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

Appellate Case No. 2017-001258
Case No. 2015-CP-26-00034

Christine LeFont, ... Appellant,

v.

City of Myrtle Beach; Myrtle Beach
Convention Center Hotel Corporation, ...Respondents.

APPELLANT'S RETURN TO RESPONDENT'S PETITION FOR REHEARING

This Return is filed by Appellant Christine LeFont, pursuant to Rule 221 and Rule 240(e) of the South Carolina Appellate Court Rules (SCACR), in the matter that this Court decided via published opinion filed March 11, 2020, specifically Christine LeFont v. City of Myrtle Beach, Op. No. 5715 (S.C. Ct. App. filed March 11, 2020) (Shearouse Adv. Sh. No. 10 at 53).

In compliance with this Court's correspondence to Appellant, dated May 13, 2020, Appellant timely files this requested Return within the 10 days allotted by the Court's correspondence.

Rule 221, SCACR, governs petitions for rehearing. Rule 240(e), SCACR, governs returns to motions and petitions generally.

I. Respondent's Petition for Rehearing does not state any point this Court overlooked or misapprehended.

A Petition for Rehearing "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR (emphases added); *see Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011). "In order to prevail on a petition for rehearing, [Respondent] must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001). The purpose of a Petition for Rehearing is not "to have the case tried in the appellate court a second time." *Id.*

Here, Respondent's Petition for Rehearing fails to state with particularity any point this Court supposedly overlooked or misapprehended. A thorough examination of the Petition reveals that the Respondent simply disagrees with the Court's opinion. Beyond that disagreement, it is at best unclear as to what the Respondent contends this Court either overlooked or misapprehended in its opinion because the Petition merely repeats Respondent's arguments previously made in its Final Brief.

Because Respondent failed to demonstrate with particularity that this Court has overlooked or misapprehended any points warranting rehearing, the Petition must be denied. This Court's opinion reaches the correct result for the correct reasons without overlooking or misapprehending the issues and arguments presented by the parties. This Court did not err in reversing the trial court.

II. This Court correctly held that neither barrel of the circuit court's "two barrel appeal" contained a ruling on the Tort Claims Act subsection (15).

In the Factual/Procedural Background of its Petition, Respondent improperly states an argument presented as fact: that the trial court granted directed verdict to it on multiple grounds **including a lack of evidence establishing liability under S.C. Code Ann. § 15-78-60(15)**." (Pet. 2-3) (emphasis added).

Obviously, whether the directed verdict was based upon S.C. Code § 15-78-60(15) is an issue in dispute on which the parties have disagreed. (*See* Opinion, p. 3). Respondent's presentation of this centrally disputed issue as if it were a non-argumentative, objective fact is improper.

Nevertheless, this Court's opinion makes clear that this Court did not overlook any of Respondent's arguments and that the Court did not misapprehend any of Respondent's arguments. Rather, after having hearing, considering, and with comprehension of the Respondent's arguments, this Court issued its opinion.

Notwithstanding Respondent's failure to highlight any points purportedly overlooked or misapprehended by this Court, Respondent's argument concerning the SCTCA is based on a false premise: that the trial judge did in fact grant directed verdict based on subsection (15).

Respondent's argument confuses a court ruling with an in-court discussion. The court's stated ruling and stated grounds on which that ruling is based is what matters—not a discussion.

Respondent's argument requires a tortured reading of the trial court record and is incompatible with the trial judge's "two barrel appeal" ruling. The colloquy at trial concluded with the trial judge stating to Appellant's counsel his holdings which "creates a twofold—a two barrel appeal if you want to take it . . . the Plaintiff met the definition of a licensee, not an invitee . . . But primarily I don't find that there's any evidence that would establish constructive notice . . ." Neither of the stated two barrels were loaded with a ruling on the Tort Claims Act or subsection (15) thereof and the trial judge never discussed a "third barrel."

Acceptance of Respondent's argument advances an absurd result. First, accepting Respondent's argument would require that every in-court discussion or conversation be appealed from in addition to every stated ruling or stated ground upon which that ruling was based. That is absurd. Second, accepting Respondent's argument would force counsel to appeal *dicta* to preclude the law of the case doctrine. That result is squarely at odds with longstanding South Carolina case law. *See White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 609 S.E.2d 811 (Ct. App. 2005) (finding it elementary that the law of the case doctrine does not apply to *dicta*); *see also Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (stating "doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication.").

This Court fairly reviewed the record and correctly held that the circuit court did not grant a directed verdict to Respondent based or grounded upon a South Carolina Tort Claims Act issue, including S.C. Code § 15-78-60(15). When parties and the trial court engage in a discussion, that does not mean that the trial court has ruled on every topic or issue discussed. So, too, when a trial court does not state it is ruling on a previously discussed issue, does specifically state it is ruling on two other issues, and then proceeds to enumerates those stated rulings (i.e. "twofold—a two barrel appeal if you want to take it . . ."), it should be clear that those unstated matters were not ruled upon.

Because there was no ruling on the Tort Claims Act, including subsection (15), this issue cannot be the law of the case. Appellant appealed and briefed all of the stated grounds and bases of the circuit court's directed verdict ruling; there are no unchallenged stated rulings which could be the law of the case. Accordingly, the law of the case is inapplicable here. Therefore, Respondent's Petition seeking affirmance based on the law of the case of an unstated ruling must be denied.

III. Appellant's status at the time of her fall is a determination left to the jury.

In the Petition for Rehearing, Respondent repeats the same invitee and licensee arguments that have been thoroughly briefed, argued, considered, and well-comprehended by this Court in its opinion. Respondent repeats: (1) Appellant was a licensee as a matter of law when she fell in the parking lot;

and (2) no evidence exists from which a jury could infer Appellant was an invitee. (Pet. 9). Also, Respondent raises several additional points concerning Appellant's legal status that are internally inconsistent, disregard the applicable standard of review, and disregard case law relied upon by this Court in its opinion—namely *Vogt v. Murraywood Swim & Racquet Club*, 357 S.C. 506, 511, 595 S.E.2d 617, 620 (Ct. App. 2004). (*See* Opinion, II. LeFont's Status).

A. Evidence exists yielding more than one inference concerning Appellant's status.

Respondent contends "this Court erred in finding that evidence exists for a jury to determine the legal status of Appellant at the time of the subject incident." (Pet. 9). Then Respondent immediately acknowledges the existence of testimony that Respondent's security guard opened the parking lot gate specifically for Appellant to enter, and expressly gave her permission to park therein. Disregarding how this evidence must be viewed for directed verdict purposes, Respondent argues that this evidence exists but "is not fatal to a finding of Appellant as a licensee" because licensees are "privileged to enter or remain on the premises only by the property owner's express or implied consent." (Pet. 9) (citing *Sims*, 343 S.C. at 720, 541 S.E.2d at 863-64). Respondent disregards the fact that this testimony, as this Court correctly found, is some evidence from which a jury could reasonably infer that Appellant entered or remained not only by *consent* but with express and implied *invitation*.

B. The broad unwritten holding inferred by Respondent misapprehends this Court's correct analysis.

Respondent contends 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" (Pet. 9). As an initial matter, Respondent's contention is clearly not supported by the language of this Court's opinion. However, to the extent this unwritten holding has been inferred by Respondent, the Respondent's argument is mistaken because it disregards the existence of evidence and further disregards that the evidence reasonably yields more than one inference.

C. Respondent concedes Appellant was an invitee/business visitor but became licensee as a matter of law upon entry to parking lot due to exceeding the scope of invitation.

Immediately following Respondent's unwritten holding argument or inference, as described in the preceding paragraph, Respondent abruptly pivots away from its repeated "licensee as a matter of law" argument to a theory it first raised in its Briefs to this Court on appeal (Resp. Final Br. 12), but repeated in its Petition for Rehearing: "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." (Pet. 10). Respondent asserts "because Appellant exceeded

the scope of invitation, Appellant's status at the time of the subject incident was that of a licensee." (Pet. 10).[1]

Respondent seemingly concedes Appellant was an invitee or business visitor. (Pet. 10). Respondent then conclusively states Appellant exceeded the scope of invitation upon being specifically admitted entry into the parking lot by Respondent's security guard and, thereby, immediately upon entry Appellant lost business visitor status becoming a licensee as a matter of law. (Pet. 10).

No argument was presented by Respondent to the circuit court that it was entitled to a directed verdict because Appellant lost her status as an invitee or business visitor by exceeding the scope of invitation upon entry to the parking lot. So, too, the circuit court did not issue an order or finding on this issue or this argument.

First, Respondent significantly omits that its own argument—whether Appellant exceeded the scope of invitation—is necessarily a factual determination that is determined by a jury. *See Hoover v. Broome*, 324 S.C. 531, 479 S.E.2d 62 (Ct. App. 1996) (legal status of invitee versus licensee completely based on factual determination of conflicting inferences, specifically regarding the scope of invitation). Respondent's argument conveniently ignores that "[t]he loss of invitee status is usually a question for the jury." *Sims*

[1] Respondent does not state that this point was overlooked or misapprehended by this Court.

v. Giles, 343 S.C. 708, 733, 541 S.E.2d 857, 870 (Ct. App. 2001). Respondent has not argued nor distinguished how the loss of invitee status, in this case, is an exception to that well-accepted rule. Appellant has argued throughout that her status on the property was, in fact, a question for the jury to determine. *See, e.g.* (Appellant's Final Br. 9–10) (Appellant's Final Reply Br. 6–7). This Court correctly held Appellant's status at the time of her fall was a question for the jury.

Second, Respondent omits that its own argument as to change in Appellant's legal status from business visitor to licensee would necessarily acknowledge evidence in conflict as to her status, which is a question of fact to be determined by a jury. This Court correctly held the conflicting evidence regarding Appellant's status presents a question of fact properly left to the jury. Therefore, this Court should deny Respondent's Petition for Rehearing.

IV. Constructive notice.

This Court correctly found sufficient evidence in the record for a jury to infer that Respondent had constructive notice of the hole. (Opinion, III. Notice). This Court specifically mentioned the testimony of Dr. Bryan Durig and testimony from others, referring to the testimony of several employees of the Respondent.

Respondent fails to state that this Court overlooked or misapprehended any material fact or principle of law. Therefore, Respondent's Petition should be denied. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 ("to prevail on a

petition for rehearing, [Respondent] must demonstrate the Court overlooked or misapprehended their argument.").

Notwithstanding this failure, Respondent's Petition presents a flawed and misguided constructive notice argument, outlined over four pages, based on the following contentions:

1) "evidence . . . supports mere speculation of the length of existence of the hole. . ." (Pet. 13).

2) "mere presence in or near the area of the alleged defect is insufficient. . ." (Pet. 14).

3) "that Respondent has a policy for employees to report dangerous conditions . . . does not establish or yield an inference of constructive notice." (Pet. 14-15).

4) "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." (Pet. 15).

Appellant, instead of repeating her briefs herein, responds by incorporating by reference her briefs before this Court, specifically Appellant's Final Brief Section III and Appellant's Final Reply Brief Section II. Further, Appellant responds to these contentions in turn.

In Respondent's "mere speculation" argument, Respondent concedes the existence of evidence but disagrees with the import of that evidence by ignoring the appropriate standard of review. Respondent does so by characterizing testimony in evidence from Dr. Bryan Durig and multiple employees of Respondent to support "mere speculation" of how long the hole existed. Respondent's narrow interpretation of that evidence is incorrectly determined

by not viewing all the evidence in the light most favorable to Appellant. The evidence, particularly as outlined in the Court's opinion, does reasonably yield an inference that this hole existed in the asphalt of the employee parking lot long enough for Respondent's employees to discover it.

Absurdly, Respondent argues that Appellant can never establish a jury question as to constructive notice unless she produces evidence and testimony affirmatively establishing the precise time this hole came to exist in Respondent's employee parking lot, and that any evidence or testimony short of stating that precise time is "mere speculation" and insufficient as a matter of law. (Pet. 15). This is not correct.

First, the effect of Respondent's argument is absurd—constructive notice would never present a jury question without evidence of actual knowledge. Acceptance of that argument would eradicate the inquiry notice.

Second, this Court recently rejected the very same constructive notice argument presented by Respondent in this case—*Garrison v. Target Corp.*, Appellate Case No. 2017-000267 (Jan. 15, 2020) (*cert. pending*). In *Garrison*, this Court analyzed precisely the same argument Respondent's presents—whether sufficient evidence exists from which to infer constructive notice without direct evidence as to the exact length of time the condition had existed. *See Garrison*, pg. 6-9.

In *Garrison*, there was no direct evidence as to how long the hazardous condition (a foreign substance—syringe with a needle) had existed in the

defendant's parking lot. However, several witnesses testified about the appearance of the hazardous condition, that it looked "weathered," and presumably had been there for some time. Making the argument Respondent presents, the defendant in *Garrison* argued that testimony concerning how long the syringe was in the parking lot was "speculative" and therefore insufficient to present a jury question concerning constructive notice. This Court rejected that argument by holding: "it is reasonable to infer from witness descriptions of the syringe's weathered appearance that it had been lying the parking lot long enough for Target's employees to have discovered it." *Garrison*, pg. 8.

Here, there is testimony similar to what this Court found sufficient in *Garrison*. Specifically, Dr. Durig's testimony established the hole present in the asphalt was as deep as a full layer of asphalt, measured some four to six inches in diameter and one and a half inches in depth, and contained dirt and debris. This kind of testimony is squarely what this Court in *Garrison* found sufficient to submit the constructive notice issue to a jury. Accordingly, this Court should deny Respondent's Petition for Rehearing as sufficient evidence exists concerning constructive notice and it should be decided by a jury.

As to Respondent's contention that the "mere presence" of employees nearby is insufficient (Pet. 14), Respondent sets forth one-sentence: averring that mere presence near the area is insufficient to establish constructive notice. This Court should not consider this contention as it is too conclusory to

constitute an argument on appeal and fails to state what this Court overlooked or misapprehended. Even if considered, this contention misses the point by narrowly focusing only on "mere presence" nearby while disregarding the existence of the other evidence and testimony. Finally, Respondent's one-sentence contention is followed by nearly one page of string citations of foreign substance cases where mere presence alone was insufficient; the cases involved: transparent plastic bags on floor; green beans on floor; and a Texas state court interpreting Texas state law. Those cases are obviously distinguishable from this case. Green beans on a grocer floor could appear in an instant; a full-thickness hole six inches wide worn through asphalt does not.

As to Respondent's contention that having "policy for employees to report dangerous conditions" is insufficient (Pet. 14-15), Respondent sets forth no argument other than its belief there is no evidence. This Court should deny the Petition for Rehearing.

V. Appellant's arguments are preserved for appellate review.

Respondent states that Appellant's invitee or business invitee status, mutual benefit arguments, and presence connected to the purpose premises were held open, are not preserved for appellate review. (Pet. 12). Appellant disagrees and hereby incorporates by reference her briefs and arguments to this Court, specifically Appellant's Final Reply Brief, Section II. Appellant's arguments and this Court's rulings there were all preserved for appellate review. This Court should deny Respondent's Petition for Rehearing.

CONCLUSION

Respondent has failed to state that this Court has overlooked or misapprehended any matters of fact or law warranting rehearing of this matter, the Petition for Rehearing should be denied. Nevertheless, for the foregoing reasons, this Court did not overlook or misapprehend either the law of the facts.

This Court's opinion correctly decides the matter without misapprehending or overlooking any points argued. Accordingly, Appellant respectfully requests that this Court: (1) deny Respondent's request for a rehearing; (2) deny Respondent's request for this Court to reverse its holding that the Tort Claims Act issue was not addressed by the circuit court (Pet. 7); (3) deny Respondent's request for this Court to affirm the directed verdict on the Tort Claims Act ground (Pet. 7); and (4) deny the Respondent's Petition for Rehearing so this matter can proceed towards trial in accordance with the Court's March 11, 2020 opinion.

[***Signature Page Follows***]

Respectfully submitted,

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May 26, 2020
Murrells Inlet, South Carolina

The State of South Carolina
In the Court of Appeals

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May 27 2020
SC Court of Appeals

Appeal from Horry County
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2017-001258
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Christine LeFont, ... Appellant,

v.

City of Myrtle Beach; Myrtle Beach
Convention Center Hotel Corporation, ...Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Return to Respondent's Petition for Rehearing was served on counsel for Respondent by electronic mail, pursuant to subsection (g)(3), South Carolina Supreme Court Order 2020-000447, to the following AIS e-mail addresses for counsel of record:

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s/ Ryan P. Compton
Ryan P. Compton

Subject: Christine LeFont v. City of Myrtle Beach // Appellate Case 2017-001258
Date: Tuesday, May 26, 2020 at 8:31:55 PM Eastern Daylight Time
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CC: Tom Winslow <tom@goldfinchwinslow.com>, Stephen Goldfinch <stephen@goldfinchwinslow.com>
Attachments: image001.png, LeFont v. City of Myrtle Beach - Appellant's Return to Petition for Rehearing.pdf, Ltr to CtApp encl Appellant's Return to Petition for Rehearing.pdf

Counsel,

Attached for service upon you in the above-referenced appellate matter, please find: (1) Appellant's Return to Respondent's Petition for Rehearing with Proof of Service; and (2) letter to the Court of Appeals enclosing Appellant's Return.

Thank you,

Ryan

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May 26, 2020

VIA APPELLATE ONEDRIVE SYSTEM
The Honorable Jenny A. Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Christine LeFont v. City of Myrtle Beach
Appellate Case No.: 2017-001258

Dear Mrs. Kitchings:

Please find enclosed for filing the Appellant's Return to Respondent's Petition for Rehearing in reference to the above matter. I have also enclosed a Proof of Service of this document on counsel for the Respondent. Pursuant to subsection (g)(3) of the South Carolina Supreme Court Order 2020-000447, this letter and Appellant's Return has been served on counsel of record to their respective AIS e-mail addresses. A copy of the e-mail is enclosed herein. Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Yours sincerely,

BAKER COMPTON LAW FIRM, LLC

Ryan P. Compton, Esq.

Enclosures: As Stated
cc: Christian Stegmaier, Esq. (via e-mail)
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