

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Gayle Stephens,

Plaintiff

vs.

Colliers International South Carolina, Inc.  
and Lady Street Office Complex LLC,  
Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-40-00769

**RECEIVED**

JAN 22 2019

SC Court of Appeals

**COLLIERS INTERNATIONAL SOUTH  
CAROLINA, INC.'S AND LADY STREET  
OFFICE COMPLEX LLC'S MOTION TO  
RECONSIDER THE ORDER ON THEIR  
MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE, pursuant to Rule 59(e), SCRCP, Defendants Colliers International South Carolina, Inc. and Lady Street Office Complex LLC hereby submit this Motion for Reconsideration of the Court's Order dated and entered on November 15, 2018 ("this Court's Order").

In reconsidering the denial of Defendants Motion for Summary Judgment, Defendants ask this Court to consider the following question: How can a party possibly be held liable where it was not in charge of design or construction of a particular aspect of construction, it was not in control of the construction site, and had no notice of any alleged issue with construction? Defendants will also point to numerous findings of fact and conclusions of law which were included in Plaintiff's Proposed Order and incorporated into this Court's Order that constitute **immediately appealable issues**.

**I. No Duty By These Defendants**

The Order denying these Defendants' Motion for Summary Judgment ignored uncontroverted facts which Plaintiff cannot contest. At the time of Plaintiff's fall, the USC Speech and Hearing Center (the "USC Upfit") was under construction. The building in which the USC Upfit was being built is owned by P&P, LLC ("P&P") and the

construction of USC Upfit included the construction of the landing at issue. The concrete of the landing was poured, but the area surrounding the landing was not complete. The construction manager for the project was K Square International, LLC ("K Square") and the architect was Brennan Design, LLC ("Brennan Design").

Plaintiff's expert AGREED with the following:

**1) During Construction the Contractor Controls the Construction Site and The Responsibility to Guard or Warn of Conditions in the Construction Site Lies With the Contractor**

These Defendants were not involved in construction of the landing at issue. These Defendants did not commission, pay for, direct, design, or construct the landing at issue. P&P hired Brennan Design to design the landing and hired K Square as construction manager for the project. Plaintiff's expert opines that these three entities constitute the construction team. When questioned who is responsible for the construction site, Plaintiff's expert AGREED the construction team is responsible:

Durig, Bryan, (Pages 65:14 to 66:19) (emphasis added)

Q: Have you ever had any cases that you've been involved in where there is an injury that occurs on a construction site during construction?

A: Yes, I've had some.

Q: **Okay. In those particular situations, do you agree with me that it is the contractor who has control of the construction site is the potential at-fault party?**

A: **Most of the time, yes.** The GC is in charge. We've had some where they've actually hired outside safety consultants to come in and maintain the safety issues. And I'm sure both of them had some responsibility.

Q: Okay. You agree with me that during construction, a

contractor has controls of the means and methods of construction?

A: Yes.

Q: Okay. So for instance, you talked about earlier putting up cautionary tape or putting up something to prevent people from coming into the building.

A: Correct.

**Q: You would agree with me that it is the contractor or whomever is in charge of the construction, it is their responsibility to put that up for lack of better terms?**

**A: Yes.** I mean, if the place isn't finished and you're not finished putting in your stripes in that would help contrast the levels, then yes. You don't let people cross where hazards are or you identify them by putting orange cones up.

A nearly identical issue was raised on Motion for Summary Judgment before Judge Markley Dennis in Rosemary Connelly vs. Winsor Custom Homes, LLC et. al., 2013-CP-10-3251 wherein a Contractor and homeowners were sued for a dangerous condition on a construction site. In granting the homeowners' Motion for Summary Judgment and dismissing the claims against the homeowners, Judge Dennis agreed the contractor is in charge of the construction site and the means and methods of construction and the homeowners were not liable to the Plaintiff as a matter of law. In this particular situation, these Defendants are even more removed as the USC Upfit was commission by P&P. Thus, these Defendants are entitled to Summary Judgment.

## **2) The Landing Was Built As It Was Designed**

This Court's Order and Plaintiff's expert, Mr. Durig, discuss numerous code related questions. Those questions address the issue of whether the landing in question was properly designed. Stated differently, the question is was the Architect,

Brennan Design, who was hired by the building owner, P&P, negligent in designing the landing in question without handrails and proper paint? This question has nothing to do with these Defendants as they did not hire Brennan Design and were not in charge of construction. To illustrate the point, these Defendants refer to specific testimony where Mr. Durig AGREED the landing was constructed as designed.

Durig, Bryan, (Pages 43:to 43:17) (emphasis added)

Q: Okay. If a contractor complies with the plans, is there a construction defect?

A: In taken in that text, no.

Q: Okay. Understanding it the way that I'm explaining it, meaning that there was a problem in the actual construction of the landing, and that's what I'm defining as a construction defect.

A: Okay.

Q: **Do you believe that there was a construction defect in the area where the plaintiff fell?**

A: **Not if that yellow line doesn't -- or that double line doesn't indicate any kind of nosing.**

Thus, Mr. Durig is opining there is a defect in the design of the landing. Mr. Durig agrees that building owners can rely on design professionals to ensure codes are met. Thus, there is no construction defect and these Defendants are entitled to Summary Judgment.

## **II. No Evidence of Notice**

It is not conceded that Plaintiff is an Invitee with respect to the landing. Assuming for the purposes of this motion that she was, it is a fundamental tenet of premises liability law that the property owner must have notice of an allegedly

dangerous condition.

“To recover damages for injuries caused by a dangerous or defective condition on a defendant's premises, a plaintiff 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.” Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205 (1988).

The evidence is clear that these Defendants did not create the condition at issue. There is no evidence, nor could there be, that there was an actual or constructive knowledge of a dangerous condition and failed to remedy it. Plaintiff's expert again proves this point wherein he AGREED that building owners, laypeople, are entitled to rely on construction professionals to design and construct a project that meets code. Plaintiff's assertion that the violation of the building code created the dangerous condition, therefore, cannot constitute negligence on the part of these defendants.

Durig, Bryan (Pages 59:12-60:1)

Q. Does the owner of a building have the right to rely on licensed professionals to tell them whether or not their building is being built in compliance with the code?

Mr. Goodwyn: Object to the form.

A. I think he would have that right, yes.

Q. Okay. And does the owner of a building have the right to rely on a licensed architect to draw a drawing that is in compliance with whatever applicable codes, industry standards, anything that would be applicable to the building?

Mr. Goodwyn: Object to the form.

A. It depends on his level of understanding but yes, I would expect him to expect an architect to draw it in compliance with the codes and standards.

Mr. Durig agrees that the layperson cannot be responsible for understanding codes and building practices and can rely on those professionals. Therefore, these Defendants cannot possibly be on notice of these alleged defects and there is no evidence of that in this case. As such, these Defendants are entitled to Summary Judgment.

### **III. Improper Findings and Conclusions by Court**

Respectfully, the Proposed Order by Plaintiff that was incorporated into this Court's Order, addresses issues not properly before this Court and makes findings of fact and conclusions of law that constitute **immediately appealable issues**. For that reason, these Defendants request that this Court reconsider its Order and grant Defendants' Motion for summary judgment. Each error will need to be addressed separately.

#### **1) "Undisputed" Factual Background**

As an initial matter, the reference to the "undisputed" factual background that quite clearly contains facts which are in dispute is improper.

##### **a. Invitee**

In their Motion for Summary Judgment, these Defendants raise questions as to Plaintiff's status as to the area in question. While normally the issue of Plaintiff's status is a question of law, this case presents a mixed question of fact and law which makes defining Plaintiff as an invitee premature. This Court has not heard sufficient evidence to make this finding. To that point, Plaintiff testified that she was aware of ongoing construction for several months preceding her fall and that it was still ongoing. Stephens, Gayle (Pages 25:1-24:14). Plaintiff voluntarily entered a construction zone

and was aware the area was under construction. Thus, Plaintiff was, arguably, trespassing onto a construction site. As such, with respect to the area in question, a finding of Plaintiff's status is improper as Defendants' have not had the opportunity to be heard on that issue and it is not "undisputed." A finding of this type within this Court's Order is tantamount to granting summary judgment in favor of Plaintiff on this issue without allowing Defendants to be heard.

**b. "lacked any visual cues or warning of change in elevation"**

This finding is a question of fact for the jury to decide. Similarly, it is not "undisputed." At the time of the incident, blue handicapped space lines were present that could be considered visual cues. Additionally, the striping for the new spaces was not completed, which was a part of project. Thus, this finding of fact is improper.

**2) Findings of Fact and Conclusions of Law**

**a. "At the time of Plaintiff's injury, Defendant's (sic) had completed construction of the landing"**

This is a misstatement of fact. It is undisputed that construction of the landing and surrounding area was not complete. These Defendants presented evidence on this issue at the hearing and provided the Court with photos of the area at the Court's request. Quite clearly the original plans call for a handrail and striping on the garage floor and, from the pictures presented to the Court, it is evident that neither are present. Additional handrails and yellow paint to the step were added to the project after the fall. Thus, this finding of fact is inaccurate.

Additionally, this finding of fact implies these Defendants constructed the landing. These Defendants **did not** construct the landing at issue and were not involved in

commissioning the USC Upfit project, which includes construction of the landing at issue. These Defendants did not commission, pay for, direct, design, or construct the landing at issue.

**b. "Defendants' representation of Mr. Durig's testimony"**

This comment made within this Court's Order appears to indicate that the undersigned has misrepresented the expert testimony as it relates to these Defendants. Not only did the undersigned provide direct quotes, but he also provided context for those quotes within the attached exhibits. In summary, Mr. Durig opined that these Defendants were not the contractor, that they did not have control of the means and methods of the construction, and these Defendants were not responsible for erecting temporary barriers or tape. The undersigned is more than happy to provide the entire transcript at the Court's request.

**c. "Thus, the landing in question deviated from the requirements set forth in the 2012 IBC"**

This finding is a question of fact for the jury to decide. Thus, this finding is improper at this time.

**d. "Such a deviation is substantial evidence of a defective and dangerous condition and Defendant's failure to eliminate or warn Plaintiff of this condition constitutes a breach of the duty of due care."**

This finding is a question of fact for the jury to decide. Thus, this finding is improper at this time. Additionally, Mr. Durig was clear that the construction team would have been responsible for this and, as such, this is an incorrect finding of fact.

- e. **"In addition to deviating the from the requirements set forth in Section 1003 of the 2012 IBC, the landing in question also deviated from the requirements set forth in Chapter 11 of the 2012 IBC which requires handrails."**

This finding is a question of fact for the jury to decide. Thus, this finding is improper at this time.

**f. References to the Accessibility Act and the ADA**

Any references made to either the Accessibility Act and the ADA are improper. These Acts were enacted to protect a specific protected class of individuals. Any individual that is not within that protected class cannot rely on these Acts as evidence of a breach of the standard of care. Plaintiff is not and has never complained of being disabled; thus, these Acts do not apply to her and any reference to them is improper. These Defendants were not heard on this issue specifically and would ask to be heard on this issue if not corrected.

- g. **"Defendant's failure to provide handrails in the area of Plaintiff's fall is a violation of Chapter 11 of the 2012 IBC and constitutes a breach of the duty of due care."**

This is a misstatement of fact. These Defendants did not construct the landing at issue and were not involved in commissioning the USC Upfit project, which includes construction of the landing at issue. This finding of fact implies Defendants constructed the project; they did not. These Defendants did not commission, pay for, direct, design, or construct the landing at issue. Further, this finding is a question of fact for the jury to decide. Thus, this finding is improper at this time.

- h. "To the extent it was not constructed in that manner, it is a deviation from an industry standard and constitutes a dangerous condition."**

This finding is a question of fact for the jury to decide. Thus, this finding is improper at this time.

- i. Despite this industry standard, and despite the possibility of alternative options, Defendants constructed this area of egress with a short flight of stairs.**

This is a misstatement of fact. This finding of fact implies these Defendants constructed the landing. These Defendants **did not** construct the landing at issue and were not involved in commissioning the USC Upfit project, which includes construction of the landing at issue. These Defendants did not commission, pay for, direct, design, or construct the landing at issue.

- j. "Then, Defendants failed to follow industry standards for the construction of short flight stairs. ASTM F1637 Section 7.2.2 requires that "in situations where a short flight stair or single landing transition exists or cannot be avoided, obvious visual cues shall be provided to facilitate improved landing identification. Handrails, delineated nosing edges, tactile cues, warning signs, contrast in surface colors, and accent lighting are examples of some appropriate warning cues." Defendants' undisputed failure to provide any of these warning cues is substantial evidence of Defendant's breach of the duty of due care."**

This is a misstatement of fact. This finding of fact implies these Defendants

constructed the landing. These Defendants **did not** construct the landing at issue and were not involved in commissioning the USC Upfit project, which includes construction of the landing at issue. These Defendants did not commission, pay for, direct, design, or construct the landing at issue. Further, this finding is a question of fact for the jury to decide. Thus, this finding is improper at this time.

Again, any and all of the discussion presented by Plaintiff's expert, Plaintiff's proposed Order, and that which is incorporated into this Court's Order related to alleged non-compliance with code has to do with alleged improper design. As these Defendants did not hire the architect, did not hire the construction manager, and did not commission the project, the Plaintiff is unable to and will be unable to point to any specific point of negligence by these Defendants. Thus, these Defendants are entitled to Summary Judgment and respectfully request that the Court reconsider its Order dated November 15, 2018. A proposed Order is attached.

CLAWSON and STAUBES, LLC

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