THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Appellate Case No. 2013-001102

Case No. 2011-CP-40-04883R

Raymond Armstrong,

Appellant,

v.

Jacqueline Berry and Samuel J. Thompson,

Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This action was filed by Plaintiff alleging common law negligence against Defendant. The matter was removed from the docket pursuant to Rule 40(j) and was timely restored. Following the exchange of written discovery and depositions of the Plaintiff and Ms. Beverly Armstrong-Washington, Defendant filed this motion for summary judgment on January 11, 2012 (R. p. 20) alleging that there was no evidence that the Defendant knew or should have known of any defect or hazard. The deposition of the Defendant was taken March 16, 2012 (R. p. 145) and supplemental discovery was served on Defendant. The responses to this discovery were received by Plaintiffs counsel on May 4, 2012. The motions hearing occurred May 8, 2012. The circuit court entered an Order granting summary judgment on May 30, 2012. (R. p. 3) A motion to reconsider was timely

filed June 13, 2012. The motion for reconsideration was denied by Order dated April 17, 2013. (R. p. 1) This appeal followed.

FACTS

Plaintiff and his sister Beverly Armstrong-Washington entered into a lease agreement with Defendant Samuel Thompson in November of 2005, renting a home located at 212 Hickory Ridge, Columbia, South Carolina. On October 1, 2006, Plaintiff fell in Thompson's home sustaining injury and thereafter brought this lawsuit under a common law negligence cause of action. (R. p.11).

Plaintiff fell between the living room and the kitchen in the home rented from the defendant Thompson. (R. pp.129-130). The living room, which is adjacent to the kitchen, had hardwood flooring. (R. p. 145, p. 33 l. 17-24). The kitchen had a linoleum floor. Mr. Thompson testified that he screwed down a piece of transitional wood approximately four inches wide that covered or spanned the doorway between the kitchen and the living room. (R. 145, pp. 34, 1.4-pp.35, I. 25). Mr. Thompson stated that he used approximately six screws to secure the wooden threshold. {R. p.145, p. 36, l. 4-15}.

Plaintiff testified that as he crossed the threshold between the kitchen and living room, "the floor went down" and a "board came up." {R. p. 123 l. 70}. Plaintiff's sister testified that a piece of molding popped up. {R. p. 137, l. 44}.

Plaintiff testified that his sister, Beverly Armstrong-Washington, would have been the person to speak with the Defendant regarding any issues with the

home. {R. p 123, p. 143, l. 9-12}. In her deposition, Ms. Armstrong-Washington immediately stated that she had memory loss. {R. p. 123, l. 19-20}. She stated that her memory loss affected both her short and long term memory. {R. p. 123, l. 21} Although Ms. Armstrong Washington denied discussing any problem with the portion of flooring where Mr. Armstrong fell with the Defendant, she also specifically stated, "I cannot remember every conversation I had with Sam because I have memory trouble. I do not remember every conversation I had with him." {R. p. 123}.

Ms. Karen Moore was identified as a witness in this matter in initial discovery responses. In an affidavit, (R. p. 119) she stated that prior to Mr. Armstrong's incident, she tripped in the same location where the Plaintiff fell. She further testified that Ms. Armstrong-Washington "related to me" that she informed the landlord of the problem with the floor. (R. p. 119)

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT WHERE THERE WAS A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER DEFENDANT HAD NOTICE OF THE DEFECT WHICH CAUSED PLAINTIFF'S INJURY.

Rule 56(c), SCRCP, provides that summary judgment may be granted if a review of all documents submitted to the Court shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. In determining whether a genuine issue of material fact exists, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only

> submit a mere scintilla of evidence to withstand a motion for summary judgment.

Bass v. Gopal, Inc., 395 SC. 129, 133-134 (S.C. 2011) (citations omitted) Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D. S.C. 1975); *see also Holloman v. McAllister*, 289 SC. 183. 186, 345 S.E.2d 728. 729 (1986) (stating summary judgment is "an extreme remedy to be cautiously invoked").

Defendant's motion for summary judgment (R. p. 20) should be denied because there is evidence that the Defendant knew or should have known of the defective condition in the premises. Ms. Karen Moore stated in her affidavit (R. p. 119) that prior to Mr. Armstrong's fall, she tripped in the same location where Raymond Armstrong fell. She further testified that Ms. Armstrong-Washington "related to me" that she informed the landlord of the problem with the floor. Her affidavit does not clarify what is meant by "related to me."

Defendant moved to exclude the affidavit to the extent it contained "inadmissible hearsay." {R. p. 108} The Court did not specifically rule on Defendant's motion. However, the affidavit of Karen Moore is not acknowledged by the Court in the Order Granting Summary Judgment (R. p. 3) or in the Order Denying Reconsideration.(R. p. 1)

Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 5 8, 69, 580 SE2d 433, 439 (2003).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 362, 563 S.E.2d 331 (2002). In determining whether issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (2003). In her affidavit, Ms. Moore does not clarify what is meant by "related to me." At a minimum, summary judgment should have been denied as premature where Ms. Moore had not been deposed and the basis, nature and extent of her knowledge of complaints to the Defendant regarding the problems with the subject flooring fully explored. It is conceivable that Ms. Moore was physically present when Ms. Armstrong-Washington informed Defendant of the defect in the flooring. Therefore, there is an issue of material fact regarding whether the Defendant knew or should have known of the hazard and summary judgment was premature.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT WHERE THERE WAS A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER DEFENDANT CREATED THE HAZARD WHICH CAUSED PLAINTIFF'S INJURY.

"[W]here a lessor undertakes to repair or improve the leased premises and the work is done negligently, resulting in personal injury to the lessee, the lessor is liable for the damages so sustained. Negligence on the part of the lessor in making repairs or improvements is regarded as an act of misfeasance, subjecting

him to tort liability for any resulting damages." *Conner v. Farmers & Merchants Bank*, 243 S.C. 132, 140, 132 S.E.2d 385 (1963). *see also Creighton v. Coligny Plaza Ltd. Pshp.*, 334 S.C. 96, 116, 512 S.E.2d 510, 520 (Ct. App. 1998); *Durkin v. Hansen*, 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993) (reversing grant of summary judgment to landlord where tenant slipped and fell on floor left wet by contractor hired by landlord to clean floors); *Watson v. Sellers*, 299 S.C. 426, 433, 385 S.E.2d 369, 372 (Ct. App. 1989)("Our Supreme Court has recognized, however, a duty on the part of the landlord to exercise reasonable care in making repairs or improvements when the landlord has undertaken to repair or improve the premises. This has been the long-standing law of this state.").

In his deposition taken on March 16, 2012, Defendant testified that before the Plaintiff moved into the home, he replaced the flooring in the kitchen. When he replaced the flooring, he placed a piece of wood stripping in the doorway between the kitchen and living room. {R. p. 145} Ms. Washington testified that as Plaintiff stepped into the doorway, the piece of wood dislodged like a see-saw and Plaintiff fell. She further testified that after his fall, she removed the piece of wood stripping in the doorway. "It was no effort to remove it or anything like that. I just pulled it up. {R. p. 137, l. 20 22}. In her affidavit, Karen Moore states that the piece of stripping looked like it was secured but it actually was loose in the floor. "It had nails in it that looked as if they were securing the wood to the floor, but would become dislodged and cause you to stumble or fall." {R. p. 119}

Following the deposition of Defendant, supplemental discovery requests were served on Defendant to gain more specific information regarding the nature

of the wood stripping installed and the manner of installation. Defendant's testimony and discovery responses conclusively establish that he installed the wood stripping which became dislodged and caused Plaintiff's fall. From the testimony of Plaintiff and his sister, as well as the affidavit of Karen Moore, an issue of fact exists regarding whether Defendant created a hazardous condition which caused Plaintiff's fall.

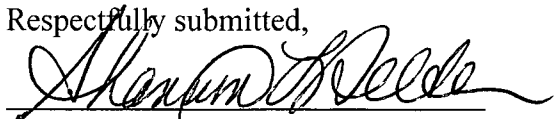
The trial court's orders do not specifically address this allegation of negligence although it was raised in opposition to summary judgment and in support of the motion to consider. Because there is a clear factual issue regarding Defendant's negligence in creating the hazard which caused the injury, summary judgment was inappropriate and the case should be remanded for trial.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

April 14, 2014

Respectfully submitted,



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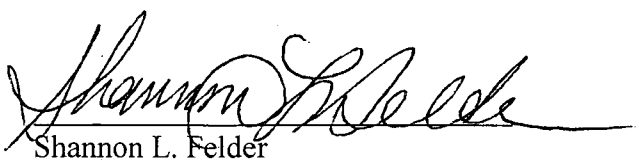
PROOF OF SERVICE

I certify that I have served the Appellants Final Brief on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 14, 2014, addressed to his attorney of record, Catherine G. Griffin, Baker Ravenel Bender, P.O. Box 8057, Columbia, SC 29202, on April 14, 2014.

April 14, 2014



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