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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge
Fifteenth Judicial Circuit

Appellate Case No.: 2017-001258

Christine LeFont,..Appellant,

v.

City of Myrtle Beach..Respondent.

RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, Respondent City of Myrtle Beach (hereinafter, "Respondent" or "City") respectfully petitions this Court for rehearing in the instant matter. The opinion of this Court, which reversed the Circuit Court's granting of Respondent's motion for directed verdict, was filed on March 11, 2020.[1]

FACTUAL/PROCEDURAL BACKGROUND

This premises liability action arises out of Appellant Christine LeFont's ("Appellant") trip and fall in a parking lot behind the Myrtle Beach Convention Center on August 13, 2014. Appellant and her husband, who own a business importing and distributing a specialty energy drink, were participating in a trade show at the Myrtle Beach Convention Center organized by H.T.

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[1] Due to the standing order of the Chief Justice of the Supreme Court, appellate court deadlines, with limited exceptions, were extended for twenty (20) days.

Hackney, a large food distributor. (R. 49, l. 17-25). The food show was open on Saturday and Sunday, August 12 and 13, 2014. (R. 65, l. 15-16). Appellant's incident occurred on the second day of the show. (R. 273, l. 21-25).

The Convention Center has a large lot dedicated to public parking. A smaller employee parking lot is located immediately behind the Convention Center. Appellant was running late the morning of her incident. (R. 93, l. 17-18). Appellant entered the employee parking lot and dropped off her husband near the loading docks allowing him to easily and quickly carry boxes of their drink product into the Exhibit Hall. (R. 52, l. 16-20). Appellant then parked in the employee lot believing it would take only a few minutes to go inside and find out if she needed to go back to the warehouse for more product. (R. 54, l. 18-20; R. 82, l. 9-14, 24 – R. 83, l. 16). As she walked towards the Convention Center, Appellant contends she stepped in a hole or depression in the pavement and fell. (R. 55, l. 21-22; R. 61, l. 9-21; R. 61, l. 12 – R. 62, l. 2).

Appellant filed the original Complaint on January 5, 2015, against the City and the Myrtle Beach Convention Center Hotel Corp. Appellant asserted a single negligence cause of action against both Defendants. The City filed a timely Answer denying liability and raising affirmative defenses. Specifically, the City asserted Appellant's claims were subject to the provisions of the South Carolina Tort Claims Act (hereinafter "Tort Claims Act"), including specifically S.C. Code Ann. § 15-78-60(15). (R. 25, Answer, ¶ 26). The parties subsequently entered a Stipulation dismissing the Convention Center Hotel Corp..

The case proceeded to jury trial before the Honorable R. Markley Dennis, Jr. the week of September 5, 2016. On September 7, 2016, at the close of all evidence, Respondent moved for directed verdict. (R. 311, l. 21 – R. 318, l. 9). The trial court granted Respondent's motion and directed a verdict on multiple grounds including a lack of evidence establishing liability under S.C.

Code Ann. § 15-78-60(15) and under a traditional premises liability analysis. (R. 320, l. 5 – R. 329, l. 24.) The Order granting directed verdict to the City was entered on September 7, 2016. (R. 3-4, Form 4 Order).

On September 20, 2016, Appellant filed a Rule 59(e) motion for reconsideration. (R. 344-354, Plaintiff's Motion for Reconsideration). The trial court denied Appellant's motion by Order dated April 27, 2017 (R. 5, Order Denying Plaintiff's Motion for Reconsideration). Appellant served a Notice of Appeal on May 26, 2017 (R. 355-361, Notice of Appeal). Appellant appeals the September 7, 2016 Order directing a verdict for the defense and the April 27, 2017 Order denying Appellant's Motion for Reconsideration.

The instant appeal followed. Following briefing and oral argument, this Court issued its opinion, reversing the Circuit Court's granting of directed verdict.

LAW/ANALYSIS

In its disposition of the case at bar, this Court held: (1) The Circuit Court did not rule on the Tort Claims Act issue; (2) The Circuit Court erred in finding Appellant was a licensee and finding sufficient evidence was presented for the jury to infer that Appellant was an invitee; and (3) there was sufficient evidence of constructive notice to allow the jury to resolve the question of Respondent's liability, if any.

Respectfully, this Court erred in reversing the Circuit Court's order granting directed verdict in favor of Respondent. Respondent avers: (1) The colloquy during the directed verdict argument makes clear the Court considered and held that Appellant failed to establish liability under the Tort Claims Act, specifically, S.C. Code Ann. § 15-78-60(15); (2) Appellant's status at the time of the subject incident was that of a licensee; and (3) Appellant failed to present evidence that Respondent had constructive notice of the condition.

I. Appellant Failed to Present Evidence Establishing Liability Under S.C. Code 15-78-60(15)

This Court held that the Circuit Court's ruling on directed verdict was not based on the Tort Claims Act. However, based on the extensive colloquy, the record is clear the Circuit Court held that Appellant failed to present evidence establishing liability under the Tort Claims Act.

A. The Circuit Court's Ruling Based on the Tort Claims Act is the Law of the Case

The Circuit Court spent considerable time explaining the application of the Tort Claims Act and his reliance on Major v City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014) which similarly involved S.C. Code Ann. § 15-78-60(15). (R. 320, l. 5 – R. 321, l.24; R. 322, l. 13 – R. 324, l. 22; R. 326, l. 21 – 24). Notably, the Circuit Court in discussing its rationale and position regarding notice, made explicit an explicit reference and distinction between cases involving governmental entities (subject to the Tort Claims Act) and private entities. Specifically, the Circuit Court stated: "They either had actual or constructive notice of it. And frankly, if you take the logic – Witherstein [sic] bothered me because you're dealing with a private entity, and that – and therein lies the – I think there's a distinction there." (R. 325, l. 12-17). The clear ruling of the Circuit Court—that there was no "evidence that would establish constructive notice of the pothole and, therefore, require that the City to take any action independent of what was done[,]"—is founded on the Tort Claims Act, and the statutory duties owed by the City **only upon** a finding that the City had notice of a defect. Accordingly, the record is clear that the Circuit Court ruled on the Tort Claims Act issue.

Appellant's brief, however, contained no challenge to the Circuit Court's ruling under the Tort Claims Act. Therefore, the Circuit Court's ruling on this ground is the law of the case. See Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. S.C. 171, 525 S.E.2d 869 (2000) (an

unappealed order, right or wrong, is ordinarily the law of the case); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646 (1993) (the trial judge's procedural ruling is the law of the case since it has not been appealed); Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 387 (Ct. App. 1998) ("holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). Appellant's failure to appeal all grounds of the directed verdict order, therefore, requires affirmance.

B. The Evidence Supports the Circuit Court's Ruling Under the Tort Claims Act

The Tort Claims Act is the exclusive remedy for torts committed by a governmental entity or its employees. S.C. Code Ann. § 15-78-20(b); see also Benton v. Roger C. Peace Hospital, 313 S.C. 520, 523, 443 S.E.2d 537, 538 (1994). S.C. Code Ann. § 15-78-60 sets out numerous exceptions to the waiver of sovereign immunity. Subsection 15 provides in relevant part:

The governmental entity is not liable for a loss resulting from:

> .... a defect or a condition in, on, or under, or overhanging a highway, road, street, causeway, bridge, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

S.C. Code Ann. 15-78-60(15)

Accordingly, to prove liability under subsection 15, a plaintiff must show the governmental entity was on notice of the condition that proximately caused his or her injury and failed to correct the condition within a reasonable time after receiving notice.

Appellant presented no evidence that Respondent had knowledge – either actual or constructive – of the hole in the employee parking lot. Appellant failed to direct the Court to any testimony that any employee of Respondent had actual knowledge the hole was present before Appellant fell. Instead, Appellant argued the City was on constructive notice because the hole was located within the employee parking lot. Of course, the fact that the hole existed on the day of Appellant's fall is not enough to prove constructive notice. It is well settled that proving constructive notice requires evidence that the condition existed for such a period of time that it should have been discovered in the use of reasonable care. Fickling v. City of Charleston, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007). Appellant has failed to point to any evidence establishing when the hole was created or how long it had been present prior to Appellant's injury. The Circuit Court correctly determined Appellant had failed to meet the required evidentiary burden and properly granted directed verdict. See Wintersteen v. Food Lion, Inc., 336 S.C. 132, 518 S.E.2d 828 (Ct. App. 1999) (finding Plaintiff failed to establish constructive notice when determining how long substance was on floor would be speculation); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969) (concluding trial court should have directed a verdict in favor of the defendant because "no evidence is pointed out which reasonably tends to prove that the rice was on the floor at any particular time prior to the actual fall. The jury should not be permitted to speculate that it was on the floor for such a length of time as to infer that defendant was negligent in failing to detect and remove it"); Pennington v. Zayre Corp., 252 S.C. 176, 179, 165 S.E.2d 695, 696 (1969) (affirming grant of involuntary nonsuit in case where plaintiff slipped on plastic bags on the floor: "The plastic bags were obviously on the floor at the time of the fall. There is no evidence in the record that the bags were on the floor for any time

prior thereto. To hold that the bags had been there sufficiently long that they should have been discovered by the merchant would be pure speculation.").

In so ruling, the Circuit Court noted the differences between the present matter and Major v. City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014). (R. 323, l. 10-19). Specifically, Major dealt with a frequently recurring problem with rutting at a particular intersection. Major also presented evidence of the City's practice of repairing the recurring ruts. There was also testimony from City employees that additional efforts to repair the ruts at the subject location were suspended because it was deemed "a fruitless effort because a few days later … it was right back to the same condition." Major v. City of Hartsville, 410 S.C. 1, 3, 763 S.E.2d 348, 350 (2014). As the Circuit Court noted, Appellant presented no evidence, like that presented in Major, of a recurring problem or a history of Respondent repairing similar problems in the employee parking lot. The Circuit Court, therefore, properly granted directed verdict based on S.C. Code Ann. § 15-78-60(15).

Accordingly, this Court should reverse its holding that the Tort Claims Act issue was not addressed by the Circuit Court and affirm the Circuit Court's grant of directed verdict on this ground.

II. Appellant Failed to Present Evidence that Respondent Breached a Duty to Appellant as a Licensee

A. Appellant was a Licensee at the Time of the Subject Incident in the Employee Parking Lot

It is well settled that the scope of a defendant's duty in a premises liability action is based upon the status of the person injured at the time of his or her injury. Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct.App.2001). South Carolina recognizes four general classifications of persons to whom varying duties are owed by the possessor: adult trespassers, invitees, licensees, and children. Id. Typically, "[a] licensee is a person whose presence is tolerated, a person not

necessarily invited on the premises, but one who is privileged to enter or remain on the premises only by the property owner's express or implied consent." Sims, 343 S.C. at 720, 541 S.E.2d at 863-64 (citing Frankel v. Kurtz, 239 F. Supp. 713 (W.D.S.C. 1965)). When a licensee enters a premises, the primary benefit is to the licensee. Hoover v. Broome, 324 S.C. 531, 479 S.E.2d 62 (Ct. App. 1994); Landry v. Hilton Head Plantation Prop. Owner's Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994). Therefore, licensees can be "said to accept the premises as they are . . . ." Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008) (quoting F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 111-12 (2d ed. 1997)).

"The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured **at the time of his or her injury**." Singleton, 377 S.C. at 200, 659 S.E.2d at 204. Accordingly, a plaintiff's status can change when exceeding the initial scope of invitation deeming the plaintiff an invitee. See Sims, 343 S.C. at 733, 541 S.E.2d at 870 ("In some cases, a worker on premises loses an invitee status when the worker exceeds the scope of work. If the invitee goes outside of the area of his invitation, he becomes a trespasser or a licensee, depending upon whether he goes there without the consent of the possessor, or with such consent.") (internal citation omitted).

This Court found sufficient evidence was presented for the jury to infer that Appellant was an invitee and, therefore, held the Circuit Court erred when it concluded Appellant was a licensee as a matter of law. Specifically, this Court held that the record contained sufficient evidence for the jury to infer that Appellant provided a benefit to the City; the record contained sufficient evidence for the jury to infer that Plaintiff was on the premises as a result of an express or implied invitation; and the record contained sufficient evidence for the jury to infer that Appellant's entry onto the Convention Center premises was for business connected to the purpose

for which the Convention Center was held open. Respectfully, this Court erred in finding sufficient evidence existed for a jury to determine the legal status of Appellant at the time of the subject incident.

As an initial matter, Appellant's testimony that the security guard working in the employee parking lot opened the gate for her to enter and gave her permission to park is not fatal to a finding of Appellant as a licensee. Indeed, South Carolina jurisprudence defines a licensee as an individual who is privileged to enter or remain on the premises only by the **property owner's express or implied consent**. Sims, 343 S.C. at 720, 541 S.E.2d at 863-64.

Further, there is no evidence that the use of the **employee lot** was for the benefit of the City. The trial testimony established that Appellant was in the employee parking lot for her own benefit. Appellant testified that she was running late on the day of the incident. (R. 81, l. 17-18). She entered the employee parking lot so that she could drop off her husband near the loading docks so that he could quickly and easily carry boxes of their product to their booth inside the exhibit hall. (R. 52, l. 16-20). If Appellant did not park in the employee lot, she would have parked on the opposite side of the building. (R. 83, l. 5-9). Instead, for her own convenience, Appellant parked in the employee parking lot believing it would only take a few minutes to run inside and find out if she needed to go to the warehouse for more product. (R. 54, l. 18-20; R. 82, l. 9-14; R. 82, l. 24 – R. 83, l. 4). Appellant's presence in the employee parking lot was, by her own admission, for her own convenience. (R. 83, l. 2-16).

This Court seemingly held that the entirety of the Convention Center premises were open for vendors, and that appellant was an invitee or business visitor for purposes of her legal status while on any part of the Convention Center premises. However, Appellant, by her own testimony, admitted that the parking lot where she was injured was designated for employees. (R. 80, l. 25 –

R. 81, l. 8). Notwithstanding Appellant's admission, numerous employee parking signs throughout the lot make clear the lot is not for use by the public. (R. 167, l. 25 – R. 168, l.23). Therefore, upon entry into the employee lot, even with the permission of the security officer, exceeded the scope of the initial invitation and designation of areas open for vendors which would have deemed Appellant an invitee or business visitor. Upon entry into the employee lot, Appellant's legal status changed from that of an invitee or business visitor, to that of a licensee. See Sims, 343 S.C. at 733, 541 S.E.2d at 870 (stating legal status can change upon exceeding scope of initial invitation upon the premises).

Finally, the benefit to the City, as noted in the Court's opinion, leads Appellant to be classified as an invitee **for the designated areas of the premises in which Appellant would be deemed as such, i.e. the extent of the invitation**. The employee lot was designated for **employees**, of which Appellant was not. There is no evidence that the City received a mutual benefit from Appellant's presence within the employee parking lot.

Accordingly, because Appellant exceeded the scope of the invitation, Appellant's status **at the time** of the subject incident was that of a licensee.

B. There is no Evidence that Respondent Breached a Duty to Appellant by Failing to Warn Appellant of a Concealed Dangerous Condition Known to Respondent

The Court noted that based upon its reversal of the Circuit Court's finding that Appellant was a licensee, the Court did not address Appellant's arguments on appeal regarding whether the City breached its duty of care. However, based on the arguments, supra, the Court erred in finding sufficient evidence existence for a jury to determine whether Appellant was a licensee or invitee. Because the record contains no evidence to support Appellant's status as an invitee, Respondent maintains that there is no evidence it breached a duty owed to Appellant.

A property owner's duty towards a licensee is (1) to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land, and (2) to use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or any change in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discovery. Neil v. Byrum, 288 S.C. 472, 343 S.E. 2d 615, 616 (1986) quoting Frankel v. Kurtz, 239 F.Supp. 713, 717 (D.S.C. 1965).

The trial court's directed verdict ruling based on Appellant's characterization as a licensee was supported by two principal evidentiary shortcomings. First, assuming the hole was a dangerous condition, there is no evidence in the record that the hole in the parking lot was concealed. Appellant did not testify the hole was concealed. In fact, Appellant's testimony supports the finding that the hole was in plain sight. Appellant agreed she could have seen the hole if she had simply looked down at the pavement. (R. 78, l. 8-15). She further testified there was nothing obstructing her view. (R. 79, l. 1-14). The hole was not located between cars or behind any obstruction. The photographic evidence shows the hole was in plain sight. Because the hole was not concealed, there was no duty to warn Appellant and therefore no breach.

Second, even if the hole was concealed, there was no breach of a duty owed to Appellant because – as discussed infra – the record does not contain a scintilla of evidence showing or supporting an inference that Respondent had knowledge of the hole prior to the incident date.

Accordingly, based on the aforementioned, Respondent did not breach a duty of care owned to Appellant and, therefore, this Court must affirm the Circuit Court's granting of directed verdict in favor of the City.

c. Appellant's Argument—and the Court's Ruling Regarding the Status of Appellant—Was Not Preserved for Appellate Review

While not addressed in this Court's opinion, Respondent maintains that Appellant's arguments regarding her classification as an invitee or a business visitor were not raised to Circuit Court and are, therefore, not preserved for appellate review. Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (finding issue must be raised to and ruled upon by circuit court to be preserved); Watson v Underwood, 407 S.C. 443, 756 S.E.2d 155 (Ct.App.2014) (declining to consider issues that were not addressed by court or raised in appellant's 59(e) motion.). Appellant's trial counsel presented no argument to the trial court concerning mutual benefit or interest or Appellant's presence being connected to the purpose for which the premises was held open. Indeed, Appellant's counsel summarily argued that Appellant was an invitee without any supporting evidence tending to show a mutual benefit or interest, that her presence was within the scope of the initial invitation as a vendor, or that her presence was connected to the purpose for which the premises was held open. Accordingly, this Court's findings with regard to the same were not preserved for this Court's review.

III. Appellant Failed to Present Evidence that Respondent Had Constructive Notice of the Condition

In its opinion, this Court held that the Circuit Court erred in finding the record contained no evidence that the City had constructive notice of the pothole. In its holding, the Court relied upon the following testimony in the record: Dr. Bryan Durig's testimony that the incident occurred in a loading zone and receive frequent traffic not only from employees and vendors, but also from tractor trailers carrying heavy loads that cause wear and tear on the parking surface; the hole was in violation of the International Property Maintenance Code that was adopted by the City and requires parking lots to be maintained free from hazardous conditions; testimony from Dr. Durig

that the hole contained dirt and debris; and testimony that the Convention Center employees were regularly in the parking lot and could have detected the hole and that the City had procedures in place for fixing holes. Respectfully, such evidence in the record, at best, supports mere speculation of the length of existence of the hole and whether the City should have known of the same. Speculation is insufficient to establish liability.

Under the traditional premises liability analysis, recovery for injuries caused by a dangerous or defective condition on a defendant's property requires a showing that defendant committed a specific act that created the dangerous condition or that defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it. Anderson v. Racetrac Petroleum, Inc., 296 S.C. 204, 205, 371 S.E.2d 530, 531 (1988); Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009).

In showing a defendant created a dangerous condition, a plaintiff must also present evidence that defendant created the condition through some negligent act or omission. Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009). The party alleging negligence has the burden of proving actionable negligence and "[t]his burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." King v. J.C. Penney Company, 238 S.C. 336, 120 S.E.2d 229, 230 (1961); see also Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262, 265 (1957) (noting "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of res ipsa loquitur does not apply in this State."). It is undisputed that the record lacks any evidence that the City created the alleged condition. Indeed, Appellant failed to direct this Court to any evidence in the record showing or creating an inference that Respondent created the

hole in the employee parking lot. There is no evidence establishing or tending to show when the hole was created or that it was created by Respondent. Additionally, there is no evidence the condition was created by a negligent act or omission of Respondent.

Accordingly, the Court's analysis turned to constructive notice. In arguing that the City was on constructive notice of the hole, Appellant argued the following: (1) City personnel were regularly "within the area of the hole;" (2) the hole "had *possibly* existed for a while;" and (3) the City had an established practice to deal with unsafe conditions on the premises.

In addressing the Court's reliance on certain evidence in the record, Respondent avers that mere presence in or near the area of the alleged defect is insufficient to establish constructive notice. Pennington v. Zayre Corp., 252 S.C. 176, 165 S.E.2d 695 (1969) (**evidence held insufficient to prove constructive notice** where the plaintiff, while shopping in a department store, slipped on a transparent plastic bag and fell to the floor and an **employee was apparently in the immediate area at the time of the fall**); Hunter v. Dixie Home Stores, 232 S.C. 139, 101 S.E.2d 262 (1957) (holding **evidence was insufficient** to charge a storekeeper with **constructive notice** of the presence on the floor of green beans that caused the plaintiff to slip and fall **even though a store employee faced toward the area where the plaintiff fell and stood 10 or 12 feet away and another employee worked 20 or 30 feet from where she fell**); see also H.E.B. Foods, Inc. v. Moore, 599 S.W. 2d 126 (Tex. Ct. Civ. App. 1980) (evidence that **store employee was in the immediate vicinity** at the time the plaintiff fell is **insufficient** evidence, standing alone, to raise the inference that the storekeeper placed the substance there or knew it was there and negligently failed to remove it).

Additionally, the fact that Respondent has a policy for employees to report dangerous conditions that are seen during the course of the workday does not establish or yield an inference

of constructive notice. The Circuit Court pointed out the absence of evidence – similar to that presented in Major – showing a recurring problem with potholes in the employee parking lot or a history of Respondent repeatedly repairing the same condition. (R. 322, l. 13 – R. 324, l. 22; R. 326, l. 21-24). Accordingly, there was an absence of "evidence that would establish constructive notice of the pothole and therefore require the City to take any action independent of what was done," (R. 329, l. 21-24).

Further, the reliance upon Dr. Durig's testimony that the hole contained dirt and debris only provide for mere speculation as to the length of time the hole existed. There is no evidence as to the length of time. This evidence fails to identify the length of time the hole existed, and may speculatively support a possibility that the hole was present for five minutes, five hours or five weeks. This is precisely why the evidence is sufficient to create a question of fact as to constructive notice. See Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627 (1969). Similarly, Dr. Durig's testimony, as relied upon by this Court, that the lot is in a loading zone and receive frequent traffic from tractor trailers carrying heavy loads is unsupportive of constructive notice. There is no evidence in the record on the cause of the subject hole. Dr. Durig's testimony only provide speculation on the cause.

Finally, the reliance upon Dr. Durig's testimony that the hole was in violation of the International Property Maintenance Code is misplaced. As noted by the Circuit Court, the mere existence of the hole is insufficient to establish liability, specifically the element of notice. Such testimony is only indicative of the existence of a dangerous or defective condition. The testimony provides no basis for whether the City had constructive notice of the hole.

Accordingly, the record is void of any evidence to support that the City had constructive notice of the hole.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court grant Respondent's Petition for Rehearing and affirm the Circuit Court's granting of directed verdict in favor of Respondent.

Respectfully submitted,

COLLINS & LACY, P.C.

By:__________________________

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April 23, 2020
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA

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APPEAL FROM HORRY COUNTY
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R. Markley Dennis, Jr., Circuit Court Judge
Fifteenth Judicial Circuit

Appellate Case No.: 2017-001258

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v.

City of Myrtle Beach...Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Petition for Rehearing by depositing a copy in the United States Mail, first class postage prepaid, on April 23, 2020, addressed to the attorney of record as follows:

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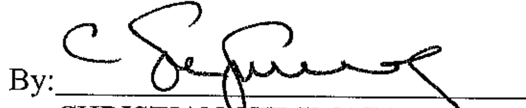
Respectfully submitted,

COLLINS & LACY, P.C.

By: 

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Proof of Service

April 23, 2020
Columbia, South Carolina

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April 23, 2020

RECEIVED
Apr 24 2020
SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: ***Christine LeFont v. City of Myrtle Beach***
Appellate Case No. 2017-001258
C&L File No. 000456-01017

Dear Ms. Kitchings:

Enclosed for filing is the original and one (1) copy of Respondent's Petition for Rehearing together with Proof of Service. Also included is a check for the filing fee in the amount of $50.00. Please return a filed copy to me in the self-addressed stamped envelope provided.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards,

Sincerely,

Christian Stegmaier

CS/aga
Enclosures

cc: Stephen L. Goldfinch, Esquire
Thomas W. Winslow, Esquire
Ryan P. Compton, Esquire

COLLINS & LACY, ATTORNEYS AT LAW

VENDOR: COURT OF APPEALS

CHECK NO: 40629

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TO THE ORDER OF COURT OF APPEALS

COLLINS & LACY
ATTORNEYS AT LAW

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