THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-2300

Yossi Haina,

Appellant,

v.

Beach Market, LLC, Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT ON REPLY

I. DEFENDANT BEACH MARKET'S RELIANCE ON *PETERSON V. PORTER* AND *MEADOWS V. HERITAGE CHURCH* IS IN ERROR, THESE CASES ILLUSTRATE THE DUTY DEFENDANT BEACH MARKET OWED TO PLAINTIFF HAINA.

Defendant Beach Market relies on two South Carolina cases in their Initial Brief: *Peterson v. Porter*, 389 S.C. 35, 697 S.E.2d 656 (Ct.App. 2010) and *Meadows v. Heritage Village Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 409 S.E.2d 349 (1991). Examining these cases illustrates the fact that Defendant Beach Market owed Plaintiff Yossi Haina a duty to warn him of the dangerous condition that existed on the roof.

To briefly recite the facts of this case, Plaintiff Yossi Haina was injured when he fell off of a roof while he was working on Defendant Beach Market's premises.[1] Plaintiff Haina was a business invitee on the property of the Defendant.[2] Mr. Jay Stever (an agent/ owner of Defendant Beach Market) asked Plaintiff Haina the morning of the injury to fix a problem on the roof,[3] and Mr. Stever was aware that there was a slippery film on the metal roof which made the roof as slippery as ice.[4] Mr. Stever did not warn Plaintiff Haina of the dangerous condition.

The Circuit Court dismissed this case on Defendant's motion for summary judgment finding that the Defendant did not owe a duty to supervise or instruct the Plaintiff. Plaintiff appeals on the basis that the Circuit Court refused to recognize the Defendant's duty to warn of obviously dangerous conditions when the Defendant anticipates a business invitee may be harmed despite such obviousness.

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[1] *Deposition of Yossi Haina,* pgs. 20-26
[2] *Defendant's Memorandum in Support of its Motion for Summary Judgment*, Pg. 3
[3] *Deposition of Yossi Haina*, pg. 18, lines 6-23; pg. 19, lines 20-25; pg. 23 lines 24-25; pg. 24 lines 1-8; *Deposition of Jay Stever*, pgs. 12 – 15, pgs. 28-29
[4] *Deposition of Jay Stever*, pg. 18, lines 19-25; pg. 19, lines 1-5

a. *Peterson v. Porter*

As is discussed in the Plaintiff's initial brief, the case of *Peterson v. Porter,* 389 S.C. 35, 697 S.E.2d 656, illustrates the duty owed by the Defendants to the Plaintiff. In *Peterson*, the Court found that a Defendant landowner was not liable to a Plaintiff business invitee who fell off their premises' roof. *Id.* at 155, 660.

The Court in *Peterson* states the general rule concerning the duty of care of landowners: "A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. [citation omitted]. The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge. [citation omitted]. A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner should have anticipated the resulting harm. [citation omitted]. *Peterson* at 153, 658.

In *Peterson*, the Plaintiff attempted to argue numerous theories of liability. The Plaintiff in *Peterson* argued the Defendants: (1) knew or should have known that he was not trained to safely perform the task assigned, (2) failed to provide him with the proper training and instruction necessary to safely perform the task assigned, and (3) failed to provide the equipment and support necessary to safely perform the task. *Id.* at 151, 657. One of the major issues in *Peterson* apparently was the very low intelligence of the Plaintiff (Plaintiff presented evidence that he was basically mentally handicapped), hence the attempt of the Plaintiff to argue duties to instruct or supervise. *Id.* at 154, 659. In disposing these arguments, the Court found:

> "...there was no evidence the Porters supplied Peterson with defective equipment or that the equipment caused Peterson to fall. Furthermore, the court determined there was no evidence of any defect or dangerous condition existing on the Porters'

> property. The court also found the roof's steep slope was an open and obvious condition, and, thus, the Porters did not have a duty to warn Peterson. The court noted there was no evidence anyone had ever fallen from the roof or that the Porters had any reason to believe a fall was likely. The court determined the Porters did not have a duty to instruct or supervise Porter in his work and there was no evidence Peterson's lack of education prevented him from safely performing his work."

Id. at 153, 658.

In Plaintiff Haina's case, there is undisputed evidence of a defect or dangerous condition existing on the roof. The Defendant had actual knowledge that it was likely that Plaintiff Haina would encounter and be harmed by the defect or dangerous condition. Defendant did not warn Plaintiff Haina of the dangerous or defective condition. Basically, Plaintiff Haina does not argue any of the main theories of liability advanced by the Plaintiff in *Peterson.*

Thus, although both *Peterson* and the case at hand involve business invitees falling from landowner's roofs, the facts of this case and the facts in *Peterson* are highly distinguishable. Under the law as stated in *Peterson*, the Defendant had a duty to warn Plaintiff Haina of the slippery roof.

b. *Meadows v. Heritage Village Church & Missionary Fellowship*

Defendant also relies on *Meadows v. Heritage Village Church & Missionary Fellowship,* 305 S.C. 375, 409 S.E.2d 349. In *Meadows*, a Plaintiff business invitee was injured when she slipped and fell on wet grass on the premises of the Defendant's building. *Id.* at 380, 352.

The Court in *Meadows*, states that, when addressing the duty to warn of a peril which is obvious: "[i]n *Callander*,[5] we adopted Restatement (Second) of Torts § 343(A) (1965) which provides that a possessor of land is not liable to his invitees for physical harm to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Since the only conclusion which could

have been reached is that the wet grass constituted an open and obvious danger rather than a latent or concealed one, the trial judge should have granted PTL's motion for judgment notwithstanding the verdict, ***unless plaintiff has shown that PTL should have anticipated the harm plaintiff suffered.***" *Emphasis added. Id.* at 378, 351.

The Court goes on to find "we hold that PTL had no duty to warn Meadows, its invitee, about the wet grass because it was a natural condition, the peril of which was obvious. In contrast, a latent defect is one which an owner has, or should have, knowledge of, and of which an invitee is reasonably unaware." *Id.* The Court, finding that the danger was obvious, goes on to finds no evidence in the record to suggest that the Defendants had, or should have had, anticipated the harm. *Id.*

Defendant Beach Market attempts to categorize the wet and slick roof as a natural condition, hence there is no duty to warn of its condition. The court in *Meadows* points out the "natural condition" nature of the grass makes it an obvious condition, as opposed to a latent defect (to which different rules apply). *Id.* Plaintiff Haina does not argue that the roof is a latent defect, and the Court in *Meadows* does not state that there is never a duty to warn regarding natural conditions. Instead, the Court in *Meadows* holds that unless the Plaintiff could show that the Defendant should have anticipated the harm that resulted (concerning the obvious condition), there was no duty to warn. *Id.*

In the case at hand, Plaintiff Haina has not only shown that the Defendant anticipated the harm, but has actually shown the Defendant fully appreciated the exact nature of the harm. Defendant's argument that Defendant could not have reasonably anticipated that Plaintiff Haina

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5 Full cite: *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991)

would walk on the slippery roof – directly after the Defendant requested Plaintiff perform work on the roof – seem unpersuasive.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand this case in order for Plaintiff Mr. Haina to have his case decided by a jury.

Respectfully submitted,

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This ____ day of July, 2013

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand this case in order for Plaintiff Mr. Haina to have his case decided by a jury.

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This 8th day of July, 2013

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Designation of Matter to be Included in Record on Appeal on Beach Market, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on July 8, 2013, addressed to their attorneys of record, Stafford John McQuillen, III, Esquire, and John H. Tiller, Esquire, Post Office Box 340, Charleston, South Carolina 29402.

July 8, 2013

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