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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Jocelyn Newman, Circuit Judge

Case No. 2018-CP-40-04219
Appeal No. 2020-001242

Joelle Snyder,

Appellant,

v.

City of Columbia, Barton-Malow Company, Contract Construction, Inc., Construction Dynamics Incorporated, Enviro AgScience, Inc., C.R. Jackson, Inc., Bull Street Development, LLC, John Doe No. 1, John Doe No. 2, John Doe Company No. 3,

Defendants,

of which Barton-Malow Company, Contract Construction, Inc. and Construction Dynamics, Inc. are the Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

The Respondents would respectfully restate the issues presented in this appeal as:

I. Did the Trial Court properly grant summary judgment to the Defendants Contract Construction, Inc., Barton-Malow Company, Construction Dynamics Incorporated where the Plaintiff did not present any evidence to dispute the affidavits presented by the Defendants which established that these Defendants did not perform any work on the curb and gutter or the pavement where the Plaintiff fell?

II. Did the Trial Court act within its discretion in refusing to allow the Plaintiff to delay summary judgment to take depositions where the Plaintiff had a reasonable opportunity to conduct discovery but made no attempt to take any depositions in the 20 months since these Defendants answered?

STATEMENT OF THE CASE

This appeal arises out of a trip and fall that occurred on August 30, 2016, on property located in Richland County, then known as Spirit Communication Park. In her complaint, filed August 9, 2018, the Plaintiff Joelle Snyder alleges that she fell while stepping off the sidewalk curb onto uneven pavement. [ROA ___; Complaint.] She named multiple entities as defendants, attempting to state a First Cause of Action for Negligence and a Second Cause of Action for Negligent Hiring, Training, Supervision and Retention, based on allegations that the defendants failed to properly construct the property, repair the area that caused Plaintiff to fall, or post any warning signs about the hazardous area. The defendants named in the original complaint included: The City of Columbia, Contract Construction, Inc., Barton-Malow Company, Construction Dynamics Incorporated, Enviro AgScience, Inc., and multiple John Doe individuals and corporations.

Defendants Barton-Malow Enterprises, Inc. (incorrectly identified as Barton-Malow Company), Contract Construction, Inc., and Construction Dynamics, Inc. (hereinafter referred to as the CCEB Defendants)[1] filed a joint answer on October 10, 2018, which was amended on October 19, 2018, denying the allegations of negligence and asserting various other defenses. [ROA ___, ___; Answer, Amended Answer.]

On May 30, 2019, a consent scheduling order was filed setting deadlines for mediation and trial: "This case shall be mediated on or before January 30, 2020"; and "This case shall be set for trial not before April 15, 2020." [ROA ___; Scheduling Order.] Mediation was deferred as evidenced by the trial docket on January 30, 2020. [See ROA ___; Trial Docket.]

Thereafter, the Plaintiff amended her complaint on March 9, 2020, to name C.R. Jackson Inc. and Bull Street Development, LLC as substitutes for the John Doe Companies, after ascertaining their identities during discovery. [ROA ___; Amended Complaint. See also R. ___; Motion to Amend, filed February 4, 2020.]

On July 15, 2020, the CCEB Defendants filed a motion for summary judgment supported by affidavits and exhibits, establishing that these Defendants were not involved in the construction of the area where the Plaintiff fell. [ROA ___; Motion and supporting memorandum, affidavits, and exhibits.] The motion came before the Trial Court for hearing on August 12, 2020. [ROA ___; Transcript.] The Trial Court entered a Form 4 order granting motion for summary judgment on August 13, 2020, and a formal order was entered on August 17, 2020, wherein the Trial Court ruled: "The Plaintiff has failed to make a showing that there is a genuine issue as to any material

[1] Construction Dynamics, Barton-Malow Company and Contract Construction were members of a joint venture known as CCEB Venue Partners. Defendant Enviro AgScience was also a member of the joint venture. [See ROA ___; Affidavit of Greg Hughes.] Defendant Enviro AgScience, Inc. appeared separately and was dismissed, without prejudice, pursuant to stipulation filed on September 22, 2020. [ROA ___; Voluntary Dismissal.]

fact nor that she has been deprived of a full and fair opportunity to complete discovery." [ROA ___; Formal Order.] The Plaintiff timely served and filed her notice of appeal.

STANDARD OF REVIEW

On appeal from the grant of summary judgment, the appellate court applies the same standard of review as applied by the trial court pursuant to Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). Rule 56(c) provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming, id. (citations omitted).

Rule 56(e), SCRCP, provides, in part: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011).

Summary judgment should not be granted until the plaintiff has had a full and fair opportunity to complete discovery. Baughman v. American Tel. & Tel., Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991); CEL Prod., LLC v. Rozelle, 357 S.C. 125, 129, 591 S.E.2d 643, 645 (Ct. App. 2004). The nonmoving party seeking to avoid or delay a motion for summary judgment

on such ground must demonstrate that further discovery will uncover additional evidence relevant to the issue and that they are not merely engaged on a "fishing expedition." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citing Baughman, supra). The nonmoving party must also show that she was reasonably diligent, and not dilatory, in her discovery efforts. Baughman, 410 S.E.2d at 544.

A trial judge's decision to rule on a summary judgment motion without allowing additional time for discovery is reviewed on appeal for abuse of discretion. "The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion. An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 127–28, 542 S.E.2d 736, 742 (Ct. App. 2001) (citations omitted) (plaintiff argued that the court erred in granting summary judgment prior to permitting him to complete discovery).

The record will show that the Trial Court properly granted summary judgment to the CCEB Defendants Contract Construction, Inc., Barton-Malow Company, Construction Dynamics Incorporated because the Plaintiff did not present any evidence to dispute the affidavits presented by the Defendants which established that these Defendants did not perform any work on the location where the Plaintiff fell. The record will also show that the Trial Court acted within its discretion in refusing to allow the Plaintiff to avoid/delay summary judgment to take depositions where the Plaintiff had made no attempt to take any depositions in the 20 months since these Defendants answered.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE CCEB DEFENDANTS WHERE THE EVIDENCE ESTABLISHED THAT THESE DEFENDANTS DID NOT PERFORM ANY WORK ON THE CURB AND GUTTER OR THE PAVEMENT WHERE THE PLAINTIFF FELL.

As alleged in her complaint, the Plaintiff fell when she stepped off the sidewalk curb and onto uneven pavement between the road and curb at Spirit Communications Park[2]. [ROA ___; Complaint §15.[3]] She identified the location of her fall as 1640 Freed Drive. [ROA ___; Complaint ¶¶ 9, 10, 11.] By her complaint and amended complaint, the Plaintiff attempts to assign responsibility to all the named Defendants for the allegedly uneven pavement between the curb and street.

The CCEB Defendants moved for summary judgment on the ground that the construction of the concrete curb and gutter and the asphalt paving where the Plaintiff fell was not in the scope of their work as defined by the different project contracts. In support of their motion for summary judgment, the CCEB Defendants presented affidavits from Greg Hughes, President of Contract Construction, and Gregory Tucker, Special Projects Administrator for the City of Columbia.

As established by the affidavit of Greg Hughes, Contract Construction, Construction Dynamics and Barton-Malow (along with Enviro AgScience) were members of a joint venture known as CCEB Venue Partners. [ROA ___; Hughes Affidavit ¶¶ 5, 6.] He further averred that CCEB Venue Partners was involved in the construction of Spirit Communications Park in 2015, but the scope of their work did not include the concrete curb and gutter or the asphalt paving where Plaintiff tripped and fell: "The scope of work by CCEB Venue Partners was for the plaza sidewalk

[2] Now known as Segra Baseball Park.

[3] At the hearing, Plaintiff's Counsel confirmed that: "Ms. Snyder fell at the -- where the sidewalk curb and gutter meet the asphalt. [ROA ___; Tr. 12/19-20.]

adjacent to Spirit Communications Park, but the scope of work stopped at the back of the concrete curb and gutter surrounding Spirit Communications Park." [ROA ___; Hughes Affidavit ¶¶ 8-9.]

The affidavit of the City's Special Projects Administrator confirmed that the scope of the work for which CCEB Defendants contracted did not include the curbing and pavement on Freed Street where the Plaintiff allegedly tripped and fell on uneven pavement. Mr. Tucker averred:

> CCEB Venue Partners, a joint venture of Contract Construction, Inc., Construction Dynamics Incorporated, Enviro AgScience Inc. and Barton Malow Company, was contracted to construct the plaza and associated sidewalks adjacent to Spirit Communications Park, but the scope of work stopped at the vertical plane created by the back side of the roadway curb surrounding Spirit Communications Park. Construction of Freed Street and its curbing adjacent to the plaza sidewalk alongside Spirit Communications Park, was outside the scope of work by CCEB Venue Partners. [ROA ___; Tucker Affidavit ¶¶ 6-7.]

The testimony of the affiants regarding responsibility for the curbing and the paving was further supported by an invoice from CR Jackson submitted to Bull Street Development for that work. [ROA ___; Invoice - Ex. A.]

By presenting this evidence in support of the motion, it was incumbent on the Plaintiff to disclose the facts she intends to rely on by affidavit or other proof. Rule 56(e), SCRCP. The Plaintiff submitted answers from the City of Columbia to her interrogatories, and certain pages from a spread sheet complied by Contract Construction to tract the project schedule, which she argues amounts to at least a scintilla of evidence to create a dispute of fact as to the scope of the CCEB's work. However, these documents do not create any genuine dispute as to the scope of the CCEB Defendants' work at Spirit Communications Park.

The Plaintiff argued that the City's answers to her interrogatories are inconsistent with the affidavit of the City's Special Project Administrator and thereby creates a genuine issue of material fact regarding the scope of work of the parties: "[T]he City of Columbia in their discovery responses, they said that Contract Construction, who is a member of the CCEB Joint Venture, they

said that Contract Construction took part in the construction of the sidewalk curb and gutter." [ROA ___; Tr. 10/24 – 11/3.] However, upon questioning by the Trial Court, the Plaintiff could not point to where in the answers the City had stated that Contract Construction was responsible for the construction of the curb and gutter. To the contrary, as acknowledged by Plaintiff at the hearing, she does not have any evidence that any of the CCEB Defendants constructed the curb and gutter on Freed Street:

> [Plaintiff's Counsel]: Judge, it says sidewalk, not sidewalk curb. So, I don't know if they're combining sidewalk curb and gutter with that term sidewalk. I'm just not sure because like I said, she did fall where the sidewalk curb and gutter meet the asphalt. So, if they constructed the sidewalk, they normally would construct the curb as well.
>
> THE COURT: But you don't have any evidence that they did.
>
> [Plaintiff's Counsel]: Not at this point. **** [ROA ___; Tr. 15/4-12.]

The use of the "sidewalk curb" as a single term reflects Plaintiff's failure to comprehend that construction of the sidewalk is separate from construction of the curb and gutter. Plaintiff's Counsel even admitted her lack of knowledge at the motion hearing: "So, I don't know where that -- I don't know where the, the sidewalk curb, gutter ends, where -- who did that versus who did just the plain sidewalk." [ROA ___; Tr. 15/16-18.] In contrast, the affidavits provided by these Defendants clearly evidence the distinctness of the sidewalks from the curb and gutter and that Contract Construction did not contract to construct the curb and gutter or the pavement.[4] Further,

[4]As a point of interest by way of example, beyond the specific defined scopes of work as set by the terms of the contracts referenced by the Tucker and Hughes affidavits and the City interrogatory answers. The general distinction between sidewalks from curb and gutters can readily be found in provisions of the Richland County Code and the City of Columbia Code. See definition of "sidewalk" in Richland County Code §1-2. "The word 'sidewalk' shall mean any portion of a street or road between the curbline, or the lateral lines of the roadway where there is no curb, and the adjacent property line intended for the use of pedestrians." [https://codelibrary.amlegal.com/codes/richlandcounty.] The City of Columbia, S.C., Code § 1-2 contains a similar definition: "The term 'sidewalk' means any portion of a street between the

Plaintiff Counsel's statement about "normal" construction of sidewalk with the curb by the same contractor amounts to nothing more than pure speculation without any support in the City's interrogatory answers. Neither Plaintiff's lack of understanding of the distinct logistics of the pertinent construction site nor her speculation can create a genuine dispute in the face of the clear testimony presented in the Tucker and Hughes affidavits which establishes the scope of the work by these Defendants.

Contrary to the Plaintiff's contention, the City's answers as well as the affidavits submitted by the Defendants clearly establish that construction of the curb and gutter was contracted separately from the construction of the sidewalk. Per the City, "Freed Street, including curbing, was constructed by Bull Street Development LLC via a contract with CR Jackson, Inc." [See ROA ___; City Interrogatories, #7.] As the Trial Court noted, there is no inconsistency: "So, the discovery responses are not inconsistent with the affidavits." [ROA ___; Tr. 13/2-3.] The City's answers are fully consistent with the Tucker and Hughes affidavits. None of the CCEB Defendants contracted for construction of the roadway or the curb and gutter on Freed Street where the Plaintiff allegedly tripped and fell.

Likewise, the isolated pages from a spread sheet complied by Contract Construction to tract the project schedule do not present any genuine dispute to create a jury issue on the scope of the CCEB Defendant's work. While there are notations of "Curb & Gutter, Sidewalks, Aprons - Main plaza" on these spreadsheets, [ROA ___; Spread Sheets] the Plaintiff did not present any evidence

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curbline, or the lateral line of a roadway where there is no curb, and the adjacent property line, intended for the use of pedestrians." [https://library.municode.com/sc/columbia/codes/code_of_ordinances] The City of Columbia, S.C., Engineering Regulations Manual §9.3.2.4 further elucidates the separateness of the two: "Sidewalks are typically constructed out of concrete and are separated from the roadway by a curb or gutter." [https://www.columbiasc.net/depts/utilities-engineering/docs/engregs/engregmanual.pdf].

identifying or explaining these pages or the notations. In Lemmons v. Macedonia Water Works, Inc., 431 S.C. 186, 200, 847 S.E.2d 471, 479 (Ct. App. 2020), the Court explained that what type of evidence must be presented to meet the scintilla of evidence requirement:

> "[A] scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a *reasonable* juror." *Crosby v. Seaboard Air Line Ry.*, 81 S.C. 24, 31, 61 S.E. 1064, 1067 (1908) (emphasis added). "[A]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative." *Bass v. Gopal, Inc.*, 384 S.C. 238, 246 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009), *aff'd*, 395 S.C. 129, 716 S.E.2d 910 (2011). The circuit court "is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984).

The bare notations on the spreadsheet do not constitute probative, material evidence on the issue of the scope of work. As alluded to in the quote above, these spreadsheet pages are no more than a morsel introduced in a vain attempt to create an issue of fact that is not genuine.

Accordingly, the Trial Court properly granted summary judgment to the CCEB Defendants where the affidavits they presented established that these Defendants did not perform any work on the curb and gutter or the pavement where the Plaintiff fell, and the Plaintiff did not present any material, probative evidence to controvert that evidence.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO ALLOW THE PLAINTIFF TO DELAY SUMMARY JUDGMENT TO TAKE DEPOSITIONS WHERE THE PLAINTIFF HAD A REASONABLE OPPORTUNITY TO CONDUCT DISCOVERY BUT MADE NO ATTEMPT TO TAKE ANY DEPOSITIONS IN THE 20 MONTHS SINCE THESE DEFENDANTS ANSWERED.

The Plaintiff argued that summary judgment was premature because she had "not been afforded a full and fair opportunity to complete discovery and further discovery is likely to uncover additional relevant evidence pertaining to the issues of Defendants' duty and liability." [ROA ___; Plaintiff's Memorandum in Opposition, p. 1.] While acknowledging that she had no evidence that the CCEB Defendants constructed the curb and gutter (of the pavement) where she fell, the

Plaintiff asked the court for time to schedule depositions to "nail down the scope of everyone's work on this area." [ROA ___; Tr. 15/13-14.]

The Trial Court did not abuse its discretion in refusing to allow Plaintiff more time because she had already had adequate time to pursue discovery. As the Trial Judge stated at the hearing, the complaint had been filed two years previously, and the Plaintiff had an opportunity to conduct discovery and notice depositions during the ensuing eighteen months after the Defendants answered. [ROA ___-___; Tr. 15/15 – 16/5.] In addition, there was a consent scheduling order that contemplated the possibility of a trial any time after April 15, 2020. Yet, the Plaintiff had not noticed any depositions of any of the Defendants as of August 12, 2020.

In support of her request for more time for discovery, the Plaintiff submitted the affidavit of her attorney, Karlen Senn, reciting certain procedural history regarding discovery efforts. [ROA ___; Senn Affidavit.] She avers that she had received discovery responses from all named defendants in November 2019 – nine months prior to the motion hearing. [ROA ___; Senn Affidavit ¶ 3.] She also avers that by at least February and June 2020, she had discussed her need to take depositions, yet she never made any affirmative effort to noticed any depositions of representatives from the City or any of the CCEB Defendants by the time the motion for summary judgment came for hearing on August 12, 2020.

While Plaintiff made reference to delays in discovery responses and a motion to compel discovery, the only motion to compel she filed was directed to Enviro AgScience and it was resolved without proceeding to a court hearing in November 2019, nine months before the summary judgment motion was filed or heard. [ROA ___, ___; Motion filed August 19, 2019, Email to court, dated November 11, 2019.] In addressing a request for more time for discovery to respond to a summary judgment motion, a trial court might consider any dilatory tactics or lack of

cooperation by defendants. *See* CEL Prod., LLC v. Rozelle, 591 S.E.2d 645 fn. 1 (grant of summary judgment affirmed where nonmoving party did not attempt to schedule a deposition until thirteen months after counterclaims were filed, and failed to present any affidavit in response to motion for summary judgment). In this case, there is no evidence that these CCEB Defendants refused to cooperate or made any efforts to obstruct the Plaintiff in pursuing discovery.

The Plaintiff argues that she was entitled to more time for discovery because she was still engaged in written discovery with the "newly added parties" – Bull Street Development and CR Jackson. However, as the Trial Court noted, it was not those newly added parties that moved for summary judgment, and Plaintiff had had nine months to pursue discovery with them since they had been added by the amended complaint:

> THE COURT: That would be nice, but I really think there's been an opportunity. I mean, I have before me a properly supported motion for summary judgement that shows that there's no genuine issue of material fact, and really the response is but there could be if I can do some more discovery on a two year-old case that's been on a trial roster. I did add new parties, but those parties were added nine months ago, and none of those new parties were these parties that are moving for summary judgment. And, in fact, had you been more intensive with your discovery two years ago or so, you probably would have learned the identities of those parties that you substituted earlier this year maybe a little sooner. I just think summary judgment is appropriate. I have nothing to defeat it except a request for more time, and I don't think that that's reasonable in this case. [ROA ___-___; Tr. 16/18 – 17/8.]

On the record presented, the Trial Court did not abuse its discretion in refusing to allow the Plaintiff more time for discovery where the Plaintiff failed to make a showing that she has been deprived of a full and fair opportunity to complete discovery.

CONCLUSION

Wherefore, based on the foregoing, the Trial Court properly granted summary judgment to the Defendants Contract Construction, Inc., Barton-Malow Company, Construction Dynamics Incorporated where these Defendants presented affidavits establishing that they did not contract to perform any work on the curb and gutter or the pavement where the Plaintiff fell, and the Plaintiff did not present any probative, material evidence to dispute the facts as established by those affidavits. In addition, the Trial Court acted within its discretion in granting summary judgment without allowing the Plaintiff additional time for discovery where Plaintiff had already had a reasonable time to conduct discovery.

Accordingly, the judgment rendered by the Trial Court should be affirmed.

Respectfully submitted,

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January 27, 2021

STATE OF SOUTH CAROLINA
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Defendants,

of which Barton-Malow Company, Contract Construction, Inc. and Construction Dynamics, Inc. are the

Respondents,

Certificate of Service

The undersigned certifies that on this **27th** day of **January, 2021**, a copy of the Initial Brief and Designations on behalf of Respondents Barton-Malow Company, Contract Construction, Inc. and Construction Dynamics, Inc., were served by emailing a copy of each, on the following counsel at the addresses listed below:

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January 27, 2021

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SC Court of Appeals

VIA EFILING
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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Re: Joelle Snyder v. Barton-Malow Company
Appellate Case No. 2020-001242
HLF File No. 290.027

Dear Ms. Kitchings:

Enclosed please find the Respondents' Initial Brief and Respondents' Designation of Matters to Be Included in the Record on Appeal in the above captioned matter. Also enclosed herewith is the Certificate of Service. I am serving all other counsel of record by emailed copy of this letter.

Kind regards,

Yours truly,

/s/ Jennifer F. Nutter

Jennifer F. Nutter

JFN/jad
Enclosure(s)
cc [***Via E-Filing***]: Karlen K. Senn, Esquire