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

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SC Court of Appeals

Appellate Case No.: 2017-001258

Christine LeFont,.....Appellant,

v.

City of Myrtle Beach.....Respondent.

RESPONDENT'S REPLY TO APPELLANT'S RETURN TO 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") petitioned this Court for rehearing in the instant matter following this Court's published opinion filed on March 11, 2020. Subsequently, the Court requested a return brief from Appellant, addressing the arguments articulated by Respondent in its petition. Appellant filed her Return on or about May 26, 2020. Respondent hereby files its Reply to Appellant's Return.

LAW/ANALYSIS

In her Reply, Appellant initially argues that Respondent failed to state "any point this Court overlooked or misapprehended," and, therefore, the Petition must be denied. Additionally, in addressing the merits of Respondent's Petition, Appellant asserts: 1. The Court correctly held that

the Circuit Court did not rule on the Tort Claims Act; 2. Appellant's status at the time of her fall is a determination left to the jury; 3. There is sufficient evidence to create a question of fact as to whether Respondent had constructive notice of the alleged defect; and 4. All of Appellant's arguments on appeal were preserved for consideration by this Court.

I. Appellant Fails to Specifically Address the Circuit Court's "Discussion" That Appellant Failed to Present Evidence Establishing Liability Under S.C. Code 15-78-60(15)

Appellant asserts that "neither barrel of the circuit court's 'two barrel appeal' contained a ruling on the Tort Claims Act." Appellant criticizes Respondent's reliance on the Circuit Court's considerable time explaining the application of the Tort Claims Act, calling it a mere" in-court discussion," that was unnecessary to appeal. While the Circuit discussed a "two barrel appeal," the Circuit Court 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), clearly supports that the Circuit Court relied upon and ruled on the application of the Tort Claims Act.

To term the ruling by the Circuit Court as an "in-court discussion" improperly characterizes the lengthy consideration of the Tort Claims Act, case law being argued as applicable to the subject case and fact, and the Circuit Court's clear consideration of and ruling on the applicability of the Tort Claims Act, finding that such did apply to the subject case.

Appellant asserts that Respondent's contention—that the Circuit Court ruled upon the Tort Claims Act issue—would "absurdly" force Appellant to appeal "dicta to preclude the law of the case doctrine." However, deeming the statements by the Circuit Court as "dicta" is unfounded where the court spent considerable time addressing the issue of the applicability of the Tort Claims

Act. Such consideration is not mere dicta, in light of the surrounding colloquy, as well as reliance and distinction made as to certain South Carolina jurisprudence.

Accordingly, the Tort Court Claims was addressed by and ruled upon by the Circuit Court. This Court overlooked the entirety of the colloquy, including the Circuit Court's explicit reference and distinction between cases and the applicability of the Tort Claims Act. Therefore, because the Circuit Court ruled upon the Tort Claims Act—which was not appealed or challenged by Appellant—such is 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 reversal of this Court's opinion.[1]

II. The Court Respectfully Misapprehended South Carolina Jurisprudence That the Legal Status of an Individual Can Change Upon Exceeding the Intended Purpose or Invitation

Appellant contends that Respondent's argument contained in its petition for rehearing are incompatible with Respondent's contention that there is no evidence that exists for a jury to determine the legal status of Appellant at the time of the subject incident. (App. Reply, p. 6).

As an initial matter, the Court overlooked the preservation of Appellant's purported arguments that she was an invitee at the time of the subject incident. The Court failed to address the lack of preservation with regard to Appellant's argument—particularly those addressed in the Petition for Rehearing with regard to a change of status from invitee to licensee. As addressed in Respondent's Petition for Rehearing, Respondent maintains that Appellant's arguments regarding her classification as an invitee or a business visitor were not raised to Circuit Court and were,

[1] Respondent incorporates herein verbatim its arguments in its Petition for Rehearing regarding the merits of the Tort Claims Act and specifically, that there is no evidence to support any liability on the part of Respondent.

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 Rule 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, by this Court addressing the evidence and inferences therefrom with regard to invitee or licensee status, the Court overlooked the procedural flaw in Appellant's arguments.

In addressing the merits of the Court's ruling regarding the legal status of Appellant, and in responding to the arguments contained in Appellant's Reply, as articulated in its Petition, Respondent acknowledges and references certain testimony but avers that such evidence is not fatal to a finding of Appellant as a licensee. Appellant's contention that the acknowledgement of evidence and an argument that such evidence is not fatal to Respondent's position is inconsistent with the Court's standard regarding directed verdict. Such argument is without sufficient basis.

Respondent incorporates its arguments contained in its Petition regarding the status of Appellant at the time of the subject incident. Respondent also reemphasizes the lack of evidence that Appellant was within the employee parking lot for any benefit to Respondent. 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).

Respondent avers that the Court—while addressing certain evidence that may tend to yield more than one inference concerning Appellant's status—overlooked the complete lack of evidence to support that Appellant was within the **employee parking lot** for any purpose other than a self-serving purpose. There is a complete lack of evidence that Respondent was conferred a benefit by Appellant's temporary use of the employee parking lot.

The Court's opinion seemingly disregards the well-established case law that an individual's legal status can change when exceeding the initial scope of invitation initially deeming the individual as 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). There is no evidence to support that the initial invitation to use the lot designed for the vendors was extended for use of the entirety of the Convention Center premises. The mutual benefits conferred on each party—so as to classify Appellant as an invitee—did not extend once Appellant utilized the employee lot.

Additionally, Appellant avers that Respondent's concedes Appellant was an invitee or business visitor. (App. Reply p. 8). However, Appellant's argument misapprehends Respondent's position. As articulated in its Petition, Respondent maintains that the use of the vendor or public

lot—in exchange for a benefit conferred on Respondent—would deem Appellant an invitee.[2] However, any mutually conferred benefit was extinguished upon Appellant's use of the employee parking lot. There is only but one reasonable inference from the evidence in the record: While the security officer permitted Appellant to utilize the employee parking lot, such use was solely for Appellant's own benefit. As noted in Respondent's petition, 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). There is no evidence to support that any benefit was conferred upon Respondent by Appellant's use of the employee parking lot. Where there is only but one reasonable inference from the evidence, directed verdict is proper. Accordingly, the Court respectfully erred in finding the Circuit Court improperly held Appellant was a licensee as a matter of law.

[2] Appellant argues that "[n]o argument was presented by Respondent to the circuit court that it was entitled to a directed verdict because Appellant lots 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." Respondent interprets such statement as a position that the Circuit Court did not rule upon the change of status. However, Respondent addressed the issue both within its Final Brief and at oral argument, solely to demonstrate and combat Appellant's argument that Appellant is deemed an invitee. The issue of a change of status was not addressed in argument before the Circuit Court because the Circuit Court held—without contention—that Appellant was a licensee.

Moreover, there is no evidence that the invitation deeming Appellant an invitee extended to the entirety of the Convention Center Premises. There is no conflicting inferences to make from the evidence presented at trial or before the Circuit Court.

Accordingly, because Appellant exceeded the scope of the invitation, the evidence presents but only one reasonable inference: Appellant's status **at the time** of the subject incident was that of a licensee. See Solanki v. Wal-Mart Store No. 2806, 410 S.C. 229, 763 S.E.2d 615 (Ct. App. 2014) ("When the evidence supports but one reasonable inference, it is solely a question of law for the court[.]").

III. The Court Misapprehended South Carolina Jurisprudence in Determining More Than One Inference Exists as to Constructive Notice.

Appellant avers that while Respondent "concedes the existence of evidence" to support constructive notice, Respondent "disagrees with the import of the evidence by ignoring the appropriate standard of review." Appellant's contentions are misplaced.

As an initial matter, Respondent does not assert that an appellant can never establish a jury question as to constructive notice unless the appellant affirmatively establishes the precise time the hole came to exist. Rather, Respondent contends that constructive notice cannot be establish by mere speculative evidence. In short, there is no evidence to support any inference of constructive notice in the instant case.

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. See Coker v. Cummings, 381 S.C. 45, 671 S.E.2d 383 (Ct. App. 2008) (generally stating that evidence that is purely speculative does not raise a material question of fact to send the issue to a jury).

Interestingly, Appellant avers that the lines of cases cited by Respondent in its Petition regarding mere presence of an employee in the area of an alleged defect are distinguishable. Specifically, Appellant contends that these cases deal with foreign substance as the alleged defect. Yet, in asserting that there is sufficient evidence that leads to more than one inference, Appellant relies strictly on a foreign object case. See Garrison v. Target, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020).

Regardless, in the instant case, Appellant's expert Dr. Brian Durig testified at trial—in referencing photographs not taken by himself—that there "look[ed] like" something was in the alleged hole, "some dirt, looks like or – debris." Of note, Durig did not testify that there was in fact dirt or debris in the subject hole—only that the photograph, one that was not taken by Durig, appeared to show dirt and debris. There is no other supporting testimony of the condition of the hole. This is the precise basis as to the pure speculation of this testimony in establishing constructive notice. Unlike the testimony presented in Garrison, Durig's testimony is purely speculative. Further, Appellant's reliance on Durig's remaining testimony—that being the size of the depression—only merely shows the existence of a purported dangerous condition, but does not

lend itself to support any grounds that the existence of such was present for a period of time to provide Respondent was constructive notice.

Additionally, both Appellant and this Court misapprehended and improperly relied upon evidence that employees may have been present in or near the area of the alleged defect. Such evidence lacks foundational support that Respondent had constructive notice—or that an inference can be made regarding the same. See 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).

Based on the aforementioned, as well as the arguments contained in Respondent's Petition, the Court misapprehended the applicable and reliance of certain evidence in holding that there is more than one inference in which a jury could determine whether Respondent had constructive notice of the alleged defect.

IV. Respondent's Petition is Proper for Consideration

Appellant avers that because Respondent failed to use the terms "misapprehend" and/or "overlooked," its petition and the arguments contained therein are improper. While Appellant devotes an entire section of her Return to this issue, Appellant repeatedly states throughout the Return in addressing the merits of Respondent's Petition that the specific arguments raised by Respondent fail to articulate how the Court "misapprehended" or "overlooked" certain arguments, law, or points.

Appellant's argument is misguided. Respondent clearly argues and articulates errors of law, misapprehension of certain facts, or where Respondent avers that the Court overlooked certain arguments and or consider applicability of the evidence and argument to establish case law. Neither the South Carolina Appellate Court Rules nor case law addressing Petitions for Hearings require the use of the terms "misapprehended" or "overlooked" within the arguments articulated in the Petition.

Accordingly, because Respondent's Petition undoubtedly asserts its arguments in a manner that addresses arguments, law, and/or points overlooked or misapprehended—despite the use of the lack of the terms—the Court must respectfully consider the Petition.

CONCLUSION

For the foregoing reasons, as well as the arguments contained within Respondent's Petition for Rehearing, 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,

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PROOF OF SERVICE

I certify that I have served the Respondent's Reply to Appellant's Return to Petition for Rehearing by depositing a copy in the United States Mail, first class postage prepaid, on June 22, 2020 addressed to the attorneys of record as follows:

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