THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Opinion No. 5715 (Filed March 11, 2020)
Appellate Case No. 2020-001273

Christine LeFont,..Respondent,

v.

City of Myrtle Beach..Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Appellant City of Myrtle Beach (City) submits the following in reply to Respondent's Return to the Petition for a Writ of Certiorari:

I. The Petition Makes Clear That Special and Important Reasons Exist for This Court to Exercise its Broad Discretion to Issue a Writ of Certiorari

Respondent contends no special or important reason exists for this Court to grant the Petition for a Writ of Certiorari pursuant to Rule 242(b), SCACR. As an initial matter, Respondent ignores that Rule 242(b)(3), provides this Court with broad discretion to grant a writ of certiorari where it determines there are "special and important reasons" for doing do. Although Rule 242(b) lists examples of the "character of reasons which will be considered," the Rule makes clear that the listed reasons are "neither controlling nor fully measur[e] the Supreme Court's discretion or power to grant review in general."

As outlined in the Petition, this appeal concerns the exposure of a municipality protected by the South Carolina Tort Claims Act (SCTCA) to liability for circumstances in direct contravention with the limitations on the waiver of sovereign immunity provided by the SCTCA. Specifically, the Court of Appeals incorrectly held that the trial judge did not rule the City was entitled to a directed verdict under S.C. Code Ann. § 15-78-60(15), which states a governmental entity is not liable for a loss resulting from a defect such as that alleged in this case unless the defect is not corrected within a reasonable time after actual or constructive notice. S.C. Code Ann. § 15-78-60(15). Because Respondent did not challenge the trial court's ruling under the SCTCA, the Court of Appeals' ruling rescued Respondent's appeal from being barred by the law of the case doctrine and allowed the Court of Appeals to address the merits of the appeal. The Court of Appeals' erroneous ruling deprived the City from the protections afforded by the SCTCA and thus presents a special and important reason for review by this Court.

Furthermore, the Court of Appeals' opinion's conflict with the decision rendered by this Court in Major v City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014) is centrally discussed in the Petition. The trial judge explicitly stated he was relying on this case to grant a directed verdict and as discussed in the Petition, the Court of Appeals' decision directly conflicts with Major. In addition, as set forth in the Petition, the Court of Appeals' decision directly conflicts with a number of other decisions by this Court holding that an employee's presence in the area of defect is insufficient to establish constructive notice of the defect. Accordingly, the Petition advances special and important reasons to warrant issuance of a writ of certiorari.

II. Respondent Ignores that Constructive Notice is Required Under Both the SCTCA and Traditional Premises Liability Analysis

It is undisputed that the trial court granted a directed verdict in favor of the City based on Respondent's failure to present sufficient evidence of constructive notice. At issue on appeal is whether the trial judge meant constructive notice: 1) in the context of traditional premises liability analysis under South Carolina case law; 2) in the context of S.C. Code Ann. §15-78-60(15) of the SCTCA; or 3) both. In her Appellant's Brief to the Court of Appeals, Respondent challenged the constructive notice ruling under only the premises liability analysis. The City contended the trial court's ruling regarding lack of constructive notice also was based on the SCTCA and thus, Respondent's failure to appeal this ruling was the law of the case and required affirmance by the Court of Appeals. Respondent took the position that the trial judge's ruling on constructive notice did not encompass the SCTCA and the Court of Appeals agreed. This ruling was erroneous.

Respondent attempts to boil this issue down to a math problem and latches onto the trial judge's comment that he was creating room for a "two barrel appeal." (R. p. 341, l. 3). According to Respondent's logic, because the City moved for directed verdict on three grounds and the trial judge said he was creating a "two barrel" appeal he could not possibly have ruled on all the City's

grounds for directed verdict. What Respondent (and the Court of Appeals) ignores is that one of these two barrels—the ruling that Respondent failed to present sufficient evidence of constructive notice—encompasses the grounds for directed verdict asserted under the SCTCA and under traditional premises liability analysis, as **both SCTCA and traditional premises liability analysis require proof of constructive notice**. Respondent would have this Court limit its review of the directed verdict portion of the trial to a single page of the transcript bearing the magic words "I find" and ignore that the trial judge clearly stated his reasoning for the forthcoming magic words in the prior pages.

When presenting the directed verdict arguments, the City specifically argued that both traditional premises liability analysis under South Carolina case law and the exception to the waiver of immunity in S.C. Code Ann. §15-78-60(15) of the SCTCA require the plaintiff prove actual or constructive notice of the alleged defect giving rise to the accident. (R. p. 312, l. 8-p. 313, l. 23) (explaining "those two arguments tie in together"). In fact, Respondent does not now and did not at trial dispute this overlap in the proof requirements. After hearing argument from Respondent's counsel, the trial judge noted the SCTCA protects governmental entities and discussed Major v City of Hartsville, 410 S.C. 1, 763 S.E.2d 348 (2014), stating **"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."**[1] (R. 322, ll. 13-19). The trial judge continued to explain the rationale underlying his forthcoming ruling that Respondent had not presented sufficient evidence of constructive notice by outlining the Major decision and specifically distinguishing it from the case at hand. As noted by the trial judge, in Major, this Court held there was sufficient evidence from which a jury could infer that the defendant-municipality had

[1] Which was to grant the directed verdict motion.

constructive notice of the defective condition. The trial judge stated, "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).

Importantly, 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. This portion of the directed verdict phase was not merely dicta or a "discussion," as characterized by Respondent. It is the trial judge's reasoning for his ruling that Respondent failed to present sufficient evidence of constructive notice.

The trial judge did not limit his ruling on constructive notice to the context of traditional premises liability analysis. In fact, when the directed verdict phase is read in its entirety, it is clear the trial judge was focused on the fact that this case involved a municipality and implicated the SCTCA. Frankly, even if review of this issue is limited to a single page of the transcript containing the words "I find" as advanced by Respondent, all we are left with is "primarily I don't find that there's any evidence that would establish constructive notice of the pothole and therefore require that the City take any action independent of what was done." (R. p. 329, lines 21-24). It is no more reasonable to conclude from this sentence alone that the trial judge was referring to constructive notice in the context of traditional premises liability case law than to constructive notice in the context of the SCTCA. Yet, that is exactly that the Court of Appeals and Respondent have done.

Finally, Respondent's argument that the trial judge's directed verdict ruling was based on only two grounds—licensee status and constructive notice in the context of traditional premises liability analysis—is inconsistent with the position she took before the Court of Appeals. In her Appellant's Brief to the Court of Appeals, Respondent stated the trial judge "implicitly ruled" the hole was open and obvious and "appears to have implicitly found, or at least reasoned that, the

hole in the parking lot was not a hazard." (App. Br. pp. 10-13). With regard to the implicit ruling that the hole was not a hazard, Respondent referred to portions of the directed verdict arguments other than those appearing on the single page which Respondent now contends contains the only ruling made by the trial judge. Accordingly, Respondent previously has acknowledged that the judge's rulings and reasoning therefor appear throughout the directed verdict phase of the transcript and that rulings may even be implicit.

In sum, the trial court's ruling that Respondent failed to present evidence of constructive notice encompasses both traditional premises liability analysis and the SCTCA. Respondent failed to appeal the portion of this ruling pertaining to the SCTCA required affirmance by the Court of Appeals under the law of the case doctrine.

III. The Trial Court May Determine an Individual's Classification on the Premises as a Matter of Law

"The court must determine, as a matter of law, whether the law recognizes a particular duty. Singleton v. Sherer, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008). If there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law. Id.; citing Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) ("If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created."). Here, the only reasonable inference is that when she entered the employee parking lot, Appellant's status was that of a licensee.

Respondent's testimony that the security guard working in the employee parking lot opened the gate for her to enter does not create an inference that she is anything more than a licensee. A licensee must have the property owner's express or implied consent to enter. Similarly, an invitee enters with express or implied invitation. The distinction between a licensee

and an invitee is that an invitee confers a benefit on the landowner. Singleton, 377 S.C. at 198-99, 659 S.E.2d at 203.

The mere fact that Respondent was a vendor at the trade show for which the Convention Center was open does not render her an invitee. The Court of Appeals' opinion fails to recognize that an individual's status can be different on different portions of the premises.[2] Respondent fell in the clearly marked employee parking lot, which she was using for her own benefit and convenience because she was in a hurry to access the building. (R. 54, l. 18-20; R. 82, l. 9-14; R. 82, l. 24 – R. 83, l. 4). Respondent does not dispute that she was in the employee parking lot for her own benefit and not the benefit of the City. Respondent's presence in the employee parking lot was, by her own admission, for her own convenience and benefit. (R. 83, l. 2-16). This lack of benefit to the premises owner at the time of the accident is the crux of the licensee status and allowing her through the gate into the employee parking lot does not change her status to that of an invitee. 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). Because there exists no conflict in the evidence regarding Respondent's status in the employee parking lot, the trial judge properly held Respondent was a licensee as a matter of law.

IV. Respondent's Arguments Concerning Evidence of Constructive Notice Improperly Rely Upon Speculation

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

[2] Respondent contends the City did not argue to the trial judge that it was entitled to a directed verdict because Respondent's status was different upon entering the parking lot. This is incorrect. The City specifically contended that status was to be determined "with regard to the employee parking lot if you look at it within the scope of that area, because I think you can be different classifications at different portions of the premises depending on the scope of the invitation, so to speak." (R. p. 315, l. 22-p. 316, l. 2).

(1969). The length of time that the defective condition was present cannot be left to speculation. See, e.g., Calvert v. House Beautiful Paint and Decorating Ctr. Inc., 313 S.C. 494, 496, 443 S.E.2d 398, 399 (1994). This is because the jury should not be permitted to speculate that the defective condition was present for any such length of time before the accident so as to infer that the defendant was negligent in failing to remedy it. See Wimberly v. Winn-Dixie Greenville, Inc., 252 S.C. 117, 165 S.E.2d 627, 629 (1969). Contrary to Respondent's contention, the City does not argue Respondent must produce evidence establishing the precise time the hole came to exist. Respondent is required to, however, produce evidence from which a jury could reasonably conclude (not speculate) that the hole was present for a sufficiently long enough time that the City should have noticed and fixed it. 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. Dr. Durig provided no testimony or evidence as to how long it would take such a hole to form or dirt to accumulate. And even he was not sure what was in the hole, stating it "looked" like dirt of debris. (R. 162, ll. 10-17). This is textbook speculation.

Likewise, that City employees use the employee parking lot does not create an inference of constructive notice as to the existence of this particular hole for any length of time before Respondent's accident. Such a standard would be insurmountable for a property owner—if the accident happens in an area accessed by or near employees, the property owner would be effectively strictly liable for resulting injuries. Accordingly, the case law makes clear that the presence of any employee 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). Even when viewed in a light most favorable to Respondent, it is not enough that employees used the parking lot, as there is no evidence that any particular employee should have noticed or in fact did notice the subject hole. In fact, City employee Susan Skellet testified she had not seen the hole until after the accident, probably would not have reported it if she had, and probably would not have expected any other employees to do so. (R. p. 292, l. 17p. 293, l. 21). Furthermore, Ms. Skellet did not know how long the hole was present and had no knowledge of any complaints concerning the condition of the parking lot before Respondent's accident. (R. p. 296, ll.15-25). For these reasons and the reasons previously outlined in the Petition, the Court of Appeals erred in finding evidence was presented from which a jury could reasonably conclude the City had constructive notice of the hole.

CONCLUSION

For the foregoing reasons, as well as the arguments raised in the Petition for a Writ of Certiorari, the City respectfully requests the Court grant the Petition for a Writ of Certiorari, reverse the decision of the Court of Appeals, and reinstate the directed verdict in favor of the City.

[Signature Page to Follow]

Respectfully submitted,

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