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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Steven H. John
Circuit Court Judge

C.A. No.: 2020-CP-26-04430

Priscilla Peterkin ....Appellant

v.

Bummz on the Beach, LLC, City of Myrtle Beach, and Bummz on the Beach, Inc., Individually and d/b/a Bummz on the Beach Café .... Defendants,

of which Bummz on the Beach, Inc., individually and d/b/a Bummz on the Beach Café, is ....Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

FACTS 3

STANDARD OF REVIEW 5

ARGUMENT 6

I. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION IN EXCLUDING THE SHAM AFFIDAVIT PRESENTED TO DEFEAT SUMMARY JUDGMENT IN THIS MATTER. 7

II. PETERKIN FAILED TO PRESENT EVIDENCE THAT THERE WAS A GENUINE ISSUE FOR TRIAL ON THE TWO KEY ELEMENTS OF HER CLAIM: (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. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 5
Baughman v. Am. Tel. & Tel. Co.,
306 S.C. 101, 410 S.E.2d 537 (1991) 5
Belton v. Cincinnati Ins. Co.,
360 S.C. 575, 602 S.E.2d 389 (2004) 6
Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 5
Cothran v. Brown,
357 S.C. 210, 592 S.E.2d 629 (2004) 3, 7, 8, 9
David v. McLeod Reg'l Med. Ctr.,
367 S.C. 242, 626 S.E.2d 1 (2006) 5
Fields v. J. Haynes Waters Builders, Inc.,
376 S.C. 545, 658 S.E.2d 80 (2008) 7
Garvin v. Bi-Lo, Inc.,
343 S.C. 625, 541 S.E.2d 831 (2001) 6, 10
Gibson v. Epting,
426 S.C. 346, 827 S.E.2d 178 (Ct. App. 2019) 5
Glasscock, Inc. v. U.S. Fid. & Guar. Co.,
348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) 10
Hall v. Fedor,
349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) 6
Hancock v. Mid-S. Mgmt. Co.,
381 S.C. 326, 673 S.E.2d 801 (2009) 5
Hickman v. Hickman,
301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) 8
McCall v. Finley,
294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987) 9
McMaster v. Dewitt,
411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014) 7
Nguyen v. Uniflex Corp.,
312 S.C. 417, 440 S.E.2d 887 (Ct. App. 1994) 11
Richardson v. State-Rec. Co.,
330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998) 5
Shealy v. Doe,
370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006) 9
Snow v. City of Columbia,
305 S.C. 544, 409 S.E.2d 797 (Ct. App. 1991) 6
Town of Hollywood v. Floyd,
403 S.C. 466, 744 S.E.2d 161 (2013) 5
Turner v. Am. Motorists Ins. Co.,
176 S.C. 260, 180 S.E. 55 (1935) 11

Wilder Corp. v. Wilke,
330 S.C. 71, 497 S.E.2d 731 (1998) 9

Rules

Rule 56, SCRCP.......... 5, 6, 10
Rule 59, SCRCP.......... 8

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court act within its discretion in excluding Priscilla Peterkin's affidavit submitted immediately prior to the summary judgment hearing in this matter and in contradiction to her previous deposition testimony?

2. Did the trial court correctly determine there was not a genuine issue for trial in this premises liability case based on the record before it?

STATEMENT OF THE CASE

This action was initiated with the filing of a summons and complaint on July 30, 2020. (R. at 6-14). In her complaint, Priscilla Peterkin alleged premises liability and negligence claims against Bummz on the Beach, Inc., individually and d/b/a Bummz on the Beach Café ("Bummz") stemming from a fall on the sidewalk in front of Bummz on or about November 24, 2018. (*Id.*). Bummz is a beachfront restaurant in Myrtle Beach, South Carolina.

On September 29, 2020, Peterkin filed an amended complaint adding the City of Myrtle Beach ("City") and Bummz Beach, LLC as defendants. (R. at 15-23).[1] Neither the complaint nor the amended complaint makes any reference to vegetation, landscaping, or darkness.

Bummz answered the amended complaint on November 4, 2020 and asserted defenses, including a general denial and failure to state a claim. (R. at 24-28). On March 23, 2021, Bummz moved for summary judgment on the grounds that (1) Peterkin could not articulate what caused her to fall in her deposition and had not identified any evidence showing Bummz had constructive knowledge of any specific act or dangerous condition that caused her to fall; and (2) Bummz was not responsible for maintaining the sidewalk where the fall took place. (R. at 29-31).

On June 3, 2021, immediately prior to the June 8 hearing on Bummz's motion for summary judgment, Peterkin herself submitted a new affidavit stating for the first time that "[s]ince it was both dark, and because a Bummz palm tree bush was hanging over the raised concrete I couldn't see the danger and I tripped." (R. at 58). At the hearing, Peterkin argued that there was a question of fact for trial based on Peterkin's affidavit and those of Calian Tate and

[1] Bummz Beach, LLC has not appeared in this action and is unrelated to Bummz. Peterkin and the City have reached a settlement, and the City was dismissed as a party on September 14, 2021.

Antisha Peterkin. (R. at 206-09). She did not respond to Bummz's arguments that the Peterkin affidavit was a sham.

Only after the trial court indicated that it was granting the motion and finding that the Peterkin affidavit was a sham did Peterkin raise any question about the deposition transcripts in this case. (R. at 212-16). The trial court stated that an inaccuracy in Peterkin's deposition transcript might be grounds for reconsideration if she could show that the answers to questions relating to the trial court's ruling were inaccurate. (R. at 216).

The trial court issued a formal, written order granting summary judgment to Bummz on June 21, 2021, including an analysis excluding the Peterkin affidavit pursuant to *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). (R. at 1-4). Peterkin moved to reconsider on June 30, 2021, arguing that the record contained sufficient evidence showing a material question of fact for trial and that the trial court erred in excluding the Peterkin affidavit. (R. at 181-87). In response, Bummz presented an affidavit from the court reporter reflecting that the testimony at issue was correct. (R. at 196). The trial court denied the motion by order dated June 25, 2021. (R. at 5). This appeal followed.

FACTS

The facts are generally not in dispute. Peterkin tripped and fell on the City's sidewalk in front of Bummz late in the evening on or about November 24, 2018. At the time of her fall, she was returning to her hotel with several family members after a late night walk to the Myrtle Beach Sky Wheel. (R. at 75:3-76:24). Peterkin was out for a walk when she fell; she was not a Bummz customer. (R. at 77:4-17, 91:2-5).

There is no dispute that the City maintains the sidewalk at issue. (R. at 33; App. Brief at 3). Bummz leases its restaurant space and maintains the landscaping on the premises as a term of the lease agreement. (R. at 162:11-17).

With respect to the fall, Peterkin testified repeatedly in her deposition that she tripped or fell on a crack in the sidewalk. (*See* R. at 106:12-17, 114:19-25). With respect to vegetation on the Bummz premises, Peterkin testified:

> Q: All right. Just one little quick follow-up. I'll throw this picture up here. All right. This is back to that picture we were looking at earlier. It's marked as Plaintiff's Exhibit Four, but I'll – I think it's Number 1 for our transcript purposes. Do you see on the right-hand side a palm bush or some other shrubbery. Do you see that on the right?
>
> A: Uh-huh.
>
> Q: Did that cause you to fall?
>
> A: I can't say that it did.
>
> Q: Just so I understand that, is that a no it did not cause –
>
> A: No.

(R. at 97:12-24). The only other references in her deposition to vegetation relate to the existence of plants near where she fell. (R. at 101:15-24, 116:17-22). Peterkin waived the opportunity to read and sign her deposition. (R. at 119:13-15).

In response to Bummz's motion for summary judgment, Peterkin presented affidavits confirming that certain photographs accurately depicted the area of her fall. (R. at 41-45, 46-48). She also presented her own affidavit (the "Peterkin affidavit"), which contradicts her deposition testimony and states for the first time that "[s]ince it was both dark, and because a Bummz palm tree bush was hanging over the raised concrete I couldn't see the danger and I tripped." (R. at 57-59).

STANDARD OF REVIEW

On appeal from a grant of summary judgment, this Court's standard of review is the same as that of the trial court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the non-moving party. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Summary judgment is warranted when there is no genuine issue of material fact, and it appears that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Material facts are those identified by controlling substantive law as essential elements of claims and defenses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

When the nonmoving party bears the burden of proof as to an issue, a party seeking summary judgment may meet this standard by pointing out to the trial court "that there is an absence of evidence to support the nonmoving party's case." *Richardson v. State-Rec. Co.*, 330 S.C. 562, 566, 499 S.E.2d 822, 825 (Ct. App. 1998). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). A scintilla of evidence is material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror. *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). "[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Id.* A nonmoving party cannot evade summary judgment by creating and relying on "an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

If a motion for summary judgment has been properly made and supported, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). This showing must be based on evidence that would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

ARGUMENT

The mere fact that an injury occurs on or near the defendant's premises does not establish any liability on the part of the defendant, and no such liability may be presumed. *Snow v. City of Columbia*, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). "To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show 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." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001).

As an initial matter, it is not "undisputed that Respondent owed a duty and breached that duty by allowing the palm tree to overhang and cover the sidewalk." (App. Br. at 8). Instead for purposes of summary judgment, the trial court "view[ed] the evidence and all inferences in the light most favorable to the Plaintiff and [assumed], without deciding, that the Defendant owed some duty to the Plaintiff." (R. at 3).

I. The trial court correctly exercised its discretion in excluding the sham affidavit presented to defeat summary judgment in this matter.

In considering affidavits submitted at the summary judgment stage, "[a] trial court may exclude an affidavit when it was submitted 'to contradict that party's own prior sworn statement' in 'an attempt to create a sham issue of material fact.'" *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014) (*quoting Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). In *Cothran*, the South Carolina Supreme Court laid out a six-factor test to help courts distinguish between a sham affidavit and a mere correcting or clarifying affidavit:

> (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the non-movant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between the statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony and statements indicate the witness was confused at the time; and (6) when, in relation to summary judgment, the second affidavit is submitted.

357 S.C. at 218, 592 S.E.2d at 633.

In reviewing a trial court's decision to exclude a sham affidavit, this Court will apply an abuse of discretion standard. *McMaster*, 411 S.C. at 144, 767 S.E.2d at 454. Generally, "[a]n abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85–86 (2008). Here, the trial court considered the appropriate factors as well as the evidentiary record in determining the Peterkin affidavit should be excluded. Accordingly, this Court must affirm that ruling.

After reciting the *Cothran* factors, the trial court went on to find:

> The Court has examined the sworn deposition testimony and the filled affidavit of the Plaintiff in conjunction with the six (6) *Cothran* factors. There has been no explanation for the direct contradiction between the sworn deposition testimony and the affidavit submitted in response to the Defendant's motion for summary

> judgment mere days before the hearing. While the facts set forth are important, the plaintiff had access to these facts before her deposition. Further, no confusion is alleged by the Plaintiff. The Court therefore gives the affidavit no credence and hereby rules that the affidavit is excluded as a sham.

(R. at 4).

Peterkin does not contest the law applied by the trial court. Nor does she contest that the affidavit was submitted months after Peterkin's deposition and immediately prior to the summary judgment hearing.

Instead, she argues that the trial court incorrectly determined that the affidavit was submitted to create a genuine issue of material fact. In support of this argument, she argues that the affidavit was submitted based on "evidentiary concerns" stemming from the deposition transcripts of Peterkin and William Rippy, the owner of Bummz. (App. Br. at 10-13). Those concerns did not stop her from filing both depositions, nor are those concerns raised in the Peterkin affidavit, which states for the first time that "[s]ince it was both dark, and because a Bummz palm tree bush was hanging over the raised concrete I couldn't see the danger and I tripped." (R. at 58). This statement is directly contrary to her unequivocal deposition testimony that the bush did not cause her fall. (R. at 97:12-24).

Peterkin did not present this argument relating to the deposition transcripts until after the trial court made its preliminary ruling, and did not provide a full explanation until her motion to reconsider. (R. at 215:9-216:23, 181-87). As such, she did not timely raise this issue because Rule 59(e), SCRCP is not a proper mechanism for advancing new arguments. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

Moreover, the portions of Peterkin's brief relating to court reporting are unrelated to the merits of the sham affidavit issue and the *Cothran* analysis. The concerns raised in Peterkin's motion to reconsider included correcting the spelling of deponent's name and the name of the

deposing counsel and adding the court reporter's verification for the Rippy deposition and two corrections made by the court reporter to Peterkin's deposition that were unrelated to the testimony relied on by the trial court in making its ruling. (R. at 181-87, 195-96, 1-4). The Peterkin affidavit makes no mention of any court reporting concerns, and the portion of the deposition that is contradicted by the affidavit was unchanged and has been verified by the court reporter. As such, these arguments have no bearing on the trial court's ruling and fail under the "overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

With respect to Peterkin's argument that there is no contradiction, the argument is directly refuted by the language quoted above from the deposition and the affidavit. As found by the trial court, the deposition question relating to whether the palm bush caused Peterkin to fall was direct and asked without objection, and the contradiction in the pre-hearing affidavit is clear. Peterkin's argument attempts to twist these facially inconsistent statements into something other than what Peterkin testified in her deposition and signed in her affidavit. The trial judge saw through this blatant attempt to create a question of fact for trial. (R. at 212:1-214:22).

The layout of the area in question is not in dispute. Bummz agrees that there is a palm bush. Yes, the testimony on these points has been consistent. The testimony with respect to causation, on the other hand, has not. Peterkin reversed her position between the time of her deposition and her affidavit in response to Bummz's motion for summary judgment. It is that testimony that was dispositive in the trial court's ruling.[2]

[2] Peterkin does not address the trial court's findings on the other *Cothran* factors in her brief. As such, any argument relating to those factors is either unpreserved or abandoned. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998); *Shealy v. Doe*, 370 S.C. 194, 205–06, 634 S.E.2d 45, 51 (Ct. App. 2006) ("[W]hen an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal.").

For these reasons, the trial court did not commit an abuse of discretion in excluding the Peterkin affidavit as a sham.

II. Peterkin failed to present evidence that there was a genuine issue for trial on the two key elements of her claim: (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.

When the Peterkin affidavit is excluded, all that remains is a general description of the area where Peterkin fell. (*See e.g.*, R. at 41-45, 46-48, 162:1-10, 116:17-19). The existence of a palm tree or bush alone, while undisputed, is not sufficient to meet Peterkin's burden of showing a genuine issue of fact for trial.

In order to defeat summary judgment, Peterkin was required under Rule 56(e), SCRCP to come forth with specific facts showing "(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." *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). Peterkin failed to present evidence on these two points, and specifically the threshold issue of any specific act on the part of Bummz that caused her injury.

On the issue of causation, Peterkin testified repeatedly that she fell on a crack in the sidewalk. (R. at 106:12-17, 114:19-25). Contrary to the suggestion in Peterkin's brief, there is no testimony that she fell "because she couldn't see the crack in the sidewalk." (App. Br. at 9). Her testimony was that generally she couldn't say what made her fall, that it was a "trip and fall," and that she "really wasn't paying any attention to the sidewalk." (R. at 80:8-12, 86:6-9,

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Peterkin cannot correct this failure in her reply brief. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("Additionally, even though [Appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

109:13-14). With respect to Bummz, Peterkin expressly denied in her deposition that the tree or bush caused her fall. (R. at 97:12-24).

The affidavits of Antisha Peterkin and Calian Tate and the deposition of William Rippy do not signal that there is a question of fact on the issue of whether Bummz created or knew of a dangerous condition *that caused injury* to the plaintiff. Antisha Peterkin's affidavit makes no mention of Bummz, nor does it reference any vegetation. (R. at 41-45). Similarly, Calian Tate's affidavit says only "[s]he fell hard when she tripped on a crack in the sidewalk in front of Bummz" and does not reference any vegetation. (R. at 46). The Rippy deposition includes a description of the area, but no testimony as to a specific act on the part of Bummz that may have injured Peterkin or to any knowledge of a dangerous condition. (R. at 162:1-10, 163:3-7). Rippy further denied knowledge of any other trips and falls in the area. (*Id.*).

South Carolina is not a *res ipsa* state. *See Nguyen v. Uniflex Corp.*, 312 S.C. 417, 420, 440 S.E.2d 887, 889 (Ct. App. 1994); *Turner v. Am. Motorists Ins. Co.*, 176 S.C. 260, 180 S.E. 55, 56–57 (1935) (describing the scintilla rule as follows, "[t]he meaning of the rule is that there must be some *evidence* arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views. It does not set aside the rule of force in this state relating to res ipsa loquitur, which doctrine does not prevail in this state."). Peterkin must present evidence in support of every element of her claim. When the Peterkin affidavit is excluded, there is no evidence suggesting Bummz caused Peterkin's injury. Peterkin herself testified that the tree or bush did not cause her fall. Accordingly, the trial court was correct in granting Bummz's motion for summary judgment.

CONCLUSION

For all of the above reasons, the trial court's order granting summary judgment in favor of Bummz should be affirmed.

Respectfully submitted,

s/ Sarah P. Spruill

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of which Bummz on the Beach, Inc., individually and d/b/a Bummz on the Beach Café, is ....Respondent.

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent Bummz on the Beach, Inc., Individually and d/b/a Bummz on the Beach Café, in this matter complies with Rule 211(b), SCACR.

(Signature Page Follows)

Respectfully submitted,

s/ Sarah P. Spruill

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