IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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SC Court of Appeals

Case No. 2017-CP-34-00367

Sharon Thompson, Appellant,

v.

Sprint Food Store #728, Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT ERR BY GRANTING DEFENDANT'S MOTON FOR SUMMARY JUDGMENT, FINDING THERE WAS NO QUESTION OF FACT AS TO WHETHER SPRINT FOOD KNEW OR SHOULD HAVE KNOWN OF THE DANGEROUS CONDITION?

II. DID THE COURT ERR BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FINDING THAT SPRINT FOOD HAD NO DUTY TO WARN INVITEES OF ACCUMULATED WATER?

III. DID THE COURT ERR BY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FINDING WET FLOOR SIGNS WERE OBSERVED PROVIDING WARNING TO THE PLAINTIFF?

STATEMENT OF THE CASE

On December 6, 2017, Plaintiff, Sharon Thompson, brought this action alleging Premises Liability and Negligence against the Defendant. The Defendant answered the Plaintiff's Complaint on January 23, 2018 and subsequently filed a Motion for Summary Judgment on June 14, 2018. Oral arguments for Defendants Motion for Summary Judgment were heard on September 25, 2018 and the Court entered an Order granting Summary Judgment on May 13, 2019. On May 24, 2019, Plaintiff filed a Notice of Appeal.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Legette v. Piggly Wiggly, 368 S.C. 576, 629 S.E.2d 375 (2006). In determining whether any triable issues of fact exist, the evidence and all the inferences that can be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Legette v. Piggly Wiggly, 368 S.C. 576, 629 S.E.2d 375 (2006).

FACTS

On July 28, 2016 at or around 8:45 p.m., the Plaintiff, Sharon Thompson (hereinafter referred to as Ms. Thompson), was an invitee at the Defendant's, Sprint Food Stores, Inc. Ms. Thompson initially parked her vehicle at the gas tank, walked across the parking lot, and entered the Defendant's store where she pre-paid for her gasoline. After paying for her gasoline, Ms. Thompson then returned to her vehicle and pumped the gasoline into her vehicle. While pumping the gasoline into her vehicle, numerous other individuals can be observed entering and exiting the Defendant store. The Defendant's parking lot was recently pressure washed by a third party, Allen Moore, and residual water remained on the ground in the parking lot. The Defendant had actual and constructive knowledge that Allen Moore pressure washed the parking lot, which is evidenced in the Store Incident Report which states, "parking lot was being pressure washed when lady walked in and fell. She slipped as she was walking in."

After pumping the gasoline into her vehicle, Ms. Thompson walked back across the parking lot, which was wet from the recent pressure washing, with the intent to purchase something to drink from inside Sprint Food Store. Ms. Thompson did not observe anyone pressure washing the parking lot, and rendered the following testimony in her deposition on P. 27, L2-24:

> Q: When you entered the store the first time, did you observe anything going on in the parking lot:
>
> **A: No, that was—**
>
> Q: --any activity?
>
> **A: That was a busy night. That was just a busy night, just a lot of people, so I didn't observe nothing that was going on.**

Q: Do you recall seeing an individual or a company doing some pressure washing of the parking lot?

A: I didn't see anything about a company. Nothing like that, just normal people.

Q: Okay. Did you see anybody cleaning the parking lot?

A: No. I haven't noticed people cleaning because the—where I was walking in—there was nobody there, where I was walking at.

Q: So you didn't see anybody in the parking lot doing any type of cleaning with water or a hose or anything when you were entering the store?

A: No.

After taking approximately 2 steps into the store, Plaintiff's left foot slipped from beneath her, causing her to fall to the floor, thereby resulting in significant injuries. (Video Surveillance 20:39:39). Ms. Thompson's fall was captured on a video surveillance system maintained by Sprint Food Store. The video does not depict any mat at the door to reduce moisture tracked in by invitees. The video also does not depict any wet floor sign, which would be immediately visible to invitees upon entry into the premises at the time Ms. Thompson fell. It is important to note that Respondent's "Statement of Facts" states that "A wet floor sign is observed in the video, positioned in front of the doors." I strongly disagree with this statement. The video depicts an employee placing the "wet floor" sign in front of the entrance to the store after Ms. Thompson fell and while Ms. Thompson is still on the floor in a seated position. Furthermore, Ms. Thompson testified in her deposition that she did not observe a "wet floor" sign at the time she fell. (Plaintiff, Sharon Thompson Deposition, P. 41, L18-23). Finally, there has been no evidence submitted to the Court that the Defendant periodically mopped the floor to remove moisture that

was tracked into the premises from the wet parking lot or that Defendant took any remedial measures whatsoever to ensure the safety of its invitees on the wet floor.

ARGUMENTS

I. The Plaintiff has produced evidence that Sprint Foods created the alleged dangerous condition and had notice of the alleged dangerous condition.

Any party in possession or having control over the property, business operations, or activities conducted upon the property at the time of the accident, or when the dangerous condition was created, is a likely Defendant. See Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001). The duty of care owed to invitees can flow from any person or entity that has control over the property. Id. at 729, 541 S.E.2d at 867-69. Property owners have an affirmative duty of reasonable care to properly inspect their premises in order to discover dangerous conditions and to take adequate safeguards to prevent injury to invitees. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 399-400 (1977). The adequate safeguards include exercising due care to warn of or eliminate foreseeable unreasonable risks. Landry v. Hilton Head Plantation Prop. Owners Ass'n Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994).

As previously stated in Petitioners initial brief, the Respondent, Sprint Food Store, hired a third-party vendor to pressure wash the parking lot during normal business hours, thereby creating the dangerous condition. Petitioner contends that by hiring the vendor and acknowledging that the work was being done at the time of the fall, actual and constructive knowledge of the work being performed is inferred. Furthermore, the front of the Sprint Food Store is clear glass allowing for observation of the gas tanks and parking lot, therefore, it is not possible for the vendor to pressure wash the parking lot during business hours without the employees having actual notice that the work is being done.

Finally, Plaintiff contends that the Defendant admits to having actual and/or constructive knowledge. In the incident report, completed by the Defendant's employee, the Defendant states, "parking lot was being pressure washed when the lady walked in and fell." (Defendant's incident report). By making that statement, the Respondent admits actual knowledge. Therefore, based upon the stated facts, the Defendant both knew or should have known through inferred and actual knowledge the store was being pressure washed, thereby creating a duty to invitees.

II. The dangerous condition was not open and obvious. However, should the Court finds that it was, the Defendant is still liable.

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. Callander v. Charleston Doughnut Corp., 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991). The mere presence of moisture, even open and obvious moisture, does not nullify the storekeeper's duty to take reasonable precautions to provide a safe premises for its customers; the storekeeper must take reasonable steps to protect its invitee's. See Legette v. Piggly Wiggly, 368 S.C. 576, 579-580, 629 S.E.2d 375, 377 (2006). Factors to be considered in determining if an owner took reasonable steps in a slip and fall case are: (1) the use of mats, (2) the periodic mopping of an area, and (3) the placement of at least one warning sign. Id. at 579-580, 629 S.E.2d 375, 377. In order to establish liability in a slip and fall case, a Plaintiff must show that the Defendant either: (1) created the defective condition or (2) had knowledge of the dangerous condition and failed to remedy it. Legette v. Piggly Wiggly, 368 S.C. 576, 579, 629 S.E.2d 375, 377 (2006).

In this case, the danger was not known, open, or obvious to Ms. Thompson. In Ms. Thompson's deposition, the Plaintiff states that she did not see anyone pressure cleaning in the

parking lot. Specifically, in the line of questioning transcribed from P. 35, L5-24 of Plaintiff's deposition, the Plaintiff makes it abundantly clear that she did not observe anyone pressure washing. The Plaintiff ends this line of questioning by stating, "not from where I was walking in. My area that I was going to, there was no machinery right there saying—nobody was pressure cleaning right there where I was entering the store." Therefore, this case differs greatly from a rain case, because this was not an act of God. Ms. Thompson did not have notice of a natural occurrence, and the source of water which saturated the parking lot was not visible in the area that my client observed.

Furthermore, the video depicts the Plaintiff's fall, and when viewed, the front entrance can be observed. No pressure washing machinery is observed, which is an indication that the pressure washer had either moved to another area of the premises or had finished pressure washing the area immediately in front of the door. (Video Surveillance 20:39:39). Therefore, this dangerous condition was not "open and obvious" to invitees entering Sprint Food.

In the case before the Court, the Defendant, Sprint Food Store, hired a third-party to pressure wash the parking lot, thereby creating the danger. Also, by hiring the third party, knowledge of the activity which was to be performed can be inferred. Therefore, in applying the 2 prongs that have been set forth in Legette, the Defendant both (1) created the defective condition by allowing the pressure washing to occur during business hours and (2) the Defendant had knowledge of the dangerous condition, and failed to remedy it, by not implementing any of the reasonable steps of (1) placing a mat at the entrance, (2) placing a wet floor sign at the entrance, or (3) periodically mopping the floor, as stated in Legette.

Thus, the Defendant, Sprint Foods Store, breached its duty to warn of or eliminate foreseeable risks, and there does exist a genuine issue of material fact for the jury to consider.

III. The Appellant was not warned of any dangerous condition.

Property owners have an affirmative duty of reasonable care to properly inspect their premises in order to discover dangerous conditions and to take adequate safeguards to prevent injury to invitees. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 399-400 (1977). The adequate safeguards include exercising due care to warn of or eliminate foreseeable unreasonable risks. Landry v. Hilton Head Plantation Prop. Owners Ass'n Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994).

The lower court states in the Order Granting Summary Judgment (, "[a]s observed in the video surveillance, a wet floor sign was propped up in the doorway." (Court Order, P. 10, ¶ 5). In this case, the Plaintiff's fall was captured by video camera maintained by the Defendant, Sprint Food Store. The video evidences, that there was not a "wet floor" sign placed at the front entrance that would be visible to invitees. (Video Surveillance 20:39:39). It is the Plaintiff's contention that by providing an inadequate warning, the Defendant failed to exercise due care to warn of or eliminate foreseeable unreasonable risks which is the standard provided in Landry. The video depicts an employee of the store moving and placing the sign at the front entrance after the Plaintiff had already fallen. The subsequent placement of the sign in front of the entrance is evidence that it was not placed properly when the actual fall occurred, and thus, Ms. Thompson was not warned of the water on the floor.

Furthermore, the question of whether the "wet floor" sign was properly placed is an issue of fact, and therefore, is a determination for the jury to make once they have heard all of the evidence and viewed the video depicting the fall.

CONCLUSION

For these reasons as well as those addressed in the Petitioner's Initial Brief to this Court, the Plaintiff respectfully requests that the Order Granting Summary Judgment be reversed, and that the Plaintiff's claim be remanded to the Circuit Court.

Respectfully submitted,

May 4, 2020

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief complies with Rule 209, SCACR.

May 4, 2020

Marshall S. Weaver

PROOF OF SERVICE OF BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant on Kelsey J. Brudvig, Esq., attorney of record for the Respondent, by depositing a copy of it in the United States Mail, postage prepaid on May 4, 2020, addressed as Kelsey J. Brudvig, Esq., Collins & Lacy, P. C., Post Office Box 12487, Columbia, South Carolina 29211.

May 4, 2020

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May 4, 2020

VIA FACSIMILIE AND EMAIL: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: ***Sharon Thompson vs. Sprint Food Stores #728***
Appellate Case No.: 2019-000872

Dear Ms. Kitchings:

Enclosed please find the following:

1. Initial Reply Brief of Appellant with Proof of Service
2. Designation of Matter to be Included in the Record on Appeal with Proof of Service.

If you have any questions or concerns, please do not hesitate to contact me.

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