THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5715 (Filed March 11, 2020)
Case No.: 2017-001258

Christine LeFont,.....Respondent,

v.

City of Myrtle Beach.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner City of Myrtle Beach ("Petitioner" or "the City") certifies the Petition for Rehearing was made and ruled upon by the Court of Appeals on August 24, 2020.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in holding the directed verdict for the City was not based upon the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-60(15) and in failing to hold that such ruling was the law of the case?

II. Did the Court of Appeals err in reversing the Circuit Court's grant of a directed verdict for the City by holding sufficient evidence existed from which the jury could conclude Respondent was an invitee at the time of the accident in the City's employee parking lot?

III. Did the Court of Appeals err in reversing the Circuit Court's grant of a directed verdict for the City by finding sufficient evidence was presented from which the jury could infer the City had constructive notice of the condition?

STATEMENT OF THE CASE

This premises liability action arises out of Respondent Christine LeFont's ("Respondent") trip and fall in hole or depression in the surface of a parking lot behind the Myrtle Beach Convention Center on August 13, 2014. Respondent 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 (the "Convention Center") organized by H.T. 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). Respondent's accident 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. Respondent was running late the morning of her incident. (R. 93, l. 17-18). She 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). Respondent 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, Respondent 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).

Respondent filed her Complaint on January 5, 2015 against the City.[1] 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 ("SCTCA"), including S.C. Code Ann. § 15-78-60(15). (R. 25, ¶ 26).

[1] Defendant Convention Center Hotel Corp. subsequently was dismissed by stipulation of the parties.

The case proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. the week of September 5, 2016. At the close of all evidence, the City moved for directed verdict. (R. 311, l. 21 – R. 318, l. 9). The City's directed verdict motion was based upon several grounds: 1) that Respondent had not presented sufficient evidence to establish liability under the SCTCA, specifically S.C. Code Ann. § 15-78-60(15); 2) that Respondent failed to present sufficient evidence the City either created the hole/depression or had actual or constructive notice of it as required in a premises liability case; and 3) that evidence supported as a matter of law that Respondent was, at best, a licensee at the time of the accident. (R. 311, l. 21 – R. 330, l. 3).

The trial court granted the motion and directed a verdict on multiple grounds. (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). On September 20, 2016, Respondent filed a Rule 59(e) motion for reconsideration. (R. 344-354). The circuit court denied Respondent's motion by Order dated April 27, 2017 (R. 5).

Respondent appealed the Circuit Court's decision to the Court of Appeals. After briefing and oral argument, the Court of Appeals reversed and remanded for a new trial. See LeFont v. City of Myrtle Beach, Op. No. 5715 (S.C. Ct. App. filed March 11, 2020). The Court of Appeals held: (1) The Circuit Court did not rule that a directed verdict was appropriate pursuant to the SCTCA; (2) the Circuit Court erred in finding Respondent was a licensee and held sufficient evidence was presented for the jury to infer that Respondent 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. Id.

The City then filed a Petition for Rehearing. Respondent submitted a Return to the Petition for Rehearing pursuant to the Court of Appeals' request and the City submitted a Reply. Subsequently, the Court of Appeals denied the Petition for Rehearing on August 24, 2020.

STANDARD OF REVIEW

Rule 50 of the South Carolina Rules of Civil Procedure provides that the trial judge may direct a verdict when the case presents only questions of law. Rule 50(a), SCRCP. On a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and deny the motion where either the evidence yields more than one inference or its inference is in doubt. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 286 (2003). "However, this rule does not authorize submission of speculative, theoretical, or hypothetical views to the jury." Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 292-93, 628 S.E.2d 496, 503 (Ct. App. 2006).

In reviewing a grant of directed verdict, the appellate court applies the same standard as the trial court. However, the appellate court will only reverse the trial court's ruling on a directed verdict motion when there is "no evidence to support the ruling or where the ruling is controlled by an error of law." Law v. S.C. Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006). Furthermore, the appellate court must determine "whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his [or her] favor." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). Both the trial court and appellate court are only concerned with the existence or non-existence of evidence and neither have the authority to decide credibility issues or to resolve conflicts in testimony. Id. See also Hoover v. Broome, 324 S.C. 531, 538, 479 S.E.2d 62, 66 (Ct. App. 1996).

ARGUMENT

The Court of Appeals erred in reversing the Circuit Court's order granting a directed verdict in favor of the City. The City avers: (1) the colloquy during the directed verdict argument makes clear the Circuit Court considered and held that Respondent failed to establish notice as required by the SCTCA; (2) Respondent's status at the time of the subject incident was that of a licensee; and (3) Respondent failed to present evidence that the City had constructive notice of the hole/depression.

I. The Court of Appeals Erred in Holding the Directed Verdict Was Not Based Upon the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-60(15) and That Such Ruling Was Not the Law of the Case

A. The Circuit Court's Ruling Was Based on the South Carolina Tort Claims Act

In her Appellant's Brief to the Court of Appeals, Respondent did not challenge the trial court's ruling under the SCTCA. Thus, the City argued to the Court of Appeals that this failure rendered such ruling the law of the case and Respondent's failure to appeal all grounds of the directed verdict required the Court of Appeals to affirm. On reply, Respondent contended to the Court of Appeals that no such ruling was made by the trial judge. The Court of Appeals agreed with Respondent and held that the Circuit Court's grant of a directed verdict was not based on the SCTCA, S.C. Code Ann. §15-78-60(15), thus saving Respondent's appeal from being barred by the law of the case doctrine.[2] However, based on the extensive colloquy between counsel and the

[2] Of course, even if the Court of Appeals was of the opinion that the trial judge did not explicitly rule on the SCTCA, it is undisputed that the issue was raised to the trial court, thus rendering it an additional sustaining ground on which the Court of Appeals could affirm the decision of the trial court. See, e.g., I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating "[i]t would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review" and prevailing party's additional

trial judge regarding this issue, the record as a whole reflects that the Circuit Court did in fact direct a verdict based on Respondent's failure to present sufficient evidence establishing liability under S.C. Code Ann. §15-78-60(15). Accordingly, the Court of Appeals erred by not affirming the trial court's decision under the law of the case doctrine.

The SCTCA 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). South Carolina Code Ann. § 15-78-60 sets out numerous exceptions to the SCTCA's 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).

During the colloquy ruling on the directed verdict motion, the trial judge spent considerable time explaining the application of the SCTCA 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).[3] Notably, the Circuit Court in discussing its rationale and position regarding notice, made an explicit reference and distinction between cases involving governmental entities (subject to the SCTCA) and private entities.

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sustaining grounds are preserved if the basis for them appears in the record on appeal and they are raised in the appellate brief).

[3] The directed verdict portion of the trial is located at pages 311 through 330 of the Record on Appeal.

Specifically, the Circuit Court inquired if any of the cases referenced by Respondent's counsel concerning notice involved municipality lawsuits, stating:

> [b]ut that's why the Tort Claims Act did what it did. Because it protects – it's got to protect the entity because they can't do that. I mean, what really started triggered this is my statement earlier that the State can't be responsible for all the holes. I mean, that's crazy. And the holes, every single hole in the road today, based on [Respondent's expert's] testimony, just taking your argument, is a violation. And therefore if somebody is injured, its negligence. It can't be. And the reason it can't be is because of the Tort Claims Act. It protects the State. It protects a public body. And it has to. I mean, there's no way they can be that—held to that accountability.

(R. 331, line 1-R. 320 line 24).

Respondent's counsel then again quoted S.C. Code Ann. §15-78-60(15) and continued with additional argument concerning notice. (R. 321, line 3- R. 322, line 12). The trial judge responded by referencing 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), and stated **"I'm going to rely on this decision, because it really, really is about as close to anything I found. And frankly, it sets up for you what I'm about to do."** (R. 322, lines 13-19). The trial judge then went on to explain that this Court had reversed the Court of Appeals' decision in Major because this Court found there was sufficient evidence in Major for a jury to infer that the defendant-municipality had constructive notice of the alleged defective condition, a recurring rut in the road the municipality repeatedly filled. (R. 322, l. 19 – R. 323, l. 15). The trial judge distinguished the case at hand from Major, explaining "I don't have anything like that here." (R. 323, ll. 16-19; R. 324, l. 16 – R. 325, l. 6; R. 326, ll. 21-24).

In continuing this discussion, the circuit court stated "[t]hey 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).[4] The discussion then changes to whether Respondent was an invitee or a licensee, with the court stating she was a licensee. (R. 326, l. 25 – R. 329, l. 20). Finally, the court concludes 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." (R. 329, ll. 21-24). When read in conjunction with the preceding portions of the directed verdict phase, it is clear that the Circuit Court's ruling regarding lack of constructive notice is founded on **both** traditional premises liability law and the SCTCA, both which require the defendant have actual or constructive notice of the alleged defect and both of which were discussed at length by counsel and the court leading up to this concluding statement. Accordingly, the Court of Appeals erroneously held the Circuit Court did not rule on the applicability of the SCTCA.

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

It is undisputed that Respondent failed to appeal the Circuit Court's ruling concerning lack of constructive notice as required by the SCTCA. (Resp. Brief). 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

[4] The trial judge was referencing Wintersteen v. Food Lion, 344 S.C. 32, 542 S.E.2d 728 (2001), the leading case which sets forth the required elements of a premises liability cause of action—the plaintiff must prove that the defendant either created the defective condition or had actual or constructive notice of the same and failed to remedy it within a reasonable time. Notably, S.C. Code Ann. § 15-78-60 tracks these elements of actual or constructive notice in its exception to the waiver of immunity of a governmental entity.

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"). Respondent's failure to appeal all grounds of the directed verdict order, therefore, required affirmance by the Court of Appeals. The Court of Appeal's holding with respect to this issue is in direct conflict with well-established law from this Court concerning the law of the case doctrine and warrants review by this Court.

II. The Court of Appeals Erred in Holding Sufficient Evidence Existed From Which the Jury Could Conclude Respondent Was an Invitee at the Time of the Accident

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

The Court of Appeals found sufficient evidence was presented for the jury to infer that Respondent was an invitee and, therefore, held the Circuit Court erred when it concluded Respondent was a licensee as a matter of law. Specifically, The Court of Appeals held that the record contained sufficient evidence for the jury to infer that Respondent provided a benefit to the City, was on the premises as a result of an express or implied invitation, and that her entry onto the Convention Center premises was for business connected to the purpose for which the Convention Center was held open. Respectfully, the Court of Appeals erred in finding sufficient evidence existed for a jury to determine the legal status of Respondent at the time of the subject incident. The Court of Appeals' decision fails to recognize that an individual's status can be different on different portions of the premises. Instead, the Court of Appeals seemingly concluded that because Respondent was on the premises for the tradeshow for which the Convention Center premises was held open, then she was an invitee at all times, even 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." Id. 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 or on different area of the property. See Parker v. Stevenson Oil Co., 245 S.C. 275, 281, 140 S.E.2d 177, 179 (1965) (noting the "logical and generally accepted limitation to the rule requiring the occupant to exercise due care to protect invitees from harm, which is that this duty applies only to those portions of the premises to which the invitation actually or apparently extends and during times included therein or apparently so); 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).

As an initial matter, Respondent'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 Respondent 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 (emphasis added). Accordingly, the security officer's alleged express or implied consent does not preclude Appellant from being classified as a licensee, as Respondent's use of the employee parking lot was solely for her own benefit.

Further, there is no evidence that Respondent's use of the employee lot was for the benefit of the City. The trial testimony established that Respondent was in the employee parking lot for her own benefit. Respondent 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 Respondent 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, she 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). Respondent's presence in the employee parking lot was, by her own admission, for her own convenience and benefit. (R. 83, l. 2-16). In fact, Respondent had no relationship with the City. The City leases the Convention Center to the entity that sponsors and hosts the tradeshow, H.T. Hackney, and H.T. Hackney in turn uses it in whatever fashion they

desire and invites vendors such as Respondent. (R. 289, l. 20 – R. 291, 1. 4). It was H.T. Hackney and Respondent, not the City, that potentially derived a benefit from Respondent utilizing the employee parking lot. The City gained no benefit from Respondent using the parking lot quickly and easily access the building during the tradeshow at which she was promoting her product.

The Court of Appeals seemingly held that the entirety of the Convention Center premises were open for vendors, and that Respondent was an invitee or business visitor while on any and all parts of the Convention Center premises. There is simply no evidence that Respondent was an invitee as to the entirety of the premises. Respondent, 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 this 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, 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 classified Respondent as an invitee or business visitor. Upon entry into the employee lot, Respondent'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 of Appeals' opinion, leads Respondent to be classified as an invitee **for the designated areas of the premises in which Respondent would be deemed as such, i.e. the extent of the invitation**. The employee lot was designated for **employees**, of which Respondent was not. There is no evidence that the City received a mutual benefit from Respondent's presence within the employee parking lot. Accordingly, the evidence on this issue gives rise to only one inference—that when she fell in the employee parking lot, Respondent was a licensee as a matter of law. The Court of Appeals erred

in failing to consider and hold that because Respondent exceeded the scope of the invitation by utilizing the employee parking lot solely for her own benefit, her status at the time of the subject incident was that of a licensee.

B. There is No Evidence that the City Breached a Duty to Respondent as a Licensee by Failing to Warn of a Concealed Dangerous Condition Known to Respondent

The Court of Appeals noted that because it reversed the Circuit Court's finding that Respondent was a licensee, it need not address Respondent's arguments on appeal regarding whether the City breached its duty of care. However, based on the arguments, supra, the Court of Appeals erred in finding sufficient evidence existence for a jury to determine whether Respondent was a licensee or invitee. Because the only inference supported by the record is that Respondent was a licensee, the City maintains that there is no evidence it breached a duty owed to Respondent as a licensee.

A licensee is said to accept the premises as they are and can demand no greater safety than the premises operator provides himself. A licensee is owed something less than a duty of care. 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). 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 not to discover. Id. (word "not" inserted in part (2) because Frankel misquoted Prosser on Torts §77, at 445 (2d ed. 1955)).

The trial court's directed verdict ruling based on Respondent's characterization as a licensee was supported by two principal evidentiary shortcomings in Respondent's case. First,

assuming the hole/depression was a dangerous condition, there is no evidence in the record that it was concealed. Respondent did not testify the hole was concealed. In fact, Respondent's testimony supports the finding that the hole was in plain sight. Respondent 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 Respondent and therefore no breach.

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

Accordingly, the City did not breach a duty of care owned to Respondent in her capacity as a licensee and, therefore, this Court must affirm the Circuit Court's granting of directed verdict in favor of the City.

C. Respondent's Argument—and the Court of Appeals' Ruling Regarding Her Status as an Invitee—Was Not Preserved for Appellate Review

While not addressed in the Court of Appeals' opinion, the City maintains that Respondent's arguments to the Court of Appeals regarding her classification as an invitee or a business visitor were not raised to Circuit Court and were, 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.). Respondent's trial counsel presented no argument to the trial court concerning mutual benefit or interest or Respondent's presence in the parking lot being connected to the purpose for which the Convention Center premises was held open. Indeed, Respondent's

counsel summarily argued that Respondent 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, the Court of Appeals' rulings with regard to the same were not preserved for review.

III. The Court of Appeals Erred in Finding Sufficient Evidence Was Presented From Which the Jury Could Infer the City Had Constructive Notice of the Condition

In its opinion, the Court of Appeals held that the Circuit Court erred in finding the record contained no evidence that the City had constructive notice of the pothole.[5] Because the Court of Appeals found that the trial court did not rule on the SCTCA, the Court of Appeal's ruling on constructive notice presumably was based solely on the required elements to be proven by a plaintiff under a traditional premises liability analysis. However, as outlined above, the required proof of notice under S.C. Code Ann 15-78-60(15) of the SCTCA and a traditional premises liability an analysis is very similar—both require proof of either actual or constructive notice of the defect. Accordingly, the discussion herein regarding the lack of evidence of constructive notice of the hole/depression is applicable under either theory.

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

[5] Interestingly, the Court of Appeals cites to Major for the definition of constructive notice. As discussed above, Major discussed constructive notice in the context of the SCTCA, S.C. Code Ann. § 15-78-60(15), not in the context of the traditional premises liability analysis.

Summerton, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009). Similarly, S.C. Code Ann. §15-78-60(15) requires a defect or condition created by a third-party be corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice.

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, 382 S.C. 397, 675 S.E.2d 783. 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 the Court of Appeals to any evidence in the record showing or creating an inference that the City created the hole in the employee parking lot. Similarly, there is no evidence the City had actual knowledge of the hole prior to Respondent's fall.

Accordingly, the analysis turns to constructive notice. Of course, the fact that the hole existed on the day of Respondent's fall is not enough to prove constructive notice. Constructive notice may be established by showing that the dangerous condition was present sufficiently long that the premises operator should have discovered and remedied it in the exercise of ordinary care. Pennington v. Zayre Corp., 252 S.C. 176, 178, 165 S.E.2d 695, 696 (1969). However, the length

of time that the defective condition has been present is not a determination that can be left to speculation. See Calvert v. House Beautiful Paint and Decorating Ctr. Inc., 313 S.C. 494, 496, 443 S.E.2d 398, 399 (1994) (granting summary judgment for merchant where there was no evidence of constructive notice); Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627, 629 (1969) ("No evidence is pointed out which reasonably tends to prove the [defective condition] was on the floor for any particular time prior to the actual fall. The jury should not be permitted to speculate that [the defective condition] 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) ("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 at 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."); 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); Gillespie v. Wal-Mart Stores, Inc., 302 S.C. 90, 394 S.E.2d 24, 25 (Ct. App. 1990) ("[The record] does not show how long the water had been on the floor ... [and][t]he question of whether the water was on the floor for such a length of time as to infer that Wal-Mart was negligent in not discovering and removing it is not one that can be left to speculation.").

In reaching its decision that sufficient evidence of constructive notice existed, the Court of Appeals relied upon the following: 1) testimony by Plaintiff's engineering expert, Dr. Bryan Durig, that the incident occurred in a loading zone, which would be subject to frequent traffic from employees and vendors, as well as tractor trailers carrying heavy loads that cause wear and tear on the parking surface; 2) testimony by Dr. Durig that 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; 3) testimony from Dr. Durig that the hole contained dirt and debris; 4) 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 at best supports mere speculation as to the length of time the hole existed prior to the accident and whether the City should have known of the same. Speculation is insufficient to establish liability.

Respondent presented no evidence at trial establishing when the hole was created or how long it had been present prior to Respondent's injury. The Court of Appeals' reliance upon Dr. Durig's testimony that the hole contained dirt and debris only provides mere speculation as to the length of time the hole existed. This testimony fails to create an inference as to the length of time the hole existed or that it existed sufficiently long enough for the City to remedy it prior to Respondent's accident. For all we or Dr. Durig know, the hole/depression was created just prior to Respondent's incident and dirt tracked or blown into it at that time. Dr. Durig's testimony, at best, only speculatively supports a possibility that the hole was present for five minutes, five hours, or five weeks. In fact, Dr. Durig did not testify there was in fact dirt or debris in the depression, only that it "looked" like there was some dirt or debris in a photograph he did not take. (R. 162, ll. 10-17). This type of equivocation is precisely why the evidence is insufficient 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 employee lot contains a loading zone and receives 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 provides speculation on the cause. Regardless,

even if this was the cause of the hole, there is no evidence as to when it was in fact caused in relation to Respondent's accident, which is the key issue relating to constructive notice.

In addition, the Court of Appeals improperly relied on evidence that City employees used the parking lot where the hole was located as tending to show constructive notice. Such reliance directly conflicts with well-established South Carolina Supreme Court case law holding the defendant's mere presence in or near the area of the alleged defect is insufficient to establish constructive notice. 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 the City has a policy for employees to report and repair potentially dangerous conditions that are seen during the course of the workday does not establish or yield an inference of constructive notice. Unlike in Major, there is no evidence that the City had a recurring or repeating problem with holes or depressions in this or any other parking lot. The Circuit Court soundly 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).

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.

Rather, the Circuit Court performed the proper analysis regarding constructive notice based on Major v. City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014). (R. 323, l. 10-19). As noted by the Circuit Court, 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, Respondent 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, which would support a finding of constructive notice. The Circuit Court, therefore, properly granted directed verdict based the absence of evidence from which a jury could reasonably conclude the City had constructive notice of the hole/depression.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court reverse the decision of the Court of Appeals and reinstate the Circuit Court's directed verdict in favor of the City.

Respectfully submitted,

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September 23, 2020
Murrells Inlet, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5715 (Filed March 11, 2020)
Case No.: 2017-001258

Christine LeFont,.....Respondent,

v.

City of Myrtle Beach.....Petitioner.

PROOF OF SERVICE

Counsel for Petitioner City of Myrtle Beach certifies they have served Petitioner's Petition for a Writ of Certiorari on all parties via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on September 23, 2020, addressed to the following attorneys of record:

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and

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

[Signature Page to Follow]

Respectfully submitted,

COLLINS & LACY, P.C.

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September 23, 2020

VIA EMAIL ONLY:
supctfilings@sccourts.org

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Christine LeFont v. City of Myrtle Beach
Appellate Case No. 2017-001258
C&L File No. 000456-01020

Dear Mr. Shearhouse:

In reference to the above-captioned matter, please find attached the Petition for a Writ of Certiorari together with Proof of Service for same. A check for the $250.00 filing fee has been mailed.

With warmest regards, I am,

Very truly yours,

Amy L. Neuschafer

/aga
Attachments

pc: Ryan P. Compton, Esquire (ryan@bakercomptonlawfirm.com)
Stephen L. Goldfinch, Jr., Esquire (stephen@goldfinchwinslow.com)
Thomas Winslow, Esquire (tom@goldfinchwinslow.com)
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September 23, 2020

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re: Christine LeFont v. City of Myrtle Beach
Appellate Case No. 2017-001258
C&L File No. 000456-01020

Dear Mr. Shearhouse:

Please find enclosed our check in the amount of $250.00 which represents the filing fee for the Petition for a Writ of Certiorari that was filed via email today.

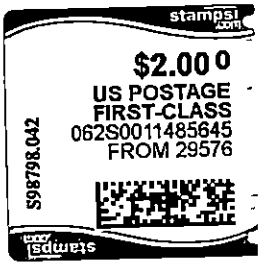
With warmest regards, I am,

Very truly yours,

Amy L. Neuschafer

/aga
Enclosure

pc: Ryan P. Compton, Esquire
Stephen L. Goldfinch, Jr., Esquire
Thomas Winslow, Esquire
The Honorable Jenny Abbott Kitchings ✓



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