

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 28 2013

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

SC Court of Appeals

Case No. 2011-CP-07-2300

Yossi Haina.....Appellant,

vs.

Beach Market, LLC.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT IN FAVOR OF BEACH MARKET, LLC, BASED ON ITS FINDING THAT THERE WAS NO DUTY TO PROTECT AGAINST THE OPEN AND OBVIOUS DANGER OF A SLIPPERY ROOF?

FACTS

On August 17, 2010, Yossi Haina was performing maintenance work at Beach Market, LLC (“Beach Market”), a shopping center on Hilton Head Island owned in part by Jay Stever. (Haina Dep. at 16-17; Stever Dep. at 8, R. at ____). Haina is a handyman for his company Yossi Renovation, which had performed many projects for Beach Market tenants. (Haina Dep. at 11, 15, R. at ____). Haina’s previous projects included work on the roof of Beach Market. (Haina Dep. at 19; Stever Dep. at 12-13, R. at ____).

On the morning of August 17, 2010, Haina worked on a project for a Beach Market tenant from 3:00 a.m. until around 8:00 a.m. (Haina Dep. at 16-17, R. at ____). As Haina finished that project, Stever approached him about roof repairs to correct a spot that continued to leak after an earlier attempted repair. (Haina Dep. at 19; Stever Dep. at 12-13, R. at ____). Stever gave no specific instruction to Haina as to how or when to repair the leak. (Haina Dep. at 23-24, 40-41; Stever Dep. at 13-14, 28, R. at ____).

Haina left Beach Market to pick up some supplies and returned to begin the project later that morning. (Haina Dep. at 19, R. at ____). He climbed a ladder to the roof to diagnose the source of the problem. (Haina Dep. at 22, R. at ____). As he returned to the ladder, he slipped and fell off the roof resulting in injuries. (Haina Dep. at 22-23, 33, 35, R. at ____). According to Haina, the ladder slipped as he put one foot on it. (*Id.*) He does not contend the ladder was defective. (Haina Dep. at 29, 33, 35, R. at ____). He further testified that he was not being supervised or directed at the time of the accident. (Haina Dep. at 24, R. at ____).

STANDARD OF REVIEW

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). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the non-moving party. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). A moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element with respect to which the non-moving party has the burden of proof. *Celotex Corp.*, 477 U.S. at 322. Issues of existence and scope of duty, however, are questions of law for the court. *Staples v. Duell*, 329 S.C. 503, 506-07, 494 S.E.2d 639, 641 (Ct. App. 1997).

ARGUMENT

The trial court granted summary judgment in favor of Beach Market on the grounds that Beach Market had no duty to instruct or supervise Haina or to protect him from an open and obvious danger. (Order, R. at ____). The parties are in agreement that Haina was a business invitee at the time of the accident and that the slippery condition of the roof was an open and obvious condition. (11/5/12 Hearing Trans. at 7-8, R. at ____).

Beach Market owes its invitees “the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty.” *Sims v. Giles*, 343 S.C. 708, 718, 541 S.E.2d 857, 863 (Ct. App. 2001). A property owner has a duty to warn invitees of latent or hidden dangers of which the property owner has or should have knowledge. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004). “Although questions of negligence are often for the jury, when

the risk complained of is open and obvious to [Plaintiff], there is no duty to warn of that risk as a matter of law.” *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 42, 674 S.E.2d 500, 504 (Ct. App. 2009).

The facts in this case mirror those in *Peterson v. Porter*, 389 S.C. 148, 697 S.E.2d 656 (Ct. App. 2010). In *Peterson*, Frank Peterson performed occasional odd jobs for the Porters. On a particular date, Peterson was pressure washing the Porters’ home. The Porters supplied Peterson with the equipment to perform the task, including a ladder, but they did not give him specific instructions on how to perform the work nor did they supervise the work. Peterson was injured when he fell off the ladder. There was no evidence that the ladder or the roof was defective. On those facts, the trial court granted summary judgment to the Porters finding there was no duty.

On appeal, Peterson argued the defendants had a duty “to warn him of the inherent danger of pressure washing their home.” He further contended the defendants had a duty “to provide him instructions for safely using the pressure washing equipment and with on-site supervision and guidance to mitigate any danger.” This Court disagreed and held as follows:

Here, the Porters owed Peterson the duty of reasonable care and to warn him of latent or hidden dangers on their property. The record does not contain any evidence of dangerous or defective conditions on the Porters’ property. There is no evidence there were any defects associated with the Porters’ ladder, pressure washer, or roof. Furthermore, Peterson failed to establish that the Porters had a duty to give him instructions and supervise his work. Peterson failed to cite any legal authorities supporting his claim that the Porters had a duty to instruct and supervise him. Thus, there is no evidence the Porters breached the duty of reasonable care owed to Peterson as an invitee. Moreover, Peterson’s negligence claim also fails because he did not

produce any evidence that the Porters' negligence proximately caused his injuries.

Peterson, 389 S.C. at 154, 697 S.E.2d at 659. This case is indistinguishable on the facts: Haina was a business invitee, he was not told how or when to undertake the work, and there was no latent or hidden defect with the roof or the ladder. Accordingly, the trial court correctly granted summary judgment in favor of Beach Market.

Haina argues on appeal that the trial court improperly focused on a duty to instruct or supervise rather than a duty to warn. However, the ruling in *Peterson* related to both a duty to instruct or supervise and a duty to warn; therefore, the result should be the same under either theory. Quite simply, Beach Market did not have a duty with respect to Haina and this open and obvious danger.¹

In support of his argument, Haina cites to earlier cases in which the South Carolina Supreme Court found a duty to warn may exist, notwithstanding an open and obvious defect, if the property owner should anticipate the harm. *See Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 31, 491 S.E.2d 571, 574 (1997) (finding duty to warn existed for dock that only had a partial railing in light of warnings given to property owner about risks); *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362-63 (1991) (finding duty to warn existed for stool that was missing its seat). In both of those cases, something was missing (i.e., the stool and the railing) which gave rise to the duty to warn because the landowner should have

¹ Even if this Court agrees that the duty to instruct or supervise language does not apply in this case, the Court may affirm for any reason appearing in the record. Rule 220, SCACR. Under *Peterson*, the trial court's determination here that there was no duty is correct as a matter of law with respect to a duty to warn as well as a duty to instruct or supervise.

anticipated that the absence of that item could result in some harm. In this case, as in *Peterson*, there was no reason to anticipate the harm and thus no duty to warn.

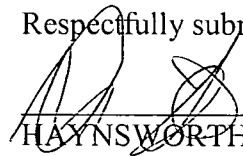
Haina also cites *Meadows v. Heritage Village Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 409 S.E.2d 349 (1991), however, *Meadows* expressly found there was no duty to warn. In *Meadows*, the court found the landowner did not have a duty to warn a patron who slipped on a wet grass and gravel path because the danger was open and obvious and the landowner could not have anticipated the harm because the landowner had provided numerous routes across the property. There is no duty to warn of “a natural condition, the peril of which [is] obvious.” *Id.*, 305 S.C. at 378, 409 S.E.2d at 351. Similarly, nothing in this record suggests Beach Market should have anticipated Haina would have voluntarily encountered this risk, especially in light of Haina’s previous work on the roof and the absence of any deadline to complete the work.

Here, the parties agree the danger was open and obvious. The record further shows that Haina had previously performed work on the roof and Beach Market did not direct Haina to perform the work in any particular way or at any particular time. Haina does not contend the equipment provided by Beach Market was defective. These factors all combine to place this case squarely within the realm of *Peterson*. As in *Peterson*, this Court should find Beach Market did not have a duty to warn Haina about the condition of the roof.

CONCLUSION

For all of the above reasons, the trial court correctly found there was no duty and granted summary judgment in favor of Beach Market. Accordingly, this Court should affirm that decision.

Respectfully submitted,



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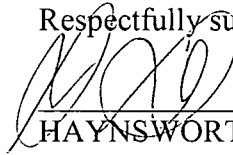
**RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE
RECORD ON APPEAL**

Respondent Beach Market, LLC proposes the following additional matter to be included in the Record on Appeal:

1. Defendant's Memorandum in Support of Its Motion for Summary Judgment dated March 23, 2012, and all attachments thereto.

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,



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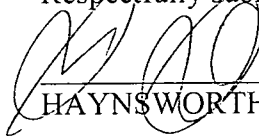
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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and the Respondent's Designation of Matter to be included in the Record on Appeal on Appellant, Yossi Haina by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorneys of record, Marshall L. Horton, Esq. and Lindsay Y. Goodman, Esq., P.O. Box 3766, Bluffton, SC 29910 on May 28, 2013.

Respectfully submitted,



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