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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Dennis Markley, Circuit Judge

Case No. 2019-CP-10-4310

Treca DeShields.....Appellant,

v.

JHM Enterprises, Inc., d/b/a Marriott in Charleston County, S.C.....Respondent.

AMENDED INITIAL BRIEF OF APPELLANT

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CASES

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Dowling v. Home Buyers Warranty Corp., II, 303 S.C. 295, 400 S.E.2d 143 (1991).
Fleming v. Rose, 350 S.C. 488 567 S.E.2d 857 (2002).
Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990).
Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 803 (2009).
Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728 (1986).
Murr v. Nationwide Mut. Ins. Co., 389 S.C. 170, 697 S.E.2d 660 (Ct.App. 2010).
Watson v. Southern Ry. Co., 420 F.Supp. 483 (D.S.C. 1975).

RULES

Rule 56, SCRPC

STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR BY RULING THERE WAS NO NOTICE OF A DEFECT OR PROBLEM WITH APPELLEE'S DESK?
- II. DID THE TRIAL COURT ERR BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANT'S MOTION FOR RECONSIDERATION WHEN THERE WAS AT LEAST A SCINTILLA OF EVIDENCE OF NOTICE OF A DEFECT AND NEGLIGENCE BY APPELLEE?

STATEMENT OF THE CASE

August 16, 2019, Appellant filed the summons and complaint.

November 13, 2019, Appellee filed and served its answer.

August 6, 2020, Appellee filed its motion for summary judgment without requesting a hearing.

October 7, 2020, Appellee filed its memorandum in support of its motion for summary judgment with affidavits and pictures.

December 11, 2020, Appellant filed her return and memorandum.

February 10, 2021, Trial Court issued a Form IV order.

June 16, 2021, Trial Court issued a formal order.

June 17, 2021, Appellant filed her motion to reconsider.

July 14, 2021, Appellant filed her appeal to the South Carolina Court of Appeals because of the Trial Court's delay.

August 10, 2021, South Carolina Court of Appeals dismissed Appellant's appeal without prejudice.

August 30, 2021, South Carolina Court of Appeals remitted Appellant's matter without prejudice (because no final order on motion to reconsider).

November 23, 2021, Trial Court denied Appellant's motion to reconsider, alter or amend.

November 30, 2021, Appellant filed her notice of appeal.

December 22, 2021, Appellant filed her amended notice of appeal.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Id.; See Rule 56(c), SCRPC.

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, 350 S.C. at 493–494, 567 S.E.2d at 860.

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. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

FACTS

Appellee's desks have a desk panel that is held in place by disconnected, wooden hinges at the bottom of the desk panel. (Appellant's Return and Memo; Ex. 7) Magnets hold the top of the desk panel in place. (Appellant's Return and Memo; Ex. 6) (Appellant's Return and Memo; Dep. Dickerson; pg. 23; lines 19-25) (Appellant's Return and Memo; Dep. Dickerson; pg. 24; line 1) A power strip is hidden behind the desk panel and is further hidden by a cutout at the upper right corner of the desk panel. (Appellant's Return and Memo; Ex. 6) (Appellant's Return and Memo; Dep. Martin; pg. 11; lines 19-25)

On December 1, 2017, Appellant was a guest at Appellee's hotel. During her stay, she was seated at a desk when the desk panel under the desk fell down and struck her right knee whereupon she turned and struck her left knee on the same desk panel. (Appellant's Return and Memo; Dep. Deshields; pg. 47; lines 1-23)

After the incident, Appellant called Appellee's front desk employee who asked Appellee's engineer, Mr. Fargis, to inspect and fix the desk panel connected to the desk. (Appellant's Return and Memo; Dep. Deshields; pg. 53; lines 1-9) Appellant took a series of pictures before and after Mr. Fargis's arrival. (Appellant's Return and Memo; Exs. 1-7) These pictures included a picture of Mr. Fargis pushing back up the desk panel that had fallen. (Appellant's Return and Memo; Ex. 5) When Mr. Fargis was in Appellant's room, Appellant heard him say the desk panel had come loose again. (Appellant's Return and Memo; Dep. Deshields; pg. 53; lines 11-12; pg. 55; lines 3-7)

Appellant's claim was denied.

After the lawsuit was filed, on March 16, 2020, Appellee took Appellant's deposition. Appellant's relevant testimony was as follows:

1. The backboard for the desk came loose and hit her leg. (Appellant's Return and Memo; Dep. Deshields; pg. 47; lines 1-23)
2. Mr. Fargis stated upon his arrival in Appellant's room, "Oh, it came loose." (Appellant's Return and Memo; Dep. Deshields; pg. 53; lines 11-12; pg. 55; lines 3-7)
3. The ninth picture taken by Appellant showed Mr. Fargis was seen pushing the backboard back from a position against the front legs. (Appellant's Return and Memo; Ex. 5) (Appellant's Return and Memo; Dep. DeShields; pg. 55; lines 10-11)

On November 3, 2020, Appellant took the depositions of several of Appellee's employees, Mr. Fargis, Mr. Dickerson and Mr. Martin.¹ Relevant testimony was as follows.

Mr. Fargis testified:

1. All the desks are identical. (Appellant's Return and Memo; Dep. Fargis; pg. 11; lines 22-25)

2. He never saw a fallen panel pull a power strip out of the wall. (Appellant's Return and Memo; Dep. Fargis; pg. 17, lines 1-4; pg. 18; lines 16-21)

3. He claimed when he came into room, he saw the desk panel 6 inches from wall (Appellant's Return and Memo; Dep. Fargis; pg. 21; lines 7-11) and not all way against the back of the front legs. (Appellant's Return and Memo; Ex. 3) (Appellant's Return and Memo; Dep. Fargis; pg. 22; lines 10-13)

4. He moved panel back up to connect to the magnets. (Appellant's Return and Memo; Dep. Fargis; pg. 22; lines 1-7)

5. He could not explain, according to metadata for pictures of desk, why he claimed the panel was only six to seven inches away from the wall when pictures showing the panel against the back legs of the desk were taken within minutes of his arrival. (Appellant's Return and Memo; Ex. 2) (Appellant's Return and Memo; Dep. Fargis; pg. 30; lines 16-20)

6. He could not explain how the power strip would have been pulled from the hole if the panel only fell six to seven inches. (Appellant's Return and Memo; Ex. 3) (Appellant's Return and Memo; Dep. Fargis; pg. 22; lines 10-19)

¹ The complete depositions were not filed. Only excerpts from these depositions were made a part of the record when Appellant filed her return and memorandum.

7. He agreed that it was possible his recollection could be wrong after showing him the red, white and black plaid bag in all the desk pictures and the timing of the pictures, including the picture of him pushing the panel back up. (Appellant's Return and Memo; Dep. Fargis; pg. 30; lines 21-22)

Mr. Dickerson testified:

1. If the power strip with cords plugged in was not inside the cutout, it would prevent the back panel from closing. (Appellant's Return and Memo; Dep. Dickerson; pg. 19; lines 19-25; pg. 20; line 1)

2. Defendant had other incidents where the panel separated from wall and was found in the position in Ex. 6. (Appellant's Return and Memo; Dep. Dickerson; pg. 24; lines 11-25; pg 25; line 1)

3. If the panel separated from wall and ended up against back legs of desk, he did not believe the pulling of the cables would cause the power strip to be pulled from the hole along the drywall. (Appellant's Return and Memo; Dep. Dickerson; pg. 28; lines 3-25; pg. 29; lines 1-4)

Mr. Martin testified:

1. Power strips are tucked away in a hole and not seen. (Appellant's Return and Memo; Dep. Martin; pg. 11; lines 7-25; pg. 12; line 1)

2. One has to reach and pull the power strip to get it out of the hole. (Appellant's Return and Memo; Dep. Martin; pg. 18; lines 16-25; pg. 19; lines 1-3)

3. Power strips are not secured. (Appellant's Return and Memo; Dep. Martin; pg. 12; lines 2-11)

4. Opening the panel does not cause power strip to fall. (Appellant's Return and

ARGUMENTS

I. BECAUSE THERE IS A SCINTILLA OF EVIDENCE THAT APPELLEE HAD NOTICE OF A DEFECT WITH ITS DESK PANELS, THE TRIAL COURT ERRED BY RULING THERE WAS NO EVIDENCE OF NOTICE OF A DEFECT WITH APPELLEE'S DESK AND NO DUTY OWED BY APPELLEE.

A. LAW:

An innkeeper "is under a duty to its guests to take reasonable action to protect them against unreasonable risk of physical harm." Allen v. Greenville Hotel Partners, Inc., 405 F.Supp.2d 653, 659 (D.S.C. 2005). The innkeeper undoubtedly has a duty to protect a guest from harms of which the innkeeper knew or had reason to know. See Daniel v. Days Inn of America, Inc., 292 S.C. 291, 296, 356 S.E.2d 129, 132 (S.C. App. 1987).

Deposition testimony concerning what a defendant's agent said is admissible and relevant. See e.g., Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 105, 410 S.E.2d 537,540 (1990); Murr v. Nationwide Mut. Ins. Co., 389 S.C. 170, ___, 697 S.E.2d 660, 662 (Ct.App. 2010) ("statements in [a] deposition constitute the scintilla of evidence needed to survive a summary judgment motion").

B. DISCUSSION:

In a light most favorable to Appellant, there is at least a scintilla of evidence creating a question of material fact as to Appellee's notice of a defective desk panel, duty to repair and/or warn Appellant of this defect and failure to do so. In short, Appellee's desk had a known problem with the power strips with plugs attached interfering with the floating hinges and preventing the desk panel from closing properly. Specific to this case, the photos taken by Appellant clearly show the desk panel had fallen and hit the back of the front legs and

could reach Appellant's knees. Further, because Appellee's employees collectively testified that this full open position would not pull the power strip from its hidden position, the power strip already was out of the wall and interfered with the desk panel properly closing.

First, Appellant testified Appellee's employee, Mr. Fargis, stated that the desk panel had come loose again. (Appellant's Return and Memo; Dep. DeShields; pg. 53; lines 11-12; pg. 55; lines 3-7) Appellant's testimony is admissible and, by itself, provides a scintilla of evidence that Appellee's employees were aware of a defect with the desk panel and that there is a question of material fact on the issue of notice, existence of a duty and breach of that duty. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 105, 410 S.E.2d 537, 540 (1990); Murr v. Nationwide Mut. Ins. Co., 389 S.C. 170, ___, 697 S.E.2d 660, 662 (Ct.App. 2010) ("statements in [a] deposition constitute the scintilla of evidence needed to survive a summary judgment motion").

While Mr. Fargis stated in an affidavit before his deposition was taken that he never told Appellant the desk panel had not fallen before (Appellee's Memo; Aff. Fargis; pg. 3; lines 1-4), his credibility is called into question and, at the very least, creates a question of fact on this issue. He testified that when he came into room, the desk panel was 6 inches from wall, he pushed it back up and it was not all way against the back of the front legs. (Appellant's Return and Memo; Dep. Fargis; pg. 21; lines 7-11; pg. 22; lines 10-13) A photograph of the position of the desk panel as he started to push it back into position clearly shows the desk panel all the way and touching the back of the desk legs. (Appellant's Return and Memo; Ex. 3) He could not explain this discrepancy when presented with pictures and metadata showing the picture was taken within minutes before he pushed the desk panel back into position. (Appellant's Return and Memo; Ex. 2) (Appellant's Return and Memo; Dep.

Fargis; pg. 30; lines 16-20) Further, he agreed anything is possible when asked if his recollection could be wrong after showing him the red, white and black plaid bag in all the desk pictures and the timing of the pictures, including the picture of him pushing the desk panel back up. (Appellant's Return and Memo; Dep. Fargis; pg. 30; lines 21-22)

In addition, Mr. Dickerson, Appellee's employee, provided evidence of notice of a defect with the desk panel used in conjunction with a loose power strip that had fallen and interfered with the wooden brackets at the bottom of the desk panel. He testified that he was aware that if the power strip (with cords plugged in) was not inside the cutout, it would cause a problem with the desk panel and the desk panel would not close. (Appellant's Return and Memo; Dep. Dickerson; pg. 19; lines 19-25; pg. 20; line 1) He also testified that he was aware of other incidents where the desk panel separated from wall and had to be pushed back up into position. (Appellant's Return and Memo; Dep. Dickerson; pg. 24; lines 11-25; pg. 25; line 1) He also testified that if the panel separated from wall and ended up against back legs of desk, he did not believe the pulling of the cables would cause the power strip to be pulled from the hole along the drywall. (Appellant's Return and Memo; Dep. Dickerson; pg. 28; lines 3-25; pg. 29; lines 1-4)

In addition, Mr. Martin, Appellee's employee, provided further evidence of a known defect with a desk panel falling down when contacted by guests or due to interference with a fallen power strip. He testified the desk panel could fall if someone inadvertently kicked it while using the desk. (Appellant's Return and Memo; Dep. Martin; pg. 14; lines 2-7) According to Mr. Martin, the power strip as depicted in Appellant's photos (Exs. 3-4) would not cause a power strip to fall to that position when a desk panel moves or falls away from the wall. (Appellant's Return and Memo; Dep. Martin; pg. 18; 16-25; pg. 19; 15-21) That

creates an inference that when Appellant was using the desk, the power strip had already falling into a position preventing the desk panel from properly closing - a known problem. (Appellant's Return and Memo; Dep. Dickerson; pg. 19; lines 19-25; pg. 20; line 1) The pictures taken by Appellant show the power strip down and between the wood brackets that hold the desk panel into position. Appellant contends this evidence shows a reoccurring problem of which Appellee was aware, that this problem prevented the desk panel from being secure, that this problem led to the desk panel falling against Appellant's knees and Appellee did nothing to warn or repair this problem.

Clearly, the combined testimony of Appellee's employees offers an explanation why the desk panel was not secure and would easily fall whether or not Appellant contacted it with her feet. This same problem, the desk panel separating from the wall, had occurred other times and was a known problem. The power strips prevented the desk panel from being secure and Appellee knew about this problem.

When confronted with Appellant's pictures (a) taken right after the incident, (b) taken right before Mr. Fargis came to Appellant's room and (c) taken as Mr. Fargis was moving the desk panel from a position against the back of the front desk legs, Mr. Fargis could not explain the obvious - that the power strip previously had fallen down and created a hazard. Appellee offered no evidence of any warnings provided to Appellant. Therefore, the trial court erred when if ruled there was no defect, no notice of defect and no breach of duty.

II. BECAUSE THERE IS A SCINTILLA OF EVIDENCE OF NOTICE OF A DEFECT AND NEGLIGENCE BY APPELLEE, THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANT'S MOTION FOR RECONSIDERATION.

A. LAW:

Where there is a scintilla of evidence that a defendant knew or should have known that a dangerous condition existed on its premises and that invitees would have to encounter this condition, a grant of summary judgment is error. Hancock v. Mid-South Management Co., Inc., 673 S.E.2d 801, 381 S.C. 326 (2009).

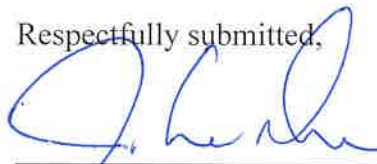
B. DISCUSSION:

Based on the foregoing, the evidence shows at least a scintilla of evidence Appellee knew about a defective condition was its desk panels due to the risk posed by fallen power strips. Appellee took no steps to take adequate preventative measures and/or warn Appellant of the same. This scintilla of evidence, in a light most favorable to Appellant, is sufficient to withstand a grant of summary judgment by the trial court.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court and remand this case for trial.

Respectfully submitted,



March 1, 2022

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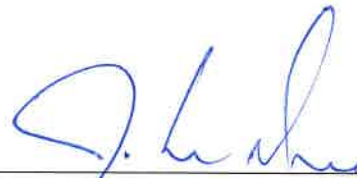
JHM Enterprises, Inc., d/b/a Marriott in Charleston County, S.C.....Respondent.

CERTIFICATE OF MAILING

I certify that I have served the Appellant's Amended Initial Brief on Helen Hiser, Esq., and Danielle F. Payne, Esq., by electronic means and by depositing a copy of the same in the United State Mail, postage prepaid, on March 1, 2022, addressed to the attorney at the address indicated below and by email to ctappfilings@sccourts.org:

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March 1, 2022

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RE: Treca Deshields, Appellant v. JHM Enterprises, Inc., d/b/a Marriott in Charleston County, S.C., Respondent.
Case No. 2019-CP-10-4310.

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Amended Initial Brief and Proof of Service. The Designation of Matter has already been filed and does not need to be amended.

By copy of this letter I am serving the same on the Appellee.

Sincerely,

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