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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

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appeal No.: 2021-001421

TRECA DESHIELDS,.....Appellant,

v.

JHM ENTERPRISES, INC., D/B/A
MARRIOTT IN CHARLESTON
COUNTY, S.C.,.....Respondent.

INITIAL BRIEF OF RESPONDENT JHM ENTERPRISES, INC., D/B/A MARRIOTT IN CHARLESTON COUNTY, S.C.

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I. WHETHER THE SUMMARY JUDGMENT WAS PROPERLY GRANTED TO DEFENDANT BECAUSE PLAINTIFF IS UNABLE TO PROVE ESSENTIAL ELEMENTS OF HER TORT CLAIM?

STATEMENT OF THE CASE

Plaintiff/Appellant Treca DeShields initiated this action on August 17, 2019 by filing a Complaint in the Charleston County Court of Common Pleas against Defendant/Respondent JHM Enterprises, Inc., d/b/a Marriott in Charleston County, S.C. Plaintiff alleged that, on December 1, 2017, she was a guest at Defendant's hotel in Charleston County. (Complaint, ¶¶ 2, 4). She alleged that, as she was sitting at the desk in her room, "the back of the desk fell and hit her right knee. When she pivoted to get up, her left knee struck the fallen back of the desk," which caused her personal injuries. (Complaint, ¶ 4). Plaintiff asserted that the condition of the desk, *i.e.*, that "the back of the desk was not properly secured and could fall," was known to Defendant and that it was "a common problem with this desk and/or similar desks throughout the rooms on its property." (Complaint, ¶¶ 4, 6).

Defendant timely answered, denying Plaintiff's claims and raising numerous affirmative defenses. (Defendant's Answer to Plaintiff's Complaint, filed Nov. 13, 2019).

After the parties engaged in discovery, including multiple depositions, Defendant moved for summary judgment. (Defendant's Motion for Summary Judgment, filed August 6, 2020). Defendant filed a Memorandum in Support of its Motion for Summary Judgment, (Defendant's Memorandum in Support of its Motion for Summary Judgment, filed Oct. 7, 2020 ("Memo in Support"), along with Exhibits A-E. Plaintiff filed an opposition, (Plaintiff's Return and Memorandum in Response to Defendant's Motion for Summary Judgment, dated December 11, 2020 ("Memo in Opposition"), along with Exhibits 1-11.

After consideration of the briefs and evidence submitted by both parties, the circuit court granted Defendant's Motion for Summary Judgement, first in a Form 4 Order, (Form 4 Order, filed Feb. 10, 2021), and then in a detailed, written Order. (Order Granting Defendant's Motion for Summary Judgment, filed June 16, 2021 ("Order")). In granting Defendant's Motion, the circuit court found and concluded that "there has been no evidence that Defendant was placed on actual or constructive notice of the alleged hazardous condition pled by Plaintiff. Specifically, there has been no evidence provided to date that the Defendant had actual or constructive notice that the entire desk panel could come off the wall thereby causing injury to patrons." The circuit court found that the evidence showed that "there had been no prior incidents where an entire wall panel came off the wall thereby causing injury to patrons," (Order, p. 5), concluding that "[a]s there have been no similar incidents pertaining to the complete removal of the desk panel and injuries resulting therefrom, Defendant could not possibly have been placed on constructive notice." (Order, p. 6).

Plaintiff filed a timely Motion to Reconsider, Alter or Amend, (Motion to Reconsider, Alter or Amend, filed June. 17, 2021), which the circuit court denied, on November 23, 2021. (Order Denying Plaintiff's Motion to Reconsider Alter or Amend, filed Nov. 23, 2021).

Plaintiff timely appealed to this Court.

BACKGROUND FACTS

Plaintiff alleges she injured both of her knees when a desk she was sitting at in Defendant's hotel room fell. She testified at her deposition that it was a "board at the bottom of the desk" that fell "from the wall, towards me." (Pl's Exh. 8, DeShields Dep.

p. 46, lines 10-17). Plaintiff testified "[s]o I was sitting sideways, 'cause I was looking at the T.V., and I was writing too, and so I was kind of turned sideways with my right leg more under the table … It hit my right leg first … When it hit my right leg first, I didn't quite know what was going on, because I heard a noise first … And then—then I turned, and it hit the other leg, and then I pull—I pulled the chair back to see what was going on, because at that time I'm feeling it." She the repeated that, "[i]t hit the right leg, and then when I turned it hit the left. I'm not sure if it was moving or not … Yeah. I just know it hit both legs." (Pl's Exh. 8, DeShields Dep. p. 46, line 24 – p. 47, line 25).

Plaintiff also testified that she spoke to someone from housekeeping who came to her room, although she could not remember the person's name or what she looked like, (Pl's Exh. 8, DeShields Dep. p. 53, lines 1-6 & lines 18-25), who called the head of maintenance to fix the desk. Plaintiff testified that, when the "guy" came to fix it, "he said, 'oh, it came a loose. It come—it come loose again.' And that was it." (Pl's Exh. 8, DeShields Dep. p. 53, lines 11-13).

When questioned further about what the maintenance worker had said, Plaintiff testified:

> A: It's loose, it came loose.
> Q: Okay. Did he mention that it had ever happened before?
> A: He said it came loose, it came loose again. So I didn't know whether he was referring to that one, or this is something that they've dealt with before.

(Pl's Exh. 8, DeShields Dep. p. 55, lines 2-7). She confirmed that the maintenance worker "pushed it back. He did something to it. He had some tools and did something to put it back up." (Pl's Exh. 8, DeShields Dep. p. 55, lines 10-11).

Bryan Fargis submitted an affidavit stating that he has been employed as the Chief Engineer at Defendant's hotel since 2013 and is responsible for all maintenance related activities at that location. (Def's Exh. D, Fargis Affid. ¶¶ 2, 3). He stated that, on December 1, 2017, he responded to a call regarding the desk in Plaintiff's room, which "was slightly leaning off the wall a mere few inches. The remainder of the panel was affixed to the wall as the panel is held in place by tracks which prevent it from being removed without manual assistance." (Def's Exh. D, Fargis Affid. ¶¶ 5, 6, 11). He inspected the panel, found no defect, and pushed it back into place. (Def's Exh. D, Fargis Affid. ¶ 7, 12). Fargis stated that, in all the years he has worked for Defendant, he knew of no "complaints or incidents where a desk panel was completely removed from the wall causing injury to any guest or employee," and never responded to a call regarding "a panel that had completely come off the wall as they cannot be removed from the wall or otherwise absent manual removal." (Def's Exh. D, Fargis Affid. ¶¶ 8, 9). Fargis disagreed that he had said anything to the effect "that there had been instances of prior desk panels completely falling off the wall." (Def's Exh. D, Fargis Affid. ¶ 14).

In his deposition, Fargis testified that the desks in the hotel rooms were identical. (Pl's Exh. 9, Fargis Dep. p. 11, lines 22-25). He stated that he could not recall ever seeing "a situation where the panel dropped any amount and caused the power strip to come out of the 5x2 space," confirming that he had not "ever encountered a—a common problem of power strips falling out of the 5x2 panel." (Pl's Exh. 9, Fargis Dep. p. 17, line 1 – p. 18, line 21).

Fargis testified that, when he arrived at Plaintiff's room, the panel was not down as far as depicted in Pl's Exh. 1 but was only down about six inches. Fargis explained

that he "reached down and pushed it in." (Pl's Exh. 9, Fargis Dep. p. 21, lines 1-11). When pressed by Plaintiff's counsel as to his recollection as to the position of the panel when he arrived at Plaintiff's room, and the location of a red, white and black bag in various photographs submitted by Plaintiff, Fargis was asked whether his recollection could be wrong, to which he simply responded, "Anything's possible." (Pl's Exh. 9, Fargis Dep. p. 30, lines 1-22).

Plaintiff's counsel represented to Fargis that "timestamps" on Plaintiff's photographs "all precede the timestamp of this photograph, which is Exhibit 5," and asked if Fargis "had an explanation for that," to which Fargis responded, "No, Sir." (Pl's Exh. 9, Fargis Dep. p. 22, lines 10-19). However, there is no evidence that any timestamps or metadata actually appeared on any of the photographs shown to Fargis.

Jere Allen, Director of Operations for Defendant, responded to the call with Fargis. (Def's Exh. E, Allen Affid. ¶¶ 2-4). Allen confirmed that, when they arrived to Plaintiff's room, the desk panel was "leaning off the wall a few inches," that the condition shown by the photographs submitted by Plaintiff "was not present in Plaintiff's hotel room when Bryan Fargis and I entered to inspect the panel." Allen stated that he watched Fargis inspect the panel and manually push it back in place, securing it with the magnets. Allen also confirmed that "the panel was affixed to the wall as the panel is held in place by tracks which prevent it from being removed without manual assistance." (Def's Exh. E, Allen Affid. ¶¶ 5-9).

Brian Boggess, P.E., Defendant's expert, studied the desk at issue as well as an exemplar desk and chair, on which he conducted tests, "including utilizing an interactive fit study of a seated person and the desk layout." (Def's Exh. C, Boggess Affid. ¶ 7).

Boggess explained that "[t]he desk is affixed to the wall, and beneath the desk against the wall face is a manufactured wood panel that acts as a decorative cover (the Panel), behind which cables are routed. The Panel uses a tongue and groove hinge system at the lower face, and the upper edge is secured by magnetic attachments. The Panel hinge system limits the forward rotation of the Panel to less than 15 degrees and approximately 6" at its upper edge. The Panels' weight is 24.5 pounds and is supported by its lower edge. The cable routing observed limits the Panel rotation from even reaching this minimal rotation." (Def's Exh. C, Boggess Affid. ¶ 11). Considering the dynamics of the desk panel and the injuries alleged by Plaintiff, Boggess concluded that the accident could not have occurred as Plaintiff alleges and, in addition, would not have caused the knee injuries she alleges. (Def's Exh. C, Boggess Affid. ¶¶ 12-16; *see also* Def's Exh. B (photographs of the desk panel showing the power cord restricting movement of the panel)).

Plaintiff took the depositions of two other individuals employed by Defendant's maintenance department, Travis Dickerson and David Martin. Plaintiff's counsel pursued the issue of the power strip with Dickerson, who explained that the power strip was placed in the space behind the panel to keep "the knotted mess of—of—because you got like three power supplies that are plugged in right there, you know? And, if it gets down behind there, it could cause an issue with that closing all the way." (Pl's Exh. 10, Dickerson Dep. p. 19, line 19 – p. 20, line 1). While appearing to acknowledge that there might have been "an incident where the wall panel has come open," Dickerson clarified that "it looks like what you see in Exhibit 6, and you just push it back in place." (Pl's Exh. 10, Dickerson Dep. p. 24, line 16 – p. 25, line 1). Dickerson also confirmed that he

did not have "any information about any other incidents or circumstances like these where the wall panel had come loose and had to be reset[.]" (Pl's Exh. 10, Dickerson Dep. p. 24, lines 11-15).

Dickerson was asked:

> Q: So if this cable right here that goes to the lamp, if the length of that cable as it's plugged into the strip, when this thing comes all the way down, if there's not enough length to this cable this cable could—would pull the power strip down?
> A: I—I don't think so.
> Q: Okay.
> A: The cables are pretty long and they're standard on all of their lamps.

(Pl's Exh. 10, Dickerson Dep. p. 28, line 23 – p. 29, line 7).

Martin confirmed that the power strips on all the desks are "tucked inside the—the flap at the top …There's—there are small—yeah, there are I guess five-inch holes lengthwise, like five inch by maybe two inch that we can tuck the electrical cord into that. That's where all your cables will—can pass from the top to the bottom." (Pl's Exh. 11, Martin Dep. p. 11, lines 1-19).

Martin was then asked:

> Q: Like when you go in—and when you see this condition right here, would you say is the typical event when someone kicks the bottom of the panel, when you come in and see this condition—
> A: Uh-huh.
> Q: —is it just a case where you go in there and push it back up where the magnets—
> A: Yeah.
> Q: —reconnect, or do you have—or is the—would this type of movement always cause the power strip to fall out of the space?

A: Not usually.

Q: Okay. I mean, I'm just looking—the reason I ask that is the—whatever length of the cords' connection, you got the plug, the cords are up in here. When this things moves this much, does it pull any of the cables taut enough to pull the circuit breaker out of the wall?

A: No, sir.

(Pl's Exh. 11, Martin Dep. p. 14, lines 2-21). Martin confirmed that, having the panel lean forward would not cause the power strip to fall out of the 5x2 space:

Q: But at any rate, this picture depicts a—a setup where the—where the power strip would be in the 5x2 space. Am I understanding that correctly?

A: Yes.

Q: So, if this is the same desk that is depicted in Exhibit 3, then there would be a place up here, but the power strip is not in there anymore.

A: Right.

Q: Okay. And I was just trying to figure out what if anything, what movement in the panel, the wall panel—

A: So basically you're asking if—what movement would—would possibly jerk it from that area?

Q: Yes.

A: From—remove it for the area?

Q: Yes, sir.

A: You would have to physically do it.

Q: You mean reach up with your hand and pull it out?

A: Yes. You would grab the cord and pull.

(Pl's Exh. 11, Martin Dep. p. 18, line 11 – p. 19, line 5).

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court." *Hansson v. Scalise Builders of S.C.*, 374 S.C.

352, 354, 650 S.E.2d 68, 70 (2007). That is, "[s]ummary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 833 (2001). In particular, summary judgment should be granted where the plaintiff fails to establish "a prima facie case as to each element" of her claim. *Hansson*, 374 S.C. at 358, 650 S.E.2d at 71.

While the nonmoving party "must be given the benefit of all favorable inferences that might be reasonably drawn from the record," *Gillespie v. Wal-Mart Stores, Inc.*, 302 S.C. 90, 394 S.E.2d 24 (Ct. App. 1990), "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015). Furthermore, while an issue must be submitted to the fact finder where "there is material evidence tending to establish [an] issue in the mind of a reasonable juror," that rule "does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court." *Hanahan v. Simpson*, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *E.g., McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 385, 684 S.E.2d 566, 568 (Ct. App. 2009).

ARGUMENTS

I. Summary judgment was properly granted to Defendant because Plaintiff is unable to prove essential elements of her tort claim.

In order to prove negligence, the plaintiff bears the burden of proving, "(1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's breach of that duty by a negligent act or omission, i.e., failure to exercise the care of a reasonable man in the circumstances; and (3) damage proximately resulting from the breach of duty." *Snow v. Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The plaintiff bears "the burden of proving each element of negligence, including the defendant's lack of due care," and that burden cannot be satisfied by simply showing that an injury occurred. 305 S.C. at 555, 409 S.E.2d at 803.

In South Carolina, a commercial landowner "is not an insurer of the safety of his customer but owes only the duty of exercising ordinary care to keep the premises in reasonably safe condition." *Garvin*, 343 S.C. at 628, 541 S.E.2d at 832. Therefore, in order to recover damages for injuries caused by an allegedly dangerous or defective condition on Defendant's premises, Plaintiff must show, among other things, "either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it." *E.g.*, *Pringle v. SLR, Inc.*, 382 S.C. 397, 404, 675 S.E.2d 783, 787 (Ct. App. 2009) (internal quotations omitted).[1]

[1] Plaintiff did not argue below or in her opening Brief that Defendant created an unreasonably dangerous condition. She only argued that Defendant had notice of a defect with its desk panels. (App. Br. pp. 6-10). Therefore, she is precluded from raising any argument in her Reply Brief that Defendant created a dangerous condition. *See*, *e.g.*, *Simmons v. SC Strong*, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a

A. Summary judgment is proper because there is no evidence that Defendant had actual or constructive knowledge of a dangerous condition.

The circuit court properly granted summary judgment to Defendant because there is no evidence, not even a scintilla of evidence, that Defendant had actual or constructive knowledge of a dangerous or hazardous condition with the desk panels in its hotel. Even assuming, solely for the sake of argument, that Fargis stated to Plaintiff, "it came loose again," that is insufficient to prove Defendant had actual or constructive knowledge of a dangerous condition with the desk. Such a statement, even if true, "may not be reasonably interpreted as proof that" a dangerous condition existed. *See Trustees of Erskine College v. Central Mut. Ins. Co.*, 270 S.C. 118, 124, 241 S.E.2d 160, 163 (1978) (statement by college official that there was "nothing of any importance" in former residence hall being used for storage could not reasonably be construed as sufficient to defeat summary judgment).

While Plaintiff places great weight on Fargis's alleged statement that the panel had "come loose again," even accepting for purposes of summary judgment that he did utter those words, that does not defeat summary judgment or require reversal. This is because Plaintiff does not even allege that Fargis stated there had been prior complaints of injuries by desk panels falling and injuring guests. Instead, uncontradicted evidence shows that neither Fargis nor any of Defendant's other employees were aware of any prior incidents where a guest was injured by a falling desk panel.

In fact, there is no inconsistency between Plaintiff's deposition testimony that Fargis said "[i]t come loose again," (Pl's Exh. 8, DeShields Dep. p. 53, lines 11-13; p. 55,

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reply brief); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E2d 449 (Ct. App. 1997) ("an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief").

lines 2-7), and Fargis's Affidavit, wherein he stated that he "never exclaimed or otherwise informed anyone that there had been instances of prior desk panels completely falling off the wall as it would have been an inaccurate statement." (Def. Exh. D, Fargis Affid. ¶ 14). As Fargis and other witnesses testified, "the panel is held in place by tracks which prevent it from being removed without manual assistance." (Def. Exh. D, Fargis Affid. ¶ 6) (*see also* Def. Exh. E, Allen Affid. ¶ 5 (confirming that "the panel is held in place by tracks which prevent it from being removed without manual assistance")) (Def. Exh. C, Boggess Affid ¶ 11 ("[t]he panel uses a tongue and groove hinge system … that limits the forward rotation of the Panel to less than 15 degrees and approximately 6" at its upper edge …. The cable routing observed limits the Panel rotation from even reaching this minimal rotation")) (Def. Exh. B (photographs of the desk panel showing the power cord restricting movement of the panel)). Thus, based on uncontroverted evidence in this case, it is entirely possible for the panel to "come loose," approximately six inches, but it is not possible for the panel to come completely out of the tracks without manually removing it.

There is absolutely no evidence that conflicts with or contradicts Fargis's statement that he had no prior knowledge of a panel falling as Plaintiff asserts and causing any injuries. Fargis attested that, in all the years he has worked for Defendant, he knew of no "complaints or incidents where a desk panel was completely removed from the wall causing injury to any guest or employee," and had never responded to a call regarding "a panel that had completely come off the wall **as they cannot be removed from the wall or otherwise absent manual removal**." (Def's Exh. D, Fargis Affid. ¶¶ 8, 9) (emphasis added). In addition, Fargis testified that he could not recall ever seeing

"a situation where the panel dropped any amount and caused the power strip to come out of the 5x2 space," confirming that he had not "ever encountered a—a common problem of power strips falling out of the 5x2 panel." (Pl's Exh. 9, Fargis Dep. p. 17, line 1 – p. 18, line 21).

Dickerson's testimony was consistent. When he was asked if he had "any information about any another [sic] incidents or circumstances like this where the wall panel had come loose and had to be reset," Dickerson responded unequivocally, "No, sir." Pl's Exh. 10, Dickerson Dep. p. 24, lines 11-15). While appearing to acknowledge that there might have been "an incident where the wall panel has come open," Dickerson clarified that, when that happens, "it looks like what you see in Exhibit 6, and you just push it back in place." (Pl's Exh. 10, Dickerson Dep. p. 24, line 16 – p. 25, line 1). In other words, any prior incidents of the desk panel "com[ing] loose" involved the panel coming only approximately six inches away from the wall at the top, with the bottom remaining secure.

There is absolutely no evidence to contradict these statements that Defendant had never encountered a desk panel that fell and injured anyone as Plaintiff alleges the desk in her room did. There is no evidence that any such failure of the desk panel had ever occurred previously or that any one had ever been injured by a desk panel that fell as far forward as Plaintiff alleges the panel in her room did. Because Plaintiff cannot prove that Defendants had actual or constructive knowledge of an allegedly dangerous condition on their property, summary judgment was proper and should be upheld.

B. Plaintiff's mischaracterization of the evidence fails to create a legitimate dispute of material fact.

Plaintiff makes a number of assertions that she alleges are "facts" but which are nothing more than her counsel's highly speculative and creative version of the evidence[2] and of how Plaintiff's injury allegedly occurred. Plaintiff's speculative theory of negligence is completely unsupported by evidence and, therefore, is insufficient to defeat summary judgment. *E.g.*, *Hanahan*, 326 S.C. at 149, 485 S.E.2d at 908 (Rule 56 "does not authorize submission of speculative, theoretical and hypothetical views to the jury"); *Heslin v. Lenahan (In re Eleanor McCarthy Lenahan Trust)*, 428 S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019) ("[a] party may not create a genuine issue of material fact through speculation or guesswork").

For example, Plaintiff discusses the timing of the photographs that she alleges prove her claim, asserting that "metadata" or "timestamps" on her photographs prove they were taken immediately before and during the time Fargis was in her room. However, there is no evidence—just Plaintiff's counsel's assertions—that Plaintiff's photographs, Pl's Exh. 1, contain any metadata or timestamps. Assertions and argument by counsel do not constitute evidence. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). Although Plaintiff's counsel asked Fargis about the

[2] Tellingly, Plaintiff does not actually quote any of the deposition testimony on which she relies but, instead, "summarizes" and editorializes it in a way that is highly misleading and unfair. This is purposeful because the actual testimony does not support Plaintiff's speculative version of events. And, while Plaintiff correctly notes that the complete depositions were not filed, perhaps suggesting (incorrectly) that support for her case lies in those other, unsubmitted portions of the depositions, this Court's review is limited to the record presented to the circuit court below. *See* Rule 10(c), SCACR ("[t]he Record shall not … include matter which was not presented to the lower court or tribunal"); *Windham v. Honeycutt*, 290 S.C. 60, 63-64, 348 S.E.2d 185, 187 (Ct. App. 1986) (advising that appellate courts, "will not consider facts that do not appear in the transcript of record").

"timestamps," there is no evidence that Fargis was presented with anything resembling metadata or timestamps that show when the photographs were taken by Plaintiff. That is because there is no metadata or timestamps on any of the photographs submitted by Plaintiff, (*see* Pl's Exh. 1-7), and no such evidence was presented to the circuit court.

Thus, Plaintiff's statements that the picture submitted as Exh. 2 was "taken within minutes of [Fargis] arrival," and her assertions about the implications of the location of "the red, white and black plaid bag," are nothing more than unsupported assertions of counsel. Indeed, noting in Plaintiff's own deposition testimony supports her current assertions regarding when or in what order she took the photographs at Pl's Exh. 1-7. (Pl's Exh. 8). What Fargis "could not explain," contrary to Plaintiff's assertions, was how to make sense of her counsel's *representations* of what the photographs did or did not depict. For example, at his deposition, Fargis was asked about the location of a "bag," apparently the red, white and black plaid bag referenced in Plaintiff's Brief, in Plaintiff's photographs. (PL. Exh. 9, Fargis Dep. p. 29, line 23 – p. 30, line 20). Given that there is no evidence—no timestamps or metadata—showing when or in what order Plaintiff took the photographs attached to her Opposition, (Pl's Exh. 1-7), and given that the bag could have sat in that precise location the entire day, the location of the red, white and black bag in Plaintiff's photographs is evidence of nothing. Fargis's statement that "Anything's possible," is more a reflection of his inability to explain Plaintiff's counsel's assertions regarding the timing of the photographs than it is an admission that he doubted his recollection of the position of the desk when he arrived at Plaintiff's hotel room on December 1, 2017.

Plaintiff similarly misconstrues Dickerson's testimony, asserting that "there is at least a scintilla of evidence," that Defendant'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." (App. Br. p. 6). Dickerson's testimony does not support this statement. Instead, Dickerson was asked, "Is there any particular reason why y'all put the power strip at least partially up in that space?' to which he replied, "Just to keep the—the knotted mess of—of—because you got like three power supplies that are plugged in right there, you know? And, **if** it gets down behind there, it **could** cause an issue with that closing all the way." (Pl. Exh. 10, Dickerson Dep. p. 19, line 19 – p. 20, line 1) (emphases added). Dickerson did not testify that the hotel had a history of the power strip falling and causing the desk panel to fall open, but only that **if** the power strip was out of place it **could** cause the panel to not close all the way. Moreover, Dickerson testified that, in the only incidents of which he was aware where the desk panel came open, it looked like the picture in Pl's Exh. 6, which shows a panel open only a few inches, "and you just push it back in place." (Pl. Exh. 10, Dickerson Dep. p. 24, line 16 – p. 25, line 1). Therefore, even if the power strips had a history of coming out of place, which they did not, that would not have caused the panel to fall the way Plaintiff alleges it did but, instead, would only cause the panel to not close completely.

Plaintiff incorrectly suggests that testimony by Dickerson—which she mischaracterizes as stating "that if the panel separated from the 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," (App. Br. p. 8, citing Pl's Exh. 10, Dickerson Dep. p. 28, line 3 – p. 29, line 4)—confirms her theory that a known issue with

fallen power strips caused the desk panel to fall onto her legs. However, Dickerson's testimony on this point is, at best, unclear. Dickerson was asked "if that happens"—without any explanation or specification as to what "that" refers to—"and the wall—and the power strip is up inside the space, would that cause the power strip to come down?" to which he responded, "I would not think so …. But I'm—I'm not sure." Pl's Exh. 10, Dickerson Dep. p. 28, lines 3-9). This vague testimony is insufficient to defeat summary judgment. Moreover, the rest of Dickerson's testimony confirms that the cable that plugs into the lamp would not cause the power strip to come down because "[t]he cables are pretty long and they're standard on all of their lamps." (Pl's Exh. 10, Dickerson Dep. p. 28, line 10 – p. 29, line 7). At best, Dickerson's testimony only confirms Martin's testimony that the only way the panel could end up in the positon Plaintiff alleges injured her—pulling the power strip completely out of place—is for someone to manually cause that to happen. (Pl's Exh. 10, Martin Dep. p. 18, line 23 – p. 19, line 5 (confirming that, in order move the power strip out of place as it is depicted in Pl's Exh. 3, "[y]ou would have to physically do it …. You would grab the cord and pull")

Plaintiff's fabricated theory of the case that the desk that allegedly injured her "had a known problem with the power strips with plugs attached interfering with the floating hinges and preventing the desk panel from closing properly," (App. Br. p. 6), simply has no evidentiary support. No witness testified that Defendant had a problem with the power strips interfering with the proper closing of the desk back—at best, Dickerson testified that **if** the power strip was out of place it **could** interfere with proper closure. (Pl's Exh. 10, Dickerson Dep. p. 19, line 19 – p. 20, line 1).

Martin's testimony does not provide "evidence of a known defect with a desk panel falling down when contacted by guests or due to interference with a fallen power strip," as Plaintiff asserts. (App. Br. p. 8). Instead, the portion of Martin's deposition cited by Plaintiff is as follows:

> Q: Like when you go in—and when you see this condition right here, would you say is the typical event when someone kicks the bottom of the panel, when you come in and see this condition—
>
> A: Uh-huh.
>
> Q: —is it just a case where you go in there and push it back up where the magnets—
>
> A: Yeah.

(Pl's Exh. 11, Martin Dep. p. 14, lines 2-10). This testimony does not support Plaintiff's allegations. First, it is unclear what Plaintiff's counsel is referring to by "this condition right here." Second, the follow-up question indicates that the situation being discussed is most likely where the panel was open only a few inches and is "push[ed] back up where the magnets" then reconnect. In addition, whatever "condition" Martin was being asked about, he testified that it would not usually cause the power strip to fall out of the space and that "when this things [sic] moves this much," it does not "pull any of the cables taut enough to pull the circuit breaker out of the wall." (Pl's Exh. 11, Martin Dep. p. 14, lines 2-21). As noted above, Martin later confirmed that, in order to move the power strip from where it was inserted, "[y]ou would have to physically do it …. You would grab the cord and pull." Pl's Exh. 11, Martin Dep. p. 18, line 23 – p. 19, line 5). Thus, Plaintiff's theory that there was a known problem with power strips independently coming loose and causing desk panels to not close and fall onto hotel guests is nothing more than unsupported speculation on Plaintiff's part.

Even accepting Plaintiff's argument that when she "was using the desk, the power strip had already falling [sic] into a position preventing the desk panel from properly closing," which she asserts was a "known problem," that would not have caused the desk panel to fall forward as she asserts it did. Instead, uncontroverted evidence shows that the only way the desk panel can end up in the position shown in Pl's Exhs 2-4 is if it is manually removed from the tracks that hold it in place. Fargis attested that, "[t]he remainder of the panel was affixed to the wall as the panel is held in place by tracks **which prevent it from being removed without manual assistance**." (Def's Exh. D, Fargis Affid. ¶¶ 5, 6, 11) (emphasis added); *see also* (Def's Exh. E, Allen Affid. ¶¶ 5-9) ("**the panel is held in place by tracks which prevent it from being removed without manual assistance**") (emphasis added).

Correspondingly, Martin testified that the only way the power strip would end up in the position shown in Pl's Exhs. 3 & 4 is that:

> A: You would have to physically do it.
> Q: You mean reach up with your hand and pull it out?
> A: Yes. You would grab the cord and pull.

(Pl's Exh. 11, Martin Dep. p. 18, line 11 – p. 19, line 5).

Boggess examined an exemplar (Plaintiff has acknowledged that all the desks are identical (App. Br. p. 4)) and explained that "[t]he desk is affixed to the wall, and beneath the desk against the wall face is a manufactured wood panel that acts as a decorative cover (the Panel), behind which cables are routed. The Panel uses a tongue and groove hinge system at the lower face, and the upper edge is secured by magnetic attachments. **The Panel hinge system limits the forward rotation of the Panel to less than 15 degrees and approximately 6" at its upper edge.** The Panels' weight is 24.5 pounds

and is supported by its lower edge. **The cable routing observed limits the Panel rotation from even reaching this minimal rotation**." (Def's Exh. C, Boggess Affid. ¶ 11) (emphases added).

The only logical or reasonable deduction from this uncontested evidence is that someone in the room physically and manually lifted the desk panel out of the grooves and placed it against the outer legs of the desk. In addition, someone had to physically grab the power strip cord and pull it out of place. While Plaintiff advances a contorted theory of how or why the desk panel fell, her explanation is nothing more than unsupported speculation. Speculation as to the potential negligence of a defendant is insufficient to withstand summary judgment. *Hanahan*, 326 S.C. at 149, 485 S.E.2d at 908 (Rule 56 "does not authorize submission of speculative, theoretical and hypothetical views to the jury"); *Heslin*, 428 S.C.at 605, 836 S.E.2d at 797 ("[a] party may not create a genuine issue of material fact through speculation or guesswork"). In other words, an "inferential leap does not create a genuine issue of material fact." *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (rejecting theory of the case that a 1990 drawing showed awareness of dangerous condition of parking lot).

Despite her attempts to fabricate and distort the evidence, there is not a shred of evidence that Defendant had notice, actual or constructive, of a dangerous condition with its hotel room desks. As a result, this Court should hold that summary judgment was properly granted by the circuit court.

CONCLUSION

For the reasons stated herein, this Court should affirm the grant of summary judgment and dismiss Plaintiff's appeal with prejudice.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appeal No.: 2021-001421

TRECA DESHIELDS,.....Appellant,

v.

JHM ENTERPRISES, INC., D/B/A
MARRIOTT IN CHARLESTON
COUNTY, S.C.,.....Respondent.

PROOF OF SERVICE

I certify that on the 22nd day of March 2022, I served the **Initial Brief of Respondent JHM Enterprises, Inc. d/b/a Marriott in Charleston County, S.C.**, and Respondent's **Designation of Matter to be Included in the Record on Appeal** on Treca DeShields by emailing a copy of each to her counsel of record as follows:

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Mar 22 2022
SC Court of Appeals

March 22, 2022

Via S.C. Courts E-Filing
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Treca DeShields v. JHM Enterprises, Inc., d/b/a Marriott in Charleston County, S.C.
Civil Action No.: 2019CP1004310 (Charleston)
Date of Incident: December 1, 2017
Carrier Claim No.: 0001863978
MGC File No.: 20465.19142
Appeal No.: 2021-001421

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. the Initial Brief of Respondent JHM Enterprises, Inc., d/b/a Marriott in Charleston County, S.C.;
2. Respondent's Designation of Matter to be Included in the Record on Appeal; and
3. Respondent's Proof of Service concerning items one and two.

Please do not hesitate to contact me if you have any questions.

Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: Jon E. Newlon, Esquire (via email only)