (*Id.* at lines 20-21; p. 146, lines 18-19.)

Plaintiff saw Dr. Dawson on Monday, August 4. (Trial Tr. p. 146, lines 18-19.) After re-stitching her wound, Dr. Dawson sent Plaintiff to Carolinas Hospital for surgery, believing that Plaintiff's fall while feeding her son's dog caused her Achilles tendon to rupture. (Trial Tr. p. 379, line 19 – p. 380, line 3; p. 147, lines 17-21.) On Tuesday, August 5, Plaintiff had surgery on her ankle to close the wound. (Trial Tr. p. 148, lines 6-7.) During that surgery, Plaintiff's physicians determined that Plaintiff's Achilles tendon was completely torn. (Trial Tr. p. 381, lines 16-21.)

On September 3, 2008, Plaintiff returned to Dr. Dawson's office complaining of an odor from her cast. (Trial Tr. p. 163, lines 18-25.) Plaintiff told Dr. Dawson that she had gotten her cast wet from taking a shower, even though she was previously instructed not to get her cast wet. (Trial Tr. p. 389, lines 10-11.) Dr. Dawson removed Plaintiff's cast and at that time noticed that Plaintiff's stitches had come undone and that a bacterial infection had begun to grow in Plaintiff's wound due to the wound being overly moist.

(Trial Tr. p. 164, lines 17-18.) He sent her to Dr. Gerald Connor, a plastic surgeon, for consultation. (Trial Tr. p. 165, lines 4-8; p. 390, lines 7-20.)

Dr. Connor performed two outpatient surgeries on Plaintiff's ankle in which he first applied an artificial skin, called Integra, and then attempted to redirect blood flow to Plaintiff's ankle. (Trial Tr. p. 166, lines 5-10; p. 169, lines 7-16.) Plaintiff underwent a third and fourth surgery to receive a skin graft to further close the wound. (Trial Tr. p. 172, lines 16-20.) Plaintiff's last and final surgery was performed in November 2008 when the doctors attempted to close the wound with Integra a final time. (Trial Tr. p. 177, lines 18-25.)

Plaintiff's expert witness, Kristopher Seluga, testified that Defendant's door violated no statute, regulation, industry standard, or manufacturer's recommendation. (Trial Tr. p. 327, line 5 – p. 328, line 15.) Seluga testified that the pneumatic door closer device that caused the door to close automatically met the manufacturer's recommendations as to the speed at which the door closed. (Trial Tr. p. 310, lines 10-25.) Seluga also admitted the door closer was constructed in compliance with the ANSI standards for construction of these types of doors. (Trial Tr. p. 330, line 19 – p. 331, line 1.)[1] Notwithstanding the door's compliance with applicable safety standards, Seluga testified that the combination of the door's height off the ground, its capability to cut a person, and its placement in an application where users would likely be carrying objects when they encountered it rendered the doorway in violation of a "catch-all" provision of

[1] Defendant notes that this is not a products liability case, and Defendant cannot be held liable for the manner in which the door or door closing mechanism were constructed, even if there were evidence of a manufacturing or design defect, except where the construction violated the building code. Defendant's only exposure to liability here arises from the maintenance of an alleged unreasonably dangerous condition at its premises. The trial court allowed Plaintiff to introduce evidence of the existence of other kinds of door closer mechanisms with locking features. (Trial Tr. p. 315, line 24 – p. 316, line 7; p. 317, lines 7 – 19.) While perhaps germane to a products liability claim or negligent design or construction claim against a builder, this evidence has no bearing upon the issues between these parties.

the applicable building code, which proscribes maintaining a non-specific unsafe condition. (Trial Tr. p. 327, line 5 – p. 328, line 15.)

Defendant's expert witness, Skip Lewis, an expert in the field of forensic engineering, testified that there were no violations of the building codes in any of the conditions that he inspected at the facilities. (Trial Tr. p. 524, lines 6-9.) Furthermore, Lewis testified that considering "the standards for the assembly or the operation of the door closers, the standards for construction of the hollow metal doors," and "good design practices," it was his expert opinion that "the building itself, [and] entry and exit conditions of the building were certainly in [a] reasonably safe condition." (*Id.* at lines 10-18.)

More specifically, Lewis testified that "the bottom edge, the configuration of the bottom edge, the . . . gauge, the thickness of the metal that was used for the fabrication of the door, and the welding parameters," were all in compliance with the manufacturers' safety standards. (Trial Tr. p. 531, lines 1-8.) Similarly, with regard to the door closer, Lewis testified that "the door closer mechanism complied with the manufacturers' standard for the door closer." (*Id.* at lines 20-24.) Lewis concluded by stating that if the door and door closer were designed and built in accordance with the safety codes and manufacturer guidelines, then he considers the building to be reasonably safe. (Trial Tr. p. 534, lines 20-25.)

STANDARD OF REVIEW

A directed verdict is appropriate where there is no evidence on any one element of the alleged cause of action. *Guffey v. Columbia/Colleton Regional Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). In considering a motion for directed verdict or

judgment notwithstanding the verdict (J.N.O.V.), an appellate court must consider the evidence in the light most favorable to the non-moving party. *See* Rule 50(a), (b), *SCRCP*; *Carolina Chemical Equip. Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996). However, the appellate court has no authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006). With respect to a denial of a motion for a directed verdict or judgment notwithstanding the verdict, the trial court can be reversed where there is no evidence to support the ruling below. *McMillan v. Oconee Memorial Hosp., Inc.*, 367 S.C. 559, 626 S.E.2d 884 (2006).

For a plaintiff to recover in any negligence action, she must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty of care by a negligent act or omission; and (3) damages proximately resulting from the breach. *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989); *South Carolina Ins. Co. v. James C. Greene & Co.*, 390 S.C. 171. 348 S.E.2d 617 (Ct. App. 1986); *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530 (Ct. App. 2002). Furthermore, a plaintiff may not recover if her negligence is greater than the defendant's. *Taylor v. Bryant*, 274 S.C. 509, 265 S.E.2d 514 (1980); *Odom v. Steigerwald*, 260 S.C. 422, 196 S.E.2d 635 (1973); *Campbell v. Paschal*, 290 S.C. 1, 347 S.E.2d 892 (Ct. App. 1986).

ARGUMENTS

I. DEFENDANT OWED PLAINTIFF NO DUTY TO WARN OR TAKE MEASURES TO RENDER DEFENDANT'S PREMISES FREE FROM THE PARTICULAR RISK ENCOUNTERED BY PLAINTIFF.

Plaintiff alleged and attempted to prove that Defendant owed her a duty to warn of the door's allegedly unsafe characteristics or that Defendant owed her a duty to take

measures to keep the door free from the particular alleged risk she encountered. Although Defendant is held to a merchant's general duty of care, Defendant is not an insurer of the Plaintiff's safety. *Larimore v. Carolina Power & Light*, 340 S.C. 438, 447, 531 S.E.2d 535, 539 (Ct. App. 2000).[2] Rather, the scope of a merchant's duty of care is limited to warning of or fixing only latent or hidden dangers of which the owner has or should have knowledge and of which the customer is reasonably unaware. *Id.*; *Wilson v. Duke Power Co.*, 273 S.C. 610, 258 S.E.2d 101 (1979). A merchant has no duty to warn of open and obvious conditions unless the owner should anticipate the resulting harm. *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991). Plaintiff failed to present any evidence at the trial of this case to show that the alleged risk she faced is encompassed within Defendant's duty of care as a merchant.

In order to recover in any negligence action, the plaintiff must first show a duty of care owed by the defendant to the plaintiff. *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989); *South Carolina Ins. Co. v. James C. Greene & Co.*, 390 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986); *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E.2d 530 (Ct. App. 2002). The concept of a legal duty "embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care." *Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991). However, where a legal duty does not exist, a plaintiff's negligence action cannot survive. *Nelson v. Piggly Wiggly*

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[2] *See generally Moore v. Levitre*, 294 S.C. 453, 365 S.E.2d 730 (1988) (merchant is not an insurer of its customer's safety); *House v. European Health Spa*, 269 S.C. 644, 239 S.E.2d 653 (1977) (business owner is not an insurer of an invitee's safety); *Bruno v. Pendleton Realty Co.*, 240 S.C. 46, 124 S.E.2d 580 (1962) (owner of shopping center is not an insurer of safety, but must exercise reasonable care); *Wintersteen v. Food Lion, Inc.*, 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999) (retailer is not an insurer of its customer's safety); *Prior v. Northwest Apartments, Ltd.*, 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996) (landlord is not an insurer of every tenant's safety).

Central, Inc., 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010).

There is no dispute in this case that merchants like Defendant owe a general duty of reasonable care to their invitees. That duty involves the obligation to discover and take appropriate steps to warn of or eliminate unreasonable risks within the area of invitation. *Parker v. Stevenson Oil Co.*, 245 S.C. 275, 281, 140 S.E.2d 177, 179 (1965) (one in control of land owes duty to invitee to exercise due care to keep premises to which invitation extends in reasonably safe condition). Although a merchant has a duty to warn of unreasonably safe conditions, a merchant is not burdened with the unlimited duty to warn of open and obvious conditions or to make completely safe all conditions on the merchant's premises, especially when those conditions are unknown to the merchant or of which a customer is, or should be, reasonably aware. *See e.g., Peterson v. Porter*, 389 S.C. 148, 153, 697 S.E.2d 656, 658 (Ct. App. 2010); *see also Larimore*, 340 S.C. at 446-47, 531 S.E.2d at 539 (no liability imposed on landowner where condition was open and obvious to invitee and landowner was unaware of the condition).

The issue presented in this case is not whether Defendant owed a duty of care to Plaintiff, but rather, whether the scope of the acknowledged merchant's duty of reasonable care extends to the particular risk that led to Plaintiff's injury. In this case, Plaintiff asserts that the exterior door on the building that housed her storage unit was not reasonably safe, because it closed relatively quickly, was raised off the ground by approximately five inches, and because it included no means of remaining in an open position without being propped by an object. However, Plaintiff has failed to identify any circumstance giving rise to a duty to warn or duty to repair because the risk encountered is inherent to doors generally, the risk was open and obvious to Plaintiff and therefore not

latent, and the potential for harm was not known to or reasonably discoverable by Defendant.

A. The door's characteristics are inherent risks associated with every type of door and Plaintiff accepted that inherent risk as part of her everyday life.

In *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998), the South Carolina Supreme Court held that primary implied assumption of the risk is a defense which "goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff." *Id.* The Court cited the Tennessee decision of *Perez v. McConkey*, 872 S.W.2d 897, 902 (Tenn. 1994) for the following proposition:

> In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care. . . . Clearly, primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.

333 S.C. at 81, 508 S.E.2d at 570. "In this sense, primary implied assumption of risk is simply a part of the initial negligence analysis." *Id.* (*citing Blackburn v. Dorta*, 348 So. 2d 287, 291 (Fla.1977)).

In *Nelson v. Piggly Wiggly*, this Court reiterated that "[a] plaintiff must identify a duty that the defendant has to protect her from a particular harm to merit consideration of her claim by a jury." 390 S.C. at 392, 701 S.E.2d at 781. In that case, the plaintiff was injured when her grandmother drove over a wheel stop in the defendant's parking lot and pinned the plaintiff between the front bumper of the car and a wall. *Id.* at 386, 701 S.E.2d at 778. The Court noted that the question before it was "not whether [the defendant] owed [the plaintiff] a duty of care, but whether the scope of the acknowledged duty of reasonable care extend[ed] to the particular risk that led to [the plaintiff's] injury." *Id.* at

392, 701 S.E.2d at 781. Ultimately, the Court concluded that the defendant did not have a duty to guard against "the possibility that an improperly operated vehicle would injure [the plaintiff]." *Id.* at 393, 701 S.E.2d at 782.

Similarly, in *Hurst v. East Coast Hockey League*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006), the South Carolina Supreme Court held that there are risks inherent in particular activities which prevent an injured plaintiff from suing in negligence. In *Hurst*, for example, the Court recognized that primary implied assumption of the risk applies in a sports context where a plaintiff was injured by a hockey puck that struck him in the face while he was watching a professional hockey game. The Court reasoned that "a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey." *Id.* at 38, 637 S.E.2d at 562-63. *See also Rudzinski v. BB*, 2010 WL 2723105 (D.S.C., July 9, 2010) (participant in a game of golf did not have a duty to protect another participant from the inherent risks associated with the sport, including those risks posed by the swinging of a golf club); *Cole v. Boy Scouts of America*, 397 S.C. 247, 725 S.E.2d 476 (2011) (baserunner in a softball game did not owe a duty to another player when baserunner collided with participant at home plate).

In this case, the danger that the door might close on Plaintiff's heel is not within Defendant's duty to warn because the risk encountered by Plaintiff is inherent in the nature and characteristics of doors in general. Doors that people come upon every day have the inherent capacity to close upon, pinch, or catch hands, feet, arms and legs. Because the inherent risks associated with doors are known to every person, there arises no duty on the part of Defendant to warn that this particular door also poses such a risk. Plaintiff presented no evidence that she was surprised by the door's characteristics or

behavior. In fact, there is uncontradicted evidence that she was aware that the door would close upon her if not propped open.

B. This particular door had no distinguishing latent or hidden dangers associated with it and Plaintiff acknowledged her awareness of this particular door's characteristics.

A merchant has a duty to warn a customer of only latent, or undiscoverable, defects of which the customer is reasonably unaware. "A latent defect is one which an owner has, or should have, knowledge of, and of which an invitee is *reasonably* unaware." *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 125, 406 S.E.2d 361, 362 (1991) (emphasis in original). "It is one which a reasonably careful inspection will not reveal." *Id.* Defendant maintains that there were no unsafe conditions of which Defendant knew or should have known with regard to this particular door. Moreover, there is clear evidence that Plaintiff was, at a minimum, aware of the characteristics of the particular door that caused her injury and therefore no duty to warn arose.

There is uncontradicted evidence that Plaintiff was aware of the door's characteristics that she claims to have been unreasonably dangerous. The evidence presented at trial shows that the alleged risk posed by the door in this case—that the door would close if not held open—was known to Plaintiff prior to the date of the accident. (Trial Tr. p. 130, 7-10.) The door's characteristics were not latent or reasonably unknown to Plaintiff and thus, Defendant had no duty to warn her of such characteristics.

Plaintiff testified that she visited the premises on several earlier occasions, first when she visited the property and took a tour of the facilities prior to leasing this particular storage unit. (Trial Tr. p. 125, lines 18-25.) Plaintiff visited the storage unit at least eight to ten times between May 21 and July 31, and on each occasion had the

opportunity to open and close the exterior door and encounter the alleged risk. (Trial Tr. p. 129, line 25 – p. 130, line 3.) On most of the prior occasions, Plaintiff was accompanied by her sons, which allowed her to hold the door open herself while her sons carried in various pieces of heavy furniture. (Trial Tr. p. 128, line 18 – p. 130, line 10.) She knew the door would close if not held open. (Trial Tr. p. 129, lines 18-21; p. 130, lines 7-10.)

Unlike her visits to Defendant's facilities in the past, on the date of the accident, Plaintiff was alone. (Trial Tr. p. 131, lines 2-3.) Plaintiff used a desk or small table to prop the door open on the date of the incident so she could carry out various pieces of small furniture by herself. (Trial Tr. p. 129, lines 18-21.) She propped the door open and carried out furniture despite relying on others' help previously. (Trial Tr. p. 128, line 18 – p. 130, line 10.) Plaintiff knew that without the table as a prop, the door would close on its own. (Trial Tr. p. 131, lines 6-14.)

After she finished moving all of her belongings out of her storage unit and into her car, Plaintiff returned to her storage unit empty-handed, and removed the table that was holding the door open. (Trial Tr. p. 132, lines 15-16.) As she picked up the table, she "could feel the door closing fast. So [she] put [her] foot back instinctively, like you would a screen door, so it wouldn't knock [her] over." (Trial Tr. p. 133, lines 1-3.) "[She] put [her] foot back to catch the door so that [she] could get out of the way before it closed." (Id.)

There is no dispute as to Plaintiff's awareness that the door would close unless held open. Plaintiff has therefore presented no evidence indicating that she was reasonably unaware of the risks posed by the door which ultimately caused her injuries.

Rather, the only evidence presented at trial shows that Plaintiff was fully aware that the door would close automatically and that it could potentially injure her if she remained in its way while it was closing. Therefore, Defendant breached no duty to warn Plaintiff and was entitled to a directed verdict in this case.

This case is similar to *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008), in which the plaintiff-invitee, a relative of the defendant-landowner, sued the defendant after the plaintiff was bitten by a raccoon on the defendant's property. This Court held that the defendant had no duty to warn of the raccoon's presence on the defendant's property because the plaintiff had acknowledged his awareness that the raccoon had bitten the defendant prior to his arrival at the defendant's home. *Id.* at 203, 659 S.E.2d at 205. Therefore, "contrary to [the plaintiff's] argument, the raccoon did not pose a hidden or latent danger about which [the defendant] had an affirmative duty to warn." *Id.* With prior knowledge of the risk, the plaintiff "entered the home and voluntarily exposed himself to any potential danger posed by the raccoon." *Id.* Accordingly, this Court affirmed the trial court's order granting summary judgment to the defendant. *Id.* at 209-210, 659 S.E.2d at 209.

Similarly, in this case Defendant owed no duty to Plaintiff to warn of the door's characteristics because when Plaintiff moved the table, the door did exactly what Plaintiff anticipated it would do. In this case, the only evidence in the record shows that Plaintiff had prior knowledge of the risk, entered the Defendant's facilities voluntarily, and knowingly exposed herself to any potential danger posed by the door. There was no duty owed by Defendant to warn Plaintiff or alter the door's characteristics because the condition was not latent and was not unknown to Plaintiff.

There was no evidence introduced at trial that the door's propensity to close was a latent or undiscovered characteristic or that Plaintiff was unaware that the door would close if not held or propped open. Rather, the only evidence shows that Plaintiff knew of the door's propensity for closing and that she had encountered this condition on at least eight to ten previous occasions. Because Plaintiff offered no evidence showing she was reasonably unaware of the risk she faced in this case, the trial court erred in denying Defendant's motion for a directed verdict.

C. The risk encountered by Plaintiff and the resulting harm she sustained was not known or reasonably foreseeable to the Defendant.

The law of premises liability imposes a duty upon landowners to warn of dangers or defects known to them but unknown to others. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004). The test is whether the defendant should have "anticipated the resulting *harm*." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009) (emphasis added). Where the landowner has no previous knowledge of the defect, there is no duty to warn. *See Larimore v. Carolina Power & Light*, 340 S.C. 438, 446-47, 531 S.E.2d 535, 539 (Ct. App. 2000).

In the trial of this case, Plaintiff attempted to show that Defendant knew or should have known of the resulting harm she sustained because it knew its customers regularly propped open the exterior doors which housed the storage units. Knowledge that its customers were propping open doors does not equate to knowledge of the potential harm to the Plaintiff. Plaintiff has also asserted that all of the conditions of the door, when considered together, including the speed at which the door closed, the fact that the door was raised approximately five inches off of the ground, and the cutting capacity of the bottom edge of the door, created an unreasonably dangerous condition. However, it is

well established in South Carolina that even if there exists an unreasonable condition on the defendant's property, no duty to warn of that condition or make it reasonably safe arises if there is no evidence that the defendant knew or had reason to know of the condition. *See Larimore, supra.*

In *Larimore*, a contractor was injured while installing vinyl siding on the defendant's home while it was under construction. *Id.* at 441, 531 S.E.2d at 537. During a previous phase of construction on the home, another contractor dug a trench from the road across the property to the meter in order to bury underground electric cables. *Id.* at 442, 531 S.E.2d at 537. The plaintiff was at the home when the trench was dug and acknowledged his awareness of the location of the trench. *Id.* A few days later, he stepped in the trench and fractured his hip. *Id.* The trial court granted a directed verdict to the defendant on the issue of liability, finding that the defendant owed no duty to warn the plaintiff-contractor of the condition or repair the unsafe trench on his property because there was no evidence to show that the defendant had knowledge of the unsafe condition of the trench. *Id.* at 447, 531 S.E.2d at 535. This Court upheld the trial court's directed verdict, finding that the plaintiff

> failed to present any evidence that [the defendant] had any knowledge of the defect's existence prior to the accident. Because [the landowner] had no knowledge of the defect's existence, it would be impossible for him to anticipate any harm that might result from it. We do not read section 434 A of the Restatement to require landowners to anticipate harm from an open and obvious condition from the moment of the condition's creation. To impose liability under such a theory would make landowners insurers of their invitees' safety; it is well established in South Carolina that they are not.

Id. at 447, 531 S.E.2d at 539.

Similar to *Larimore*, in this case Plaintiff has presented no evidence to establish

that Defendant should have anticipated the harm with regard to the particular door encountered by Plaintiff. Moreover, there was no evidence presented at trial that Defendant's other customers had sustained an injury on some prior occasion as a result of the door's attributes, despite the fact that Defendant has hundreds of them installed at numerous self-storage facilities in South Carolina and Georgia. (Trial Tr. p. 491, line 3.) Rather, all of the evidence at trial shows that the door complied with all statutes, regulations, industry guidelines, and safety standards, so that Defendant had no reason to know that the door's components, when combined, created an unsafe condition of which Defendant had a duty to warn or repair.

South Carolina courts have held that "[e]vidence of industry standards, customs and practices is often highly probative when defining a standard of care." *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477, 534 S.E.2d 289, 290-291 (Ct. App. 2000) (internal quotations omitted), *aff'd*, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) ("the general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case."). "Evidence of objective safety standards is generally offered 'in connection with expert testimony which identifies it as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care." *Elledge*, 352 S.C. at 188, 573 S.E.2d at 794 (*quoting McComish v. DeSoi*, 200 A.2d 116, 121(N.J. 1964)). The uncontradicted evidence that the door's components violated no safety standard and the absence of any evidence that Defendant knew, or should have known, these components constituted a safety hazard when combined together, should have led the trial court to grant a directed verdict to Defendant.

In *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010), this Court held that the plaintiff-customer failed to establish a duty on the part of the defendant grocery store, despite testimony by the customer's expert witness that a duty existed. This Court noted that the expert witness "testified only to his own preferences rather than to the requirements of any law, ordinance, or recognized industry safety standard," and therefore "did not, as a matter of law, establish a duty" on the defendant. 390 S.C. at 393, 701 S.E.2d at 782.

Likewise, in this case, Plaintiff never identified any duty imposed upon Defendant by any statute or regulation to warn its customers of closing doorways or to protect its customers against the likelihood of a door pinching, closing on, or otherwise catching a part of a customer's body. She also failed to offer any evidence that the conditions which existed upon Defendant's premises on the day of the accident violated any particular statute, building code, safety regulation or industry standard.

Rather than relying on an industry standard, regulation or statute to show that the door was not reasonably safe, Plaintiff's entire case hinges upon her expert's opinion that the door was not reasonably safe because it violated a non-specific "catch-all" provision that a building should be maintained in a safe condition. (Trial Tr. p. 328, lines 5-15.) Plaintiff's expert's conclusion is based on the following circular logic: because the door injured the Plaintiff, the door is unreasonably safe. (Trial Tr. p. 328, line 5- p. 329, line 2.)

Plaintiff has also attempted to show that Defendant knew its customers were propping open the storage unit doors and therefore knew or should have known that an injury would occur. The test for determining liability is whether a defendant should have

"anticipated the resulting *harm*," not whether the defendant was aware of circumstances which created the alleged harm to a customer after that harm occurs. *See Hancock*, 381 S.C. 326, 673 S.E.2d 801. Plaintiff failed to submit any evidence to show that Defendant knew or should have known of the potential harm to Plaintiff when she removed the table which was propping open the door.

Rather, the evidence shows that Defendant could not have reasonably anticipated the resulting harm to Plaintiff because there have never been any similar reported injuries despite the vast number of identical doors in use on Defendant's premises. (Trial Tr. p. 491, line 1 – p. 492, line 12.) Jay Wallace, President of Carolina Self Storage Centers, testified that there are over a hundred doors that are similar or exactly the same as the one at issue in this case in use at his company's various self-storage facilities in South Carolina and Georgia. (*Id.* at line 3.) "At any given time, there's 6,000 and over the course of a year, ten to 15,000 people . . . on our properties." (*Id.* at lines 6-7.) Despite this high number of customers moving belongings in and out of identical doors, Defendant is unaware of any other customers sustaining an injury like the one that befell Plaintiff. (*Id.* at lines 8-10.)

Defendant does not contest that all doors, including the door in this case, can at times pinch, catch, or close upon a part of a person's body. However, the mere fact that a door can injure people who are within the door's path of travel is an insufficient basis to hold Defendant responsible for Plaintiff's injuries. If Plaintiff's argument is that Defendant should have anticipated the harm suffered by Plaintiff based on the mere fact that Defendant knew its customers regularly propped open the door, Plaintiff has failed to show the existence of a legally recognized duty. South Carolina law requires that

Defendant warn its customers only of latent defects on its premises of which it is aware and of which the customer is reasonably unaware. In this case, there has been no evidence presented by the Plaintiff to show that the Defendant could have anticipated the resulting harm. Therefore, the trial court erred in failing to grant Defendant's motion for directed verdict.

D. The condition Plaintiff encountered was open and obvious and Defendant had no reason to anticipate that Plaintiff would nonetheless encounter it.

Reasonable care on the part of a business owner does not ordinarily require precautions or even a warning as to conditions which are known to a visitor or so obvious to him that he may be expected to discover them. *Peterson v. Porter*, 389 S.C. 148, 153, 697 S.E.2d 656, 658 (2010); *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 674 S.E.2d 500 (Ct. App. 2009). In this case, Defendant did not have a duty to warn Plaintiff of the door's characteristics because they were open and obvious and Defendant could not have anticipated the resulting harm. Moreover, Plaintiff's assertion that she was distracted from the condition is flatly contradicted by the evidence introduced at trial.

The well-known case of *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (2000), and other similar cases, including *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009), hold that "a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Hancock* at 331, 673 S.E.2d at 803; *Callander* at 126, 406 S.E.2d at 362; *see also 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 resulting harm). "[A]n 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 open and obvious, . . . or fail to protect himself against it." *Callander* at 126, 406 S.E.2d at 362-63 (*quoting* Restatement (Second) *Torts* § 343A, cmt. (f) at 220-221 (1965)).

In this case, there is no evidence that Defendant had prior knowledge of any alleged unsafe condition with regard to the door at issue in this case and there has been no evidence presented by the Plaintiff to show that Defendant should have anticipated the harm she suffered. Therefore, the facts of the case at bar are distinguishable from the facts in both *Callander* and *Hancock.*

In *Callander*, the defendant admitted that it had prior knowledge that the seat of a bar stool was missing for over two months, and the defendant had in fact attempted to warn its customers of the unsafe condition by placing a warning sign over the stool. *Callander* at 126, 406 S.E.2d at 363. On the date of the plaintiff's accident, the sign warning of the unsafe condition was missing, although the defendant did not know why, and the defendant took no other steps to prevent the customer from injuring himself on the unsafe condition. *Id.* The trial court and the appellate court determined that the landowner was liable for the plaintiff's injuries on the grounds that it knew of the unsafe condition, despite the fact that the stool's defect was open and obvious, because it failed to take steps to warn its customers of the defect when it had reason to anticipate the resulting harm. *Id.*

In *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801

(2009), a pedestrian who tripped and fell in a parking lot brought an action against the landowner for negligence. The pedestrian testified at trial that although she could not identify the exact cause of her fall, she was injured when she tripped on "a rock or something to that effect," "something raised up," and "broken asphalt." *Id.* at 329, 673 S.E.2d at 802. The trial court held that the landowner was not liable for the pedestrian's injuries because the parking lot's state of disrepair was open and obvious. *Id.* However, the Supreme Court reversed, maintaining that "[w]hile a parking lot's state of disrepair may be considered open and obvious, a jury could determine that [the landowner] should have anticipated that such a condition may cause an invitee to fall and injure themselves." *Id.*at 331, 673 S.E.2d at 803.

The case at bar is factually distinguishable from *Callander* and *Hancock* because in this case, there is no evidence that Defendant had advance notice that the door would injure a customer when it was used properly, even if its customers were propping it open with furniture. In fact, the evidence in the record shows that there had never been a customer complaint or injury arising from the door at issue in this case or other similar doors on the property. (Trial Tr. p. 491, line 1 – p. 492, line 12.) Because Defendant had no knowledge of the allegedly unsafe condition's existence, it would have been impossible for Defendant to anticipate any harm that might result from it.

Additionally, any claim that Plaintiff was distracted and thus unable to discover the open and obvious condition posed by the door is flatly contradicted by the record. Plaintiff's own testimony establishes that, at the time the accident occurred, she was not distracted. Plaintiff admitted that she was aware that the door was closing behind her as she was lifting the table that had been propping it open. (Trial Tr. p. 189, lines 19-23.)

Plaintiff further admitted that she put her foot backwards in order to stop the door from closing. (Trial Tr. p. 190, lines 5-10.) Therefore, unlike *Callander* where the facts showed that the customer was distracted when he backed up to sit on a stool from which the round seat top was missing, in this case Plaintiff's attention was focused on the very condition that gave rise to her injury. *See Callander*, 305 S.C. at 125, 406 S.E.2d at 362.

A merchant's duty to warn or repair unreasonably safe conditions that are otherwise open and obvious arises only where there is evidence that the merchant should have anticipated the resulting harm or had reason to expect that the customer would be distracted and not be able to discover the obvious condition. In this case, the only evidence presented shows Plaintiff was aware of the condition of the door, anticipated the result of removing the table, and should have foreseen that the door could injure her if she did not move out of the way.

At the same time, there has been no evidence submitted to show that Defendant should have anticipated the resulting harm and therefore had a duty to warn or take steps to protect Plaintiff from the harm she suffered. Furthermore, despite Plaintiff's assertion to the contrary, the evidence presented in this case shows that Plaintiff was not distracted when she removed the table which had previously been propping open the door. For these reasons, Plaintiff has failed to submit any evidence to impose upon Defendant the duty to warn of the open and obvious condition on Defendant's property and therefore the trial court erred in refusing to grant Defendant's motion for directed verdict in this case.

II. EVEN IF DEFENDANT OWED A DUTY TO PLAINTIFF AND DEFENDANT BREACHED THAT DUTY, PLAINTIFF'S OWN NEGLIGENCE EXCEEDED ANY NEGLIGENCE ON THE PART OF DEFENDANT AS A MATTER OF LAW.

Plaintiff's own negligence exceeded any alleged negligence of Defendant as a

matter of law in this case. "[A] plaintiff may only recover damages if his own negligence is not greater than that of the defendant." *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 665 S.E.2d 222, 226 (Ct. App. 2008) (*quoting Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712-13 (2000)). "Under South Carolina jurisprudence, where evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury." *Bloom v. Ravoira*, 339 S.C. at 422, 529 S.E.2d at 712-13; *see also Singleton v. Sherer*, 377 S.C. at 207, 659 S.E.2d at 208. In this case, the only inference that can be made after considering all of the facts is that Plaintiff's own negligence was overwhelmingly greater than Defendant's slight negligence, if any.

In *Singleton v. Sherer*, the South Carolina Court of Appeals found that secondary implied assumption of the risk applied to determine the plaintiff's relative liability for his own injuries. *Id.* at 207, 659 S.E.2d at 208. In *Singleton*, as previously discussed, the plaintiff sued his relative for damages arising out of a raccoon bite when the plaintiff was on the defendant's property. *Id.* The Court held: "The undisputed facts establish [the plaintiff] freely and voluntarily exposed himself to a known danger which he understood and appreciated." *Id.* Therefore, the plaintiff's own negligence was a factor to consider when comparing the parties' relative liabilities for the damage caused. *Id.*

Similarly, in this case, Plaintiff understood and appreciated the characteristics of the door. (Trial Tr. p. 129, lines 18-21; p. 130, lines 7-10.) Knowing the door's attributes, Plaintiff used a small table to prop open the door while she moved out the remainder of her belongings from her storage unit to her car. (Trial Tr. p. 131, lines 6-14.) She then picked up the table while standing in the doorway, turned and tried to catch the door with

her foot while standing on one leg. (Trial Tr. p. 132, lines 22-25; p. 189, lines 12-16.)

Plaintiff knew the door would close behind her when she picked up the table. She chose to stand in the door's path of travel and chose to try to stop it from closing with her foot, rather than another part of her body. Prior to that, she chose to remove articles from her storage unit alone, knowing the logistical problems this would create. As a result of Plaintiff's own conduct, she was injured when the door hit the back of her ankle. Her conscious choices show that Plaintiff knew and appreciated the risk she was encountering and that she assumed that risk. Plaintiff's assumption of the risk in this case was the overwhelming reason why she was injured, rather than any slight, if any, negligence on Defendant's part in failing to warn her or take precautions against the door closing on its customers.

CONCLUSION

For the foregoing reasons, the trial court should have directed a verdict in Defendant's favor. Defendant respectfully requests that the result below be reversed and that judgment be entered for Defendant.

Respectfully submitted,

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