

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Yossi Haina,

Plaintiff,

v.

Beach Market, LLC

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2011-CP-07-2300

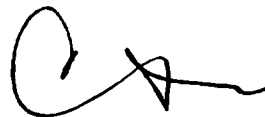
ORDER GRANTING SUMMARY
JUDGMENT

BEAUFORT COUNTY
CLERK OF COURT
J. S. HORTON
12 APR 25 PM 4:13

THIS MATTER, came before me for a hearing on the Defendant's Summary Judgment Motion on March 27, 2012. The plaintiff was represented by Marshall L. Horton and the defendant was represented by John H. Tiller.

The basis for the defendant's motion was an inability of the plaintiff to prove that Beach Market, LLC had a duty to instruct or supervise the plaintiff, and, furthermore, that the alleged dangerous condition (wet roofs and wet sidewalks) were open and obvious. I have reviewed the memoranda submitted by both counsel for the plaintiff and counsel for the defendant as well as the deposition testimony cited therein. I find that the conditions of the premises in question were open and obvious. After considering all material provided to me and the case law relied upon by the parties, I find that the plaintiff cannot prove that the defendant Beach Market owed the plaintiff a duty to instruct or supervise him and, therefore, the defendant is entitled to summary judgment as a matter of law. It is therefore,

ORDERED, ADJUDGED, and DECREED that the Defendant's Motion for Summary Judgment is hereby granted.



Carmen T. Mullen
Judge Fourteenth Judicial Circuit

April 16, 2012
Beaufort, South Carolina

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Charleston, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-07-2300

Yossi Haina

Beach Market, LLC

2012 DEC 31 PM 12: 26

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

JEROME
BEAUFORT
CLERK OF COURTAttorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT:** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT:** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to the right to restore, confirm, vacate, or modify the arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow); ☒ Statement of Judgment by the Court: At a hearing on November 5, 2012, the Court DENIED the Plaintiff's Motion to Alter or Amend.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

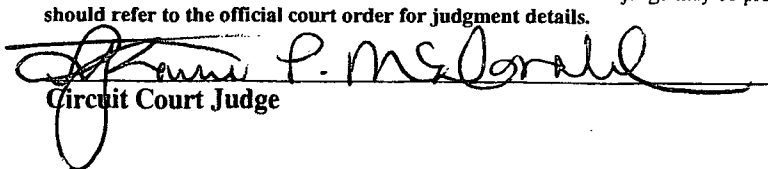
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2163
Judge Code

12-21-12
Date

• 000004

For Clerk of Court Office Use Only

This judgment was entered on 10 January, 2013, and a copy mailed first class or placed in the appropriate attorney's box on 10 January, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Marshall L. Horton PO Box 3766 Bluffton, SC 29910

ATTORNEY(S) FOR THE PLAINTIFF(S)

Stafford John McQuillin III PO Box 340 Charleston, SC
29402

ATTORNEY(S) FOR THE DEFENDANT(S)

Jamie Thompson

Jerri Ann Roseneau - Clerk of Court

Court Reporter-N/A

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

YOSSI HAINA

Plaintiff

vs.

BEACH MARKET, LLC

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 11-CP-07-_____

) COMPLAINT
) (Jury Trial Demanded)

BEAUFORT COUNTY, S.C.
CLERK OF COURT

2011 MAY 26 PM 1:59

Now comes the Plaintiff, through his undersigned attorneys, and for his cause of action states as follows:

PARTIES AND JURISDICTION

1. The Plaintiff, Mr. Yossi Haina, is a resident of Hilton Head Island, County of Beaufort, State of South Carolina.
2. Defendant Beach Market, LLC owns and operates a shopping center located in the City of Hilton Head Island, County of Beaufort, State of South Carolina.
3. This matter involves an injury that occurred on or about August 17, 2010 at the Defendant's shopping center located in the City of Hilton Head, County of Beaufort, State of South Carolina.
4. This Court has jurisdiction over the subject matter and parties to this action.

FACTUAL ALLEGATIONS

5. Each and every allegation set forth above is fully incorporated herein.
6. Plaintiff makes a living performing maintenance for various properties around Beaufort County. He has been self-employed in this capacity for at least one year.

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previous to the injuries that are the subject of this current civil action.

7. In 2010, Plaintiff had an ongoing business relationship with the Defendant to perform maintenance on the shopping center.

8. On or about August 17, 2010, the Plaintiff arrived at the Defendant's shopping center to perform maintenance work. Specifically, he arrived to drill holes in the sidewalks in order to alleviate a drainage issue. On this day, the Plaintiff performed this work alone.

9. Upon the Plaintiff completing his drilling project, a manager and/or agent of the Defendant directed the Plaintiff to perform some work on the roof at the shopping center. The manager and/or agent of the Defendant instructed the Plaintiff where a ladder was located.

10. On the day in question, the ground was wet. The Defendant's shopping center is an outdoors shopping center with cement walkways.

11. The manager and/or agent of the Defendant was aware that the Plaintiff was alone and did not have anyone to assist him in his work on the roof of the shopping center; however, the manager and/or agent of the Defendant instructed the Plaintiff to perform the work anyways.

12. At all times relevant to this action, the Plaintiff was on the property of the Defendant with the express or implied permission of said Defendant, and for the purpose of benefiting the Defendant, and was therefore a business invitee of the Defendants.

13. At about approximately 8:00 a.m., while the Plaintiff was attempting to perform the work that had been instructed of him by the manager and/or agent of the Defendant, the ladder supplied to the Plaintiff by the Defendant slipped out from under him.

14. As a result of this fall, the Plaintiff suffered great physical harm and injury to her person which has caused her to undergo much physical pain and suffering, has caused her and will in the future cause her to expend large amounts of money for medical treatments and services, has caused her to suffer trauma, anxiety, annoyance, hardship, loss of function, loss of enjoyment of life, inconvenience, and emotional distress – all to her damage and detriment.

15. The Defendant had a duty under the common law to exercise reasonable care to protect the Plaintiff from injury on the premises, which duty included the duty to make reasonable inspections to discover hazardous conditions on the premises, and to take reasonable steps to protect the Plaintiff from such conditions.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence – As To All Defendants)

16. Each and every allegation set forth above is fully incorporated herein.

17. By hiring the Plaintiff to perform maintenance work for the Defendant, the Defendants were subject to a duty of care to not order unreasonably dangerous work and/or not create an unreasonably dangerous situation for their workmen and/or not supply their workmen with faulty equipment.

18. The Defendant violated the previously mentioned duty to use reasonable care by instructing the Plaintiff to climb to the roof to perform maintenance without any help, by instructing the Plaintiff to perform work on the roof while the cement walkway was still wet, by supplying the Plaintiff a ladder which was an unreasonably dangerous condition, by supplying the Plaintiff a ladder without the appropriate safety equipment, and any other such way that discovery may show.

19. As a direct and proximate result of the Defendant's breach of duty to the Plaintiff,

he suffered serious, permanent physical injuries.

20. As a direct and proximate result of the Defendant's breach of duty to the Plaintiff, he has incurred expenses for medical and other care, and he/she anticipates continuing expenses for similar care in the future.

21. As a direct and proximate result of the Defendant's breach of duty to the Plaintiff, he has suffered physical pain and mental and emotional anguish, and expects to suffer similar pain and suffering in the future.

22. By reason of the acts and omissions of the Defendants as set forth above, the Plaintiff is informed and believes that he is entitled to an award of actual damages in an amount sufficient to fully compensate him for his injuries and losses, together with the costs of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence/Gross Negligence - As To All Defendants)

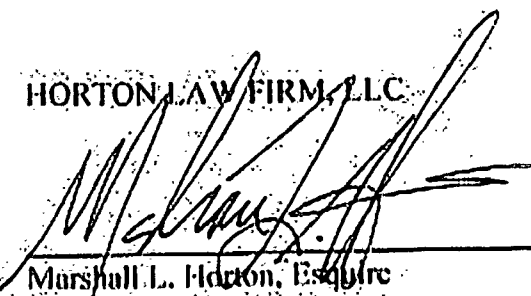
23. Each and every allegation set forth above is fully incorporated herein.

24. The Defendant owed their business invitees and patrons a duty of care to discover risks, and to take safety precautions to warn or eliminate unreasonable risks. Upon information and belief, this duty extended to and affected the Plaintiff.

25. The Defendant violated its duty to use reasonable care to protect the Plaintiff from hazardous conditions on the premises by its failure to establish and carry out regular and frequent inspections for such conditions, by its failure to establish and carry out regular and frequent maintenance operations, by its failure to provide a dry surface for the Plaintiff to use a ladder, and by its failure to implement preventive measures designed to eliminate or reduce the danger posed by this condition.

WHEREFORE, Plaintiff pray for judgment against the Defendant for actual and punitive damages in an amount to be determined by the trier of fact, for prejudgment interest, together with the costs and expenses incurred in the prosecution of this action, and for such other and further relief as the Court may deem just and proper.

HORTON LAW FIRM, LLC



Marshall L. Horton, Esquire

17 Lawton Street

Post Office Box 3766

Bluffton, South Carolina 29910

(843) 757-6190

(843) 757-6191 - fax

ATTORNEY FOR THE PLAINTIFF

Bluffton, South Carolina

This 26 day of May, 2011

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Yossi Haina,

Plaintiff,

v.

Beach Market, LLC

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2011-CP-07-2300

BEACH MARKET, LLC
ANSWER

The Defendant, above-named, answering the Complaint of the Plaintiff, above-named, alleges and says:

1. It admits, upon information and belief, the allegations of paragraph 1.
2. It admits the allegations of paragraph 2.
3. It admits that an incident occurred on August 17, 2010 at Defendant's shopping center but lacks sufficient information to either admit or deny whether Plaintiff was injured and the extent of the injuries, if any, and, therefore, it denies the same.
4. Paragraph 4 contains conclusions of law which it is required neither to nor deny, and, therefore, it denies the same.
5. Paragraph 5 does not require a response.
6. It admits, upon information and belief, the allegations of paragraph 6 and 7.
7. It lacks sufficient information to either admit or deny the allegations of paragraph 8, and therefore denies the same.
8. It denies the allegations of paragraph 9.
9. It admits, upon information and belief, the allegations of paragraph 10.
10. It denies the allegations of paragraph 11 and 12.

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11. It lacks sufficient information to either admit or deny the allegations of paragraph 13 and 14, and therefore denies the same.

12. Paragraph 15 contains conclusions of law which it is required neither to nor deny, and, therefore, it denies the same.

13. Answering the allegations of paragraph 16, it reasserts and realleges its responses to paragraphs 1 – 15 as if set forth herein fully verbatim.

14. Paragraph 17 contains conclusions of law which it is required neither to nor deny, and, therefore, it denies the same.

15. It denies the allegations of paragraph 18, 19, 20, 21, and 22 and demands strict proof thereof.

16. Answering the allegations of paragraph 23, it reasserts and realleges its responses to paragraphs 1 – 22 as if set forth herein fully verbatim.

17. Paragraph 24 contains conclusions of law which it is required neither to nor deny, and, therefore, it denies the same.

18. It denies the allegations of paragraph 25.

19. It denies each and every allegation of the Plaintiff's Complaint, which is not hereinabove specifically admit.

**FURTHER ANSWERING AND AS AN ADDITIONAL DEFENSE,
THE DEFENDANT ALLEGES AND SAYS:**

20. Even if it was negligent as alleged in the Plaintiff's Complaint, which is specifically denied, any injury and damage suffered by the Plaintiff was due to his own comparative negligence so as to bar or partially bar any recovery in this matter.

**FURTHER ANSWERING AND AS AN ADDITIONAL DEFENSE,
THE DEFENDANT ALLEGES AND SAYS:**

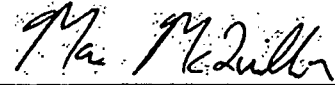
21. Whatever injury and damage was suffered by the Plaintiff was due to the sole negligence of the Plaintiff so as to bar any recovery against it.

**FURTHER ANSWERING AND AS AN ADDITIONAL DEFENSE,
THE DEFENDANT ALLEGES AND SAYS:**

22. The Plaintiff's status on the Defendant's premises was that of a licensee as opposed to an invitee such that a lesser duty of care is owed to the Plaintiff.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendant prays the same be dismissed.

HAYNSWORTH SINKLER BOYD, P.A.

By: 
John H. Tiller
Stafford J. McQuillin, III
134 Meeting Street, Third Floor
Post Office Box 340
Charleston, SC 29402-0340
(843) 722-3366 (Telephone)
(843) 722-2266 (Facsimile)
Counsel for Defendant

July 11, 2011
Charleston, South Carolina

1 BEGINNING 10:42 A.M.

2 BY THE COURT:

3 THE COURT: All right. Mr. Tiller, this is your
4 motion, and whenever you are ready. If you both, when
5 you speak, if you would introduce yourselves to my court
6 reporter, I'd appreciate it.

7 MR. TILLER: Thank you, your Honor. May it please
8 the Court. John Tiller, on behalf of the defense. Your
9 Honor, we had previously forwarded to you a memorandum of
10 law. I don't know if you've been provided with it or
11 not.

12 THE COURT: I have read it. I have read it.

13 MR. TILLER: This is our motion for summary judgment,
14 your Honor. I will candidly admit to you that I did not
15 write this memorandum, but would also tell you that, had
16 I written it, I would have written it differently, and I
17 would have started out by telling you that this case has
18 already been decided. It was decided by Judge Keesley in
19 2010, and it fits -- I rarely see it in my career a case
20 that fits more with the facts of this case than the
21 *Peterson* case.

22 THE COURT: Right.

23 MR. TILLER: In *Peterson*, your Honor, the plaintiff
24 in that case was a gentleman who did odd jobs. In this
25 case, the plaintiff, Mr. Haina, does odd jobs. In the

1 *Peterson* case, the plaintiff was asked to pressure wash
2 the defendant's home here. He was asked about looking at
3 a roof leak by Mr. Stever who was a representative of
4 Beach Market. Both in *Peterson* and here, the defense
5 supplied the equipment. In our case today, the latter --
6 in the other case, the latter pressure washer, et cetera.
7 In *Peterson*, there was no specific instruction on how to
8 perform the work. Same as here. And again, in both
9 cases, there was no supervision or control of the work by
10 the defendant.

11 We contend that there's been no duty breached to the
12 plaintiff. We did not provide any unsafe equipment. The
13 plaintiff has acknowledged there was no problem with the
14 ladder. We didn't fail to warn of any danger. And we
15 could not have reasonably anticipated the harm that was
16 suffered here.

17 Your Honor, I had *Peterson* in hand when I took the
18 plaintiff's deposition. And for that reason, I asked
19 some very specific questions. And in the plaintiff's
20 deposition, at Page 23, he acknowledge that he was not
21 told by Mr. Stever how to fix the leak.

22 And what had happened, your Honor, at some time
23 before the plaintiff had done some work on the roof,
24 where there was still some leaking problems, Mr. Stever
25 happened to be on the property that morning, ran into the

1 plaintiff, because he was doing some work for another
2 tenant. And said, *By the way, when you get a chance, I*
3 *want you to check that leak.* He didn't say I want you to
4 check that leak today. He didn't tell you let's go over
5 there and look at it. As a matter of fact, he testified
6 he had no idea that he was even going to do the work that
7 day.

8 And Mr. Haina is probably one of the most honest
9 witnesses I've ever seen. He acknowledge in his
10 deposition, you know, he didn't tell me to do it; he
11 didn't tell me how to do it; he didn't supervise me; he
12 didn't instruct me. And for all those reasons, your
13 Honor, there's no control, there's no supervision,
14 there's no direction. And the gist of the *Peterson* case
15 is, there is no breach of the duty.

16 Mr. Stever, very honest in his own right, they both
17 acknowledged there was a discussion that morning about
18 the roof leak, but he says he did not have any idea that
19 he would do the work that day. And again, I had him
20 acknowledge in his deposition that there was no
21 instruction or direction provided.

22 Thank you, your Honor.

23 THE COURT: Okay. Mr. Horton.

24 MR. HORTON: May it please the Court.

25 THE COURT: Yes, sir.

1 MR. HORTON: I have submitted a memorandum earlier
2 this morning. I don't know if it's been passed up to
3 you.

4 THE COURT: I got it. 10:32 is when you decided to
5 file it, but yes.

6 MR. HORTON: Your Honor, I'm just going to briefly go
7 over what I'd previously written in this memorandum.
8 Starting with the facts of this case, you'll see how the
9 full idea -- and I'll get to the *Peterson* case, because I
10 think this case is pretty easily distinguishable from
11 *Peterson*. But my client is a handyman who has
12 occasionally done work at the premises of Beach Plaza.
13 Beach Plaza is the plaza down there on the beach, right
14 by Coligny Plaza where --

15 THE COURT: Okay.

16 MR. HORTON: I'm sure you're familiar with that area.

17 THE COURT: I am.

18 MR. HORTON: The owner and the manager of the Beach
19 Market -- Beach Plaza. Pardon me. Beach Market, has got
20 a man by the name of Jay Stever. On August 17, 2010, my
21 client showed up at 3:00 a.m. for the purposes of doing
22 drilling in the concrete. After he was done, at around
23 7:30 a.m., he was asked by Mr. Stever to go fix a leak up
24 on the roof. In Mr. Stever's deposition, he acknowledged
25 that, when the metal roof is dry, it acts as an adhesive

1 and there's no problem walking on it. However, when it's
2 wet, it's like walking on ice, because of the film that's
3 caused by foliage in the area. Okay?

4 My client testified that due to his personality and
5 his prior military experience, that, if he's going to be
6 asked by someone to do something, he is going to
7 immediately do it. In fact, in this case, after he was
8 asked to fix the roof, he went to Grayco to go pick up
9 some materials; went back to the location; got the
10 ladder; went up there.

11 THE COURT: Had he ever tried -- am I correct in
12 saying that he had actually fixed this roof prior for the
13 leak?

14 MR. HORTON: Yes, he's fixed that roof prior to the
15 leak.

16 THE COURT: Okay.

17 MR. HORTON: However, what we don't know is --
18 there's no evidence, at least I could find, what the
19 condition was of the roof when he fixed it that prior
20 time.

21 Mr. Stever testified that he knew that the sidewalk
22 was wet that morning whether Mr. Haina was going to put
23 the ladder up. He also testified that he knew that the
24 roof was going to be slippery. And he testified that he
25 told Mr. Haina that morning that the roof needed to be

1 fixed. However, then, for whatever reason, said that he
2 didn't think that Mr. Haina would go up and actually do
3 it that morning. His answer, which is in deposition, you
4 know, I didn't find it too credible in the least, but if
5 you're interested, I'll explain to you what his answer
6 was, but.

7 THE COURT: Okay. Okay.

8 MR. HORTON: Either way, what actually caused the
9 slip in this case appears to be a mixture of the very
10 slippery roof and the wet concrete that Mr. Haina put the
11 ladder on. Again, there's deposition testimony pointing
12 to that. My client was knocked unconscious and dazed
13 when he fell off the roof. He was seriously injured in
14 this accident. Had to be medivaced out of the area
15 through the helicopter.

16 THE COURT: Has he recovered? Has he --

17 MR. HORTON: He's got some pretty serious permanent
18 injuries.

19 THE COURT: Okay.

20 MR. HORTON: And having incredible difficulty with
21 mental issues, having suffered such a serious concussion.

22 THE COURT: Okay.

23 MR. HORTON: Questionably, because he doesn't have
24 insurance.

25 THE COURT: Okay. He had a closed-head injury as a

1 result of that. Okay. Okay.

2 MR. HORTON: So we're clear, so we're identifying
3 what the condition was that we're complaining about, Mr.
4 Stever testified that, after the accident, he went and
5 investigated it, and he could see skid marks on the wet
6 metal roof, and the actual gutter was broken where my
7 client slipped. My client testified, I guess, the only
8 thing he remembered was with the ladder. The ladder
9 slipped out --

10 THE COURT: He tried to grab the gutter is what I
11 read in his testimony, yes, and he just wasn't able to.
12 Okay.

13 MR. HORTON: Absolutely.

14 THE COURT: Okay.

15 MR. HORTON: Now, your Honor, in terms of the law in
16 this case, as I understand, I've gone through every
17 single case I can find on this issue. And it appears
18 that what I'm required to do is identify the condition
19 which would be considered dangerous; identify whether
20 it's a latent defect or an open and obvious condition.

21 THE COURT: Right.

22 MR. HORTON: If it's an open and obvious condition, I
23 need to identify whether or not the defendants could have
24 reasonably anticipated harm due to that condition. Now,
25 in this case, obviously, the condition that we're

1 complaining of is we have wet concrete and a slippery wet
2 roof caused by both moisture and foliage, some pollen or
3 whatnot.

4 The facts of this case, it didn't rain this day. The
5 water was there from my client's cleaning up from the
6 dust or whatnot and machinery of drilling the holes. And
7 it's unclear exactly why the roof was wet, but since we
8 haven't contested it, it was, in fact, wet.

9 THE COURT: Okay.

10 MR. HORTON: Okay.

11 THE COURT: So the water's there because he was
12 hosing off from drilling the holes, correct?

13 MR. HORTON: On the sidewalk. No question.

14 THE COURT: Okay. Gotcha. Okay. And powder from
15 the concrete.

16 MR. HORTON: However -- well, Mr. Stever knew that
17 when he asked Mr. Haina to go over there on the roof.

18 THE COURT: Okay. And I'm going to assume, because
19 your client does odd jobs, he is not working with anyone
20 else; he has no Workers' Compensation coverage; nothing.

21 MR. HORTON: Zero.

22 THE COURT: Have you looked at all that? Okay.

23 MR. HORTON: Absolutely zero.

24 THE COURT: Okay.

25 MR. HORTON: We looked at it.

1 THE COURT: Okay.

2 MR. HORTON: If I could make a credible argument that
3 he was an employee, I would today.

4 THE COURT: Okay.

5 MR. HORTON: But he's just not.

6 THE COURT: Okay.

7 MR. HORTON: He's an independent contractor.

8 THE COURT: Okay.

9 MR. HORTON: All right. Assuming, your Honor, that
10 you find a roof and wet concrete in open and obvious
11 condition, which I don't know how I could really
12 seriously argue anything but that, the defendants told
13 him to get up there on the roof that morning. They knew
14 that he was going there. They did not warn him
15 whatsoever of the condition. They did not say, hey,
16 watch out, you know, the concrete's wet, or hey, you
17 know, the metal roof is wet with the foliage dust and
18 moisture.

19 THE COURT: You could buy that argument if he was an
20 employee, but not as an independent contractor. I think
21 that's where the -- I think that's where the disconnect
22 is, is there. Plus, he's actually done -- I understand
23 he's done it before.

24 MR. HORTON: Your Honor, if there was facts existing
25 saying that my client could have appreciated the

1 condition of the wet roof and the foliage or whatnot, you
2 know, it would be what it is, but there's not. The only
3 thing that's in the record is that my client had been on
4 the roof prior to that day.

5 There's something in particular in this case that Mr.
6 Stever had testified to, and we spent three or four
7 deposition pages going over it. He knew the exact route
8 that my client was going to take. There's only one
9 reasonable route, and he actually took a pen and showed
10 me exactly where he had to go. So he knew that my
11 client, when he went up there on the roof, was going to
12 go exactly where he went.

13 THE COURT: Okay.

14 MR. HORTON: Now, in terms of the law, I mean, what
15 I'm really arguing here is that the defense could have
16 reasonably anticipated what happened here.

17 In the *Peterson* case, I've read the *Peterson* case,
18 one of the things the *Peterson* case says is that there
19 was nothing that caused the accident. Before they really
20 get into the unreasonable -- the open and obvious
21 condition, and whether or not the people could reasonably
22 anticipate the harm, they specifically state the Court
23 determined that there was no evidence of any defect or
24 dangerous condition on the Porter property. In this
25 case, I mean, it's in my client's metal roof, slick with

1 foliage, I mean, that's a dangerous condition. No
2 obviously. Whether or not it's open and -- open and
3 obvious, and whether the tenants had reasonably
4 anticipated the harm that occurred, I think is a question
5 that needs to be asked, but it is dangerous.

6 There was nothing, no evidence that there was
7 anything wrong in the roof in the *Peterson* case. The
8 plaintiffs in the *Peterson* case just went up there and
9 said, hey, I'm on a roof, and I fell, it's an -- it's --
10 and there should be liability carried. And that's not
11 what we're saying here.

12 What we're saying here is that I got a guy on a
13 ladder, 15 feet up on a roof that's slick and the
14 pavement underneath is wet. And whether or not the
15 client's contributorally negligent for it, or whether or
16 not that there was some sort of assumption of risk,
17 that's going to be a question at trial. But in terms of
18 the legal duty that is owed here, premise liability, we
19 got the open and obvious condition and whether the
20 defendant should have reasonably have anticipated the
21 harm. And if the defense could reasonably anticipated
22 the harm, there was duty to at least warn my client, so
23 he'd have the opportunity to weigh all the facts before
24 he went up there on the roof, which did not occur in this
25 case.

1 THE COURT: Okay.

2 MR. HORTON: Your Honor, the -- I mean, since I'm
3 here, the whether or not the thin film of pollen exists
4 on metal roof, the metal roof --

5 THE COURT: Is that the foliage that you're talking
6 about?

7 MR. HORTON: The foliage. There's some sort of slick
8 on the metal roof. I don't know how happy I am saying
9 latent defect and roof in the same sentence, but in terms
10 of summary judgment, --

11 THE COURT: The pollen's pretty yellow down here.

12 MR. HORTON: And your Honor, I'm entitled to facts in
13 the light most favorable. I mean, there's no question
14 what -- there's no evidence presented what it actually
15 looked like at the time. I'm really here to argue the
16 open and obvious condition and the reasonable anticipated
17 harm.

18 THE COURT: Okay.

19 MR. HORTON: Thank you, your Honor.

20 THE COURT: Okay. And you looked at the ladder to
21 make sure, because I saw where his testimony was he
22 believed he got one foot on the ladder before he fell.
23 That was his memory. And you've had someone look at this
24 ladder to make sure.

25 MR. HORTON: We have no reason to believe -- my

1 client had used the ladder prior, so the ladder's fine.

2 THE COURT: Okay.

3 MR. HORTON: I wish I could tell you there's
4 something wrong with the ladder. I have no reason to
5 believe whatsoever. The ladder's fine.

6 THE COURT: Okay.

7 MR. HORTON: It appears as though what caused this
8 fall is, as he was coming down off the roof, slipped on a
9 slick, ladder fell off, bam. Your Honor, most of this
10 comes from Mr. Stever, from doing the investigation
11 afterwards, simply because my client was not in good
12 shape directly after this.

13 THE COURT: Okay. Okay. Mr. Tiller, anything else
14 you want to say?

15 MR. TILLER: Just a few minutes, your Honor. Mr.
16 Haina was injured. We don't dispute that. When I took
17 his deposition in December, he was back at work and is
18 doing renovations. He was actually renovating a store
19 front here in Beaufort, so he was back to full duty
20 within a little over a year after the accident.

21 THE COURT: Okay.

22 MR. TILLER: Judge, what we have is the record here.
23 What is the deposition testimony. And Mr. Haina, on
24 direct examination for me, at Page 39, is asked:

25 *Did you tell him, --*

1 speaking of Mr. Stever --

2 -- that you were going to do the work for that
3 day on the roof?

4 His answer was:

5 No.

6 So how would Mr. Stever even anticipate or know that
7 this gentleman may get on the roof.

8 THE COURT: Okay.

9 MR. TILLER: And Mr. Stever was asked the question at
10 Page 13, in his deposition:

11 *That morning, did you discuss the plumbing*
12 *vents with the O.C.?*

13 Answer:

14 Yes.

15 Okay. Question:

16 *Did you ask him to fix it that morning?*

17 The answer:

18 No.

19 Question:

20 *When you discussed it with him, did you*
21 *believe that he was going to do it that morning?*

22 Answer:

23 No.

24 So when you go back and look at Peterson, there's no
25 involvement whatsoever from the defense and Mr. Haina,

1 the plaintiff, doing this work. So how can there be any
2 breach of duty?

3 THE COURT: Okay. All right, you all, let me go
4 through. I'm going to read both the depositions just
5 thoroughly, and I'll request a proposed order from
6 someone. Okay?

7 MR. TILLER: Thank you, your Honor.

8 THE COURT: Thank you, you all.

9 MR. HORTON: Have a good day.

10 THE COURT: You, too.

I N D E X

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(No exhibits were offered or admitted.)

1 The above-styled cause came on for hearing on
2 the 5th day of November, 2012, at 11:06 a.m., before
3 Judge Stephanie McDonald, Judge at Large, presiding over
4 the Court of Common Pleas for the County of Beaufort,
5 when the following proceedings were had and entered of
6 record, to wit:

7 PROCEEDINGS

8 THE COURT: All right. Mr. Tiller, what do you
9 have?

10 MR. TILLER: Your Honor, we have the 11
11 o'clock.

12 THE COURT: All right. Which one is yours?

13 MR. TILLER: It's number -- I just looked at
14 it, Judge. -- Number 16.

15 THE COURT: All right. Number 16, Yossi versus
16 Beach Market, LLC?

17 MR. TILLER: Yes, ma'am. And this is
18 Mr. Horton, who represents the Plaintiff.

19 THE COURT: Hey, there.

20 MR. TILLER: We spoke when we found your Honor
21 here, and this is a Motion to Reconsider.

22 THE COURT: Okay. Sorry.

23 MR. TILLER: Well, we're willing to let you
24 look at it very briefly.

25 THE COURT: Okay.

1 MR. TILLER: He's Briefed it, I've Briefed it
2 before, there's an Order, and we're willing to let you
3 decide it, if you will, to save us another trip.

4 THE COURT: If both of y'all consent to that?
5 Is that correct?

6 MR. HORTON: Absolutely, your Honor.

7 THE COURT: Okay.

8 MR. HORTON: As long as you will give us a
9 little bit of time to catch you up on the --

10 THE COURT: Yeah. Let me take a look at the
11 Order specifically.

12 MR. HORTON: It's a short Order, so, hopefully,
13 you won't have to read too much.

14 MR. TILLER: Yeah, the Order entered after the
15 initial hearing, is a one-page Order.

16 THE COURT: Order granting summary judgment?

17 MR. TILLER: Yes, ma'am.

18 (Respite.)

19 THE COURT: Okay. I've reviewed the Order. I
20 am happy to hear from y'all.

21 MR. HORTON: Your Honor, if you will give me
22 one second, to kind of get myself --

23 THE COURT: Sure. No problem.

24 (Respite.)

25 MR. HORTON: May it please the Court, your

1 Honor?

2 THE COURT: Yes, sir.

3 MR. HORTON: We're here on the Plaintiff's
4 Motion for Reconsideration. This case was dismissed by
5 summary judgment from Judge Mullen on April 15th of this
6 year. Your Honor, this is a case where a workman fell
7 off the roof of a particular premise. The really --
8 pretty much everything that Mr. Tiller and I have -- are
9 talking about has to do with the existence of a duty to
10 warn of a dangerous condition. And that's pretty much,
11 at the heart of it, what this case is about.

12 We're -- I was surprised that we got bumped out
13 on summary judgment. I thought the facts were here, and
14 that's why we're here for a Motion for Reconsideration.
15 I'm going to give you a brief recitation of the facts,
16 and I certainly have the depositions here that will back
17 up most of the facts in case you wish to read them
18 yourself. My client is a workman. Mr. Yossi Haina. He
19 works for himself. He's a handyman. An independent
20 contractor. He does fix-it work on various buildings
21 over on Hilton Head Island. The Defendants in this
22 case, represented by Mr. Tiller, own a property called
23 Beach Plaza. If your Honor's ever been to the southend,
24 it's a plaza right on the other side of the street from
25 Coligny Plaza. There's some restaurants over there,

1 couple of the beach shops, and that sort of thing.

2 On August 17th, 2010, my client, who regularly
3 does work on the behalf of the owners of this place,
4 was there this morning fixing some concrete. That
5 morning, the -- one of the owners of Beach Plaza, a
6 Jay Stever, asked my client to go on the roof to go fix
7 some plumbing ducts.

8 And Mr. Tiller and I disagree on exactly what
9 the content of that conversation was. But for the
10 purposes of summary judgment, my client says Jay Stever
11 told me to get up on the roof. And I'll read you the
12 exact wording so you can make your own determination.

13 After going up on the roof, he -- he slipped,
14 falls off the roof, and is seriously injured. Now, on
15 that roof, the -- there was a collection of foliage,
16 dust, and whatnot that was wet, which, according to the
17 Defendants, made the roof as slippery as ice. Okay?

18 To sort of get into it -- I'm sorry, your
19 Honor, if this is elementary, but for all these cases,
20 I'm always interested in what the actual law is. The
21 statement of the law in these situations we've basically
22 stipulated that Mr. Haina is a business invitee, for the
23 purpose of premise liability. We stipulated that roof
24 with the pollen and foliage and all of that is not a
25 latent defect under the law, that it is an open and

1 obvious condition. It just -- it just is. I wish I
2 could argue differently, but the --

3 THE COURT: Sure.

4 MR. HORTON: So the only thing really left
5 would be: Should the Defendants have reasonably
6 anticipated this harm would have occurred in order to
7 give rise to a duty to warn? Okay. And the actual
8 letter of the law -- and I'm quoting from a case
9 Callander versus Charleston Doughnut, which was decided
10 in 1991, is: A possessor of land is not liable to his
11 invitees for physical harm caused to them by any
12 activity or condition on the land whose danger is known
13 or obvious to them unless the possessor should
14 anticipate the harm despite such knowledge or
15 obviousness.

16 THE COURT: Okay. I'm just pulling up the
17 Charleston Doughnut case.

18 MR. HORTON: Absolutely. I know it's black
19 letter law, but I'm quoting it.

20 THE COURT: That's okay.

21 MR. HORTON: The facts here indicate that --
22 that the defendant not only should have anticipated the
23 harm, but actually did anticipate the harm. Your Honor,
24 I'm going to read from the -- my client's deposition on
25 the issue of whether or not the owners of Beach Plaza

1 told him to get up on the roof this morning. This is
2 page 18 of the Defendant's deposition.

3 Question: Okay. So you finished doing
4 the drilling at about 8 o'clock --

5 THE COURT REPORTER: Could you slow down when
6 you're reading, please? Thank you.

7 MR. HORTON: I'm sorry. Just tell me. I do
8 that all the time.

9 Okay. So if you finished doing the
10 drilling at about eight o'clock, what did you do
11 next?

12 Answer: Jay came over there, I think
13 about eight o'clock, and saw me over there, and then
14 I showed him, you know, the walk, and he told me to
15 fix the roof after that.

16 Later on that same page of the deposition:

17 And then what was the rest of the
18 conversation?

19 Answer: And I saw Jay, and he told me --
20 I mean, if I can fix the leak on the roof. I said,
21 Yes. So I go to Grayco, you know, get the few stuff
22 and come back and got the ladder over there and
23 climbed.

24 Now, the Defendants' argument, saying that they
25 didn't anticipate that he was going to be on the roof,

1 is that the conversation went: Well, we told him to fix
2 the leak on the roof; we just didn't know that he was
3 going to go right that second. And the reason that they
4 make this argument is because -- I'm going to read the
5 Defendant's deposition, in terms of the danger that they
6 knew about that Mr. Haina was going to face if he got up
7 on that roof.

8 THE COURT: Okay.

9 MR. HORTON: This is from Jay Stever's
10 deposition. Jay Stever, being an owner, agent,
11 principle of Beach Plaza, LLC, the Defendant.

12 Question: That morning, were you
13 concerned that Mr. Yos- -- that Yossi was going to
14 go up on the roof for any reason?

15 Answer: I would have thought that he
16 would have never even considered it.

17 Question: And why is that?

18 Answer: Because if you had any
19 experiences with metal roofs -- metal roofs, there
20 is -- we have a lot of foliage in or about the Beach
21 Market, and, therefore, there's a film that
22 accumulates on metal roofs. When they're absolutely
23 dry, they act as an adhesive, and you can walk on
24 them with no problem; but when it's wet, it's like
25 walking on ice.

1 Question: Were you concerned that the
2 roof was wet that morning?

3 Answer: I knew the roof was wet that
4 morning.

5 And it goes on.

6 So pretty much right there, in terms of whether
7 or not the Defendants could have reasonably anticipated
8 the harm, just by the deposition testimony, my client
9 testified that he was told to go up there that morning
10 to go fix the roof, and then the Defendants talk about
11 how the roof was -- was, to quote, like walking on ice.

12 THE COURT: Well, correct me about the -- it's
13 not just that they anticipate the harm. They anticipate
14 the harm despite the open and obvious defect to the
15 extent that they have to take reasonable steps if the
16 person's so distracted they wouldn't anticipate the
17 condition. I think if it was open and obvious to the
18 Plaintiff as well, that's the problem, whether they
19 anticipated the harm or not? Correct?

20 MR. TILLER: Your Honor, and I'm reading the
21 Charleston Doughnut case, reading the Meadows case --

22 THE COURT: That's the case I'm looking at
23 right now.

24 MR. HORTON: Uh-huh. And the issue of the
25 Charleston Doughnut case really focused on, is whether

1 or not the Defendant could -- could reasonably
2 anticipate that there was going to be harmed caused
3 by -- by this condition, despite the fact that it's open
4 and obvious. I mean, if it's open and obvious, everyone
5 can see it. And, you know, the doughnut case, of
6 course, was a stool that didn't have a seat on it. And
7 in that case, the -- you know, the Court talked about
8 how the -- there was evidence that the owner potentially
9 could know that people would have sat on that and gotten
10 hurt.

11 THE COURT: Well, be distracted by backing up
12 to it without looking at it, essentially, was what it
13 appears to say.

14 MR. HORTON: Well, in this case, in terms of --
15 in terms of actually coming into contact with this slick
16 roof, of -- the Defendant's deposition, pages 36, 37,
17 and 38, and then Exhibit 1, is the Defendant going the
18 exact route that he knew the Plaintiff would go, which,
19 of course, put him right there in with the slippery-as-
20 ice roof that had him fall. And we actually had him
21 draw it out on Defendant's Exhibit 1. There's no
22 question that the Defendant knew exactly where Mr. Haina
23 could and actually did go.

24 Your Honor, I think with the -- there's some
25 facts in this case that kind of make it more complicated

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1 than it needs to be being that it's a workman and that
2 he gets up on a roof. But the laws of business invitee,
3 I understand that he's under the same duty as I would
4 if I walked into Walmart to pick up diapers or something
5 like that. I mean, there's no special elevated
6 standard. I think that Judge Mullen's Order -- and I'm
7 not sure why she did this. But Judge Mullen's Order
8 focused on the fact that I couldn't show that there's
9 a duty to instruct or supervise, which -- which I think
10 is the same thing as duty to -- as a duty to warn. But
11 on the Peterson case -- and there's some confusing
12 language. And I'm not sure if there was a hang up there
13 or something like that. Because the -- the Defendant
14 relies heavily on the case of Peterson versus Porter,
15 which is a -- admittedly, there are similar facts in the
16 Peterson versus Porter case. Your Honor, I have a copy
17 here if you would like.

18 The Peterson versus Porter, there was a
19 gentleman who went up on a roof, to go do some power
20 watching, and he fell and was injured.

21 THE COURT: Okay. I have it.

22 MR. HORTON: Yeah. The -- what I really
23 focused on in this case -- well, what we believe the law
24 is, is that this Peterson case is just the Court
25 properly interpreting the open and obvious conditions.

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1 Where if there's an open and obvious dangerous
2 condition, that there's no duty to warn unless the
3 Defendants can reasonably anticipate that there be harm
4 caused by this condition.

5 Now, in this case, it was just a roof. And the
6 plaintiffs really tried to argue everything under the
7 roof -- under the sun. Pardon me. They argue that
8 the -- that the plaintiff was mentally incapacitated or
9 was dimwitted and needed a duty to -- to people to take
10 care of him. They argued that the slope of the roof was
11 unreasonable. I guess they argued a couple of other
12 things. Obviously, none of these things fall within the
13 purview of the open and obvious condition unless there's
14 a reasonable suspicion that harm can be caused warning
15 the laws.

16 And in this case I'm going to read from here --
17 THE COURT: I've got it in front of me.

18 MR. HORTON: All right.

19 THE COURT: But I'm happy to hear from you.

20 MR. HORTON: The Court also noted that the
21 roof's steep slope was an open and obvious condition,
22 and, thus, the Porters did not have a duty to warn
23 Peterson. And I'm reading on --

24 THE COURT: Right.

25 MR. HORTON: The Court also noted that there

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1 was no evidence that anyone had ever fallen or that the
2 Porters had any reason to believe that a fall was
3 likely. And that really distinguishes our present case
4 from the Porter case to where the Defendants testified
5 at the deposition that they knew that the -- that the
6 roof was slippery as ice, and, in fact, had testified
7 that --

8 THE COURT: Well, I'm going to get Mr. Tiller
9 to tell me about that in a minute, why that isn't enough
10 to get him over summary judgment. I think that the
11 Peterson case is quite persuasive with respect to
12 Defendants' motion.

13 MR. HORTON: Your Honor, in all candor, if it
14 wasn't for the fact that the Defendants specifically
15 told him that morning to get up there, he knew that the
16 roof was slippery as ice, and you could trace the exact
17 path that he knew that the Plaintiff was going to go, I
18 probably wouldn't be making this motion because I don't
19 think there would be a case.

20 THE COURT: Okay. All right.

21 Yes, sir.

22 MR. HORTON: Thank you, your Honor.

23 THE COURT: Thank you.

24 MR. TILLER: Thank you, your Honor. We
25 appreciate you taking the time. We don't mean to burden

1 the Court with extra work.

2 THE COURT: No, no problem at all. I hope I
3 have jurisdiction to hear it. But if y'all agreed to
4 it, well --

5 MR. TILLER: Yes, ma'am. And I wanted to make
6 sure that the record reflected that.

7 Judge Mullen had heard this motion in -- back
8 in April or so, and this was the submission by the
9 Plaintiff.

10 THE COURT: Okay.

11 MR. TILLER: I had prepared a pretty extensive
12 Brief. They're all in the file. We argued the motion,
13 and we talked about the deposition testimony, and the
14 basis -- or the bases of our motion was, number one,
15 this lack of any duty to instruct or supervise, and the
16 second was, it was an open and obvious condition. What
17 I'm hearing today is, we're really just talking about
18 this second prong of it, and there are two cases cited
19 by the Plaintiff in support of that position, the
20 Callander case, which you just looked at, as well as
21 the Creech case, which involved the South Carolina
22 Department of Natural Resources.

23 THE COURT: Okay.

24 MR. TILLER: Those cases, when you compare them
25 to Peterson, show you exactly why Peterson should

1 control in this case. Both Callander, the Charleston
2 Doughnut case, and the Creech case involved when -- when
3 the Court was examining the open and obvious condition
4 -- basically missing apparati. And what I mean by that
5 is, you know, the stool was not on the -- the pole at
6 the doughnut shop. And in the Creech case, there was a
7 part of a rail missing on a dock. In this instance, we
8 have nothing missing. It's just an open and obvious
9 condition. And the Peterson facts are exactly on all
10 fours with this case. I -- I don't think in a Motion to
11 Reconsider the Court goes back and evaluates and reviews
12 the testimony it's already reviewed. But just for your
13 purposes, since you didn't actually hear it, Mr. Stever,
14 who was the 30(b)(6) deposition witness on the behalf of
15 the Plaintiff, testified on page 13 of his deposition,
16 starting at line 17:

17 Okay. Question: That morning, did you
18 discuss the plumbing vents with Yossi?

19 Answer: Yes.

20 Question: Did you ask him to fix it
21 that morning?

22 Answer: No.

23 Question: All right. When you discussed
24 it with him, did you believe that he was going to do
25 it that morning?

1 Answer: No.

2 Page 28, starting at line 20: Okay. So you
3 specifically deny telling him to get up on the roof
4 that morning?

5 Correct.

6 Question: But you do not deny that you
7 discussed with him that the work needed to be done
8 that morning?

9 Answer: Yes, that it didn't need to be.
10 It was, again, a reiteration of telling him that we
11 still had a problem with the roof, but I gave him no
12 specific instructions to get up there that day.

13 And, lastly, on page 35, lines 5 through 8:

14 Question: Did you provide Mr. Haina with
15 any instruction or direction whatsoever on the day
16 of this incident?

17 Answer: No.

18 Again, your Honor, this is an open and
19 obvious condition. The testimony of both the Defendant
20 and the Plaintiff supports that, summary judgment was
21 appropriate, and we'd ask you to affirm Judge Mullen's
22 ruling.

23 THE COURT: Okay.

24 Yes, sir. It's your motion, so you get the
25 last word.

1 MR. HORTON: Yes, your Honor. I don't know
2 what happened with Judge Mullen ruling in his favor. I
3 certainly -- the facts seem to be, again, that the
4 Defendants knew there was a dangerous condition. I
5 don't -- I see what Mr. Tiller is saying, that he's
6 distinguishing the Peterson case from the Callander case
7 and then the Creech case, in that it has to do with a
8 missing apparatus --

9 THE COURT: Uh-huh.

10 MR. HORTON: -- I mean --

11 THE COURT: The guardrail and a stool top. I
12 mean, here we've got a roof. And roofs are steep
13 sometimes, and sometimes if it's raining, roofs are
14 slippery. Roofs are slippery.

15 MR. HORTON: The -- I -- if you -- your Honor
16 is inclined to make a distinction, the Plaintiff -- the
17 Defendant testifies, when it was dry, it was perfectly
18 safe. That the -- that the foliage up there acts as an
19 adhesive. However, if it's wet, it's like ice. I mean,
20 so it's a -- it's a yes or no. You know, sometimes it's
21 safe, sometimes it's not. The distinction you can make
22 to this case is, just as though you can make -- make
23 with the missing apparatus -- guardrail -- and the stool
24 in Creech, and -- I -- I forget the other -- Callander.

25 But, your Honor, the -- the Defendant is

1 arguing with -- in terms of the conversation that
2 -- that Mr. Haina and Jay Stever had in terms of whether
3 or not the Defendant should have reasonably anticipated
4 Mr. Haina going up there, and, again, we spent a lot of
5 time talking about this. You know, I want to read to
6 you the deposition testimony when Mr. Stever was asked
7 about this, just -- and it's long. -- but just so you
8 can see basically kind of how unbelievable this is, and
9 I'm surprised that -- either way.

10 And this is page 13 of Mr. Stever's deposition:

11 Okay. Did you ask him to fix it that
12 morning?

13 THE COURT: Slow down just a little bit for me.

14 MR. HORTON: I'm inclined to do --

15 THE COURT: That's okay. Everybody does it.

16 Everybody does it.

17 MR. HORTON: Okay. Did you ask him to fix it
18 that morning?

19 Answer: No.

20 All right. When you discussed it with
21 him, did you believe that he was going to do it
22 that morning?

23 No.

24 Okay. Did you believe he was going to do
25 that at a later time?

1 Answer: Yes.

2 Question: Okay. And why did you believe
3 that?

4 And then this is -- Mr. Stever explaining why
5 he thought that Mr. Haina wasn't going to go up and fix
6 it right when he was asked to fix it.

7 Well, I've had experience with Yossi,
8 Mr. Haina, and, you know, generally, he will do
9 what he says he will do, you know. The reason
10 he hadn't -- you have to understand that this
11 was August, and during the winter season, he had
12 done extensive work on Daniel's --

13 Which is a restaurant in that center.

14 -- but once the season -- they finish up
15 a lot of work, and once the season -- the tourist
16 season starts, everybody shuts down their
17 construction work and gets ready for the season. So
18 I had not seen him very often at the Beach Market
19 because he had finished the primary work he was down
20 there for. But on a couple of occasions I ran
21 into him, when he would be down there, with his
22 wife having dinner, and I would say, you know -- I
23 might say, you know, they still have the roof
24 in -- because I didn't -- it was like I was
25 nagging him or anything -- it wasn't like I

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1 nagging him or anything like that. It's just I
2 didn't have the opportunity to talk to him very
3 often.

4 And I -- and I -- I go on.

5 Question: --

6 THE COURT: Okay. Right -- read me something
7 that has something to do with the Motion for Summary
8 Judgment.

9 MR. HORTON: All right. What I'm getting
10 to is that Mr. Stever says that he -- that he didn't
11 reasonably anticipate that Yossi would go up there.
12 He says: I didn't. But when I questioned him and
13 follow-up on that, and why he would believe that, he
14 can't give anything that resembles a straight answer.

15 So the -- if the -- which is difficult for me
16 to understand how summary judgment could be based on --
17 on the fact that the Defendant can't -- can't tell you
18 why he didn't think that Mr. Haina was going up on the
19 roof after he was asked to go up on the roof.

20 THE COURT: Okay. Well, and from reviewing
21 Judge Mullen's Order and reviewing the cases,
22 specifically Peterson, Creech, and the Charleston
23 Doughnut case, I think y'all are getting hung up on
24 that we-don't-know-when-he's-going-up-on-the-roof
25 issue, and the issue really is, was it an open and

1 obvious condition? And I can't find any true basis to
2 distinguish it from Peterson v. Porter. You know, the
3 slick roof when it's raining. I mean, the cases are
4 legion about rainy floors at the grocery stores and what
5 happens with that kind of situation.

6 I'm going to deny the Motion to Reconsider.
7 And I'll just do a Form 4 Order if that's what you would
8 like, unless you need something else.

9 MR. TILLER: I think a Form 4 would be fine,
10 Judge, given what we've briefed already --

11 THE COURT: Okay.

12 MR. TILLER: -- and -- and in anticipation of
13 this hearing.

14 THE COURT: All right.

15 MR. HORTON: I agree.

16 MR. TILLER: Thank you, your Honor.

17 THE COURT: Sure.

18 (The hearing of this cause concluded at
19 11:29 a.m., on November 5, 2012.)

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22

23

24

25

1 TILLER - HAINA (DIRECT EXAMINATION) 14
2 A Yeah, before the fall, yeah.
3 Q Other than the renovation that you're
4 doing now over in Beaufort, tell me where you've
5 worked since this fall.
6 A I'm doing small jobs. I mean, not big
7 jobs, just small fixing up here, fixing up there
8 for customer, you know.
9 Q Okay. And has that been pretty --
10 A Painting and -- you know, painting,
11 fixing, drywall, you know.
12 Q Has that been pretty steady?
13 A Yeah, I mean, trying to.
14 Q Are you currently doing any work for
15 any of the tenants at Beach Market?
16 A Currently, no, no.
17 Q Now, going back in time, how long had
18 you been doing handyman-type work around the
19 Beach Market complex?
20 A Again?
21 Q I'm sorry?
22 A What's the question again?
23 Q How long did you do odd jobs and
24 handyman work --
25 A For Beach Market?

1 TILLER - HAINA (DIRECT EXAMINATION)

15

2 Q -- at Beach Market?

3 A I did a lot of them. I mean, fixing
4 the deck over there, fixing electrical. I did
5 other stuff.

6 Q Okay. And would you do different work
7 for different tenants?

8 A For different people, yeah.

9 Q Right. I understand you did a bunch of
10 work for Aviv?

11 A Yes, I did the restaurant over there.
12 It's Daniel's which is the restaurant I did over
13 there.

14 Q All right. And have you done work for
15 other tenants there?

16 A Yeah, I did a bar over there. I built
17 a small bar over there for one of the
18 restaurant, and I fixing small stuff over here
19 and over there, you know, for people.

20 Q I'm not trying to offend you. I ask
21 everybody these questions. Do you have any sort
22 of criminal record?

23 A No.

24 Q Ever been treated for any drug or
25 alcohol abuse?

1 TILLER - HAINA (DIRECT EXAMINATION)

16

2 A No.

3 Q Okay. Let's talk a little bit about
4 August 17th of 2010. Is that the day of this
5 accident?

6 A Yes.

7 Q Okay. And from what I understand, you
8 had gone there early that morning?

9 A Yes.

10 Q What time of morning?

11 A Probably it was -- probably at three
12 o'clock in the morning.

13 Q Okay. And I don't -- you're going to
14 have to tell me, but I understood you were
15 drilling some holes --

16 A Yes, in the concrete. It's concrete,
17 it's like 12 inches deep, you know, so it takes
18 time to drill it.

19 Q Okay. And what was the purpose of
20 drilling the holes in the concrete?

21 A They have a lot of -- when it's
22 raining, it's the water stay in the area over
23 there, so we do drain over there so the water
24 doesn't stay in the concrete.

25 Q Okay. And who were you doing that work

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1 TILLER -- HAINA (DIRECT EXAMINATION)

17

2 for?

3 A For Aviv.

4 Q Okay. And so I haven't, myself, been
5 there. Is the place where you were drilling the
6 holes in the concrete near the Daniel's
7 restaurant?

8 A Yes.

9 Q Okay. And at what time did you
10 complete that work?

11 A Probably it was pretty much eight
12 o'clock, something around, you know.

13 Q Okay. And was Aviv there when you were
14 doing the work?

15 A No.

16 Q Okay. Was anyone there when you were
17 doing that work?

18 A The drilling --

19 Q Right.

20 A -- no. The reason I go over there,
21 because I cannot do it in the morning because it
22 make a lot of noise and, you know, there are
23 people, so.

24 Q Okay. And were you working by yourself
25 that day?

1 TILLER - HAINA (DIRECT EXAMINATION)

18.

2 A Yes.

3 Q Okay. So if you finished doing the
4 drilling about eight 'o'clock, what did you do
5 next?

6 A Jay came over there, I think, about
7 8:00 and saw me over there, and then I show him,
8 you know, the walk and he then told me to fix
9 the roof after that.

10 Q Okay. You showed him the walk; you
11 mean --

12 A The drill, all the holes over there
13 that I did.

14 Q Okay. So you showed him the holes you
15 drilled?

16 A Yeah.

17 Q And then what was the rest of the
18 conversation?

19 A And I saw Jay and he told me, I mean,
20 if I can fix the leak in the roof. I said yes.
21 So I go to Grayco, you know, get the few stuff
22 and come back and got the ladder over there and
23 climb --

24 Q We'll get to that. Now, had you done
25 work on that roof before that day?

1 TILLER - HAINA (DIRECT EXAMINATION)

19

2 A Yes.

3 Q Okay. And you had done some work
4 around the skylight?

5 A Skylight?

6 Q Well, tell me, what had you done on
7 that roof before?

8 A There was another leaking over there I
9 fix before, and one day I clean all the window
10 over there for the other -- Jay asked me to
11 clean the window along the building over there,
12 one of the building.

13 Q Okay. And at some point after you did
14 that initial work, did he tell you that it was
15 still leaking?

16 A I don't remember.

17 Q Okay. He may or may not have?

18 A I don't remember, to be honest with
19 you.

20 Q Okay. So after he asked you about
21 fixing the leak, you said you went to Grayco?

22 A Yeah, to pick up a few stuff, yeah.

23 Q To get some supplies?

24 A Yes.

25 Q Okay. And what time did you get back

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1 TILLER - HAINA (DIRECT EXAMINATION)

20

2 to the Beach Market premises?

3 A I don't remember what time. I didn't
4 look at the time, you know, what time --

5 Q Was it still morning?

6 A Yes, definitely.

7 Q Okay. And tell me what you did when
8 you got back.

9 A I took the ladder over there, climb on
10 the roof.

11 Q Okay. Where was the ladder?

12 A It was underneath the deck over there
13 it's all the time sitting. It belonged to the
14 plaza.

15 Q It belongs to the plaza?

16 A Yes.

17 Q Okay. And you had used that ladder
18 before?

19 A Yes.

20 Q Okay. Since I'm not familiar with it,
21 tell me how far you have to take the ladder from
22 the deck to the building where you were going to
23 to do the roof work.

24 A It's not that far. I mean, just 20
25 feet, maybe, I mean, maybe.

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1 TILLER - HAINA (DIRECT EXAMINATION)

21

2 Q Okay. So you set the ladder up. Was
3 anybody there with you?

4 A No.

5 Q Okay. Tell me what happened next.

6 A Climbed to the roof. I go see where
7 the leak exactly.

8 Q Okay. How far up on the roof was the
9 leak?

10 A Maybe 10 foot, maybe, maybe.
11 Something, I guess. It's hard for me, you know,
12 to exactly --

13 Q What was the weather like that day?

14 A It was sunny. Like regular day, you
15 know, sunny.

16 Q Okay. Hot?

17 A Probably, yeah. Probably, yeah,
18 because I was still in shorts over there, yeah,
19 so it have to be hot.

20 Q All right. And what sort of footwear
21 did you have on?

22 A My regular shoes, my sneakers.

23 Q Okay. So you had like tennis shoes or
24 sneakers on?

25 A Yeah, my shoes all the time I'm

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1 TILLER - HAINA (DIRECT EXAMINATION)

22

2 wearing.

3 Q So you got up on the roof and you
4 looked at the leak?

5 A Well, I look in the place that, you
6 know, he's talking about, and I came down and my
7 ladder slide over there and I fell.

8 Q Okay. Had you already done the work
9 yet?

10 A Not yet, no.

11 Q So the first time you went up there you
12 were basically --

13 A To see -- yeah, to see --

14 Q -- diagnosing the problem?

15 A Yes..

16 Q Okay. So was it your intent to come
17 down to get your supplies to go back up?

18 A Yes.

19 Q Okay. So you were on the roof and you
20 came back down and you got on the ladder --

21 A And the ladder slide and I fell, and I
22 tried to grab the gutter over there but I
23 couldn't.

24 Q There's a gutter on there?

25 A Yes.

1 TILLER - HAINA (DIRECT EXAMINATION)

23

2 Q Okay. So you were at the top of the
3 ladder?

4 A Yes.

5 Q Did you have the ladder tied off in any
6 way?

7 A No.

8 Q But it's your feeling that the feet on
9 the ladder which were on the concrete slipped?

10 A Probably, yeah.

11 Q Okay. Did anybody see you fall?

12 A After I fell, I know -- I remember
13 Kevin wife, one of the chef over there, she saw
14 me over there on the floor.

15 Q You were already down?

16 A Yeah.

17 Q Okay. Was that the chef -- the chef's
18 wife from Daniel's?

19 A Yes.

20 Q Okay. So nobody was present when you
21 fell?

22 A No. She saw me on the floor over
23 there; that's all I remember.

24 Q Okay. And did anyone from Beach Market
25 tell you how to fix the leak?

1 TILLER - HAINA (DIRECT EXAMINATION)

24

2 A No.

3 Q That was your job?

4 A I mean, he told me to do it, yeah.

5 Q But you're the one who would know how
6 to fix it as opposed to Jay or someone else from
7 Beach Market?

8 A Yeah.

9 Q Okay. You weren't being supervised by
10 anybody?

11 A No.

12 Q You weren't being directed by anybody?

13 A No.

14 Q Okay. Who was the first person to come
15 to your assistance, the chef's wife?

16 A She saw me, I remember that, yeah.

17 Q Okay. And did she come to your side?

18 A She come and -- I remember she came and
19 I asked her to help me to get up, but, no, she
20 called Kevin, it's the guy over there -- the
21 chef, I mean. And he come, helped me to get up,
22 you know.

23 Q Okay. And do you know who called the
24 emergency personnel?

25 A I believe -- I have no idea. I have no

1 TILLER - HAINA (DIRECT EXAMINATION)

26

2 A By Jay.

3 Q Okay. Tell me what all you injured in
4 the fall.

5 A I cut my head over there. I have the
6 tendon over there, I cut it both in my hand --

7 Q A tendon?

8 A Not tendon. The other plate over
9 there, I mean, I broke my hand over that. I
10 fractured my hip. I broke my nose.

11 Q How long were you in the hospital?

12 A I think it was a week, I think. I'm
13 not sure. A week or five days; I don't
14 remember.

15 Q Did you tell the EMS people how you
16 fell?

17 A I don't remember. It happened so fast,
18 everything with the -- you know.

19 Q Did anyone from Beach Market come to
20 the hospital while you were in the hospital?

21 A I think some of my friend came over
22 there the same day.

23 Q And who was that; Aviv?

24 A Aviv, Kafil, Monty (ph), I mean --

25 Q Who was the second person?

1 HORTON - STEVER (DIRECT EXAMINATION) 7
2 A No, Houston, Texas.
3 Q Okay. Is that where you're originally
4 from?
5 A No, Illinois.
6 Q All right. Besides for your wife, do
7 you have any family in Beaufort County?
8 A No..
9 Q All right.
10 A Wait, I'll correct that. I have a
11 nephew that lives here, Mark Stever.
12 Q Mark Stever?
13 A Yeah.
14 Q Okay. And where does he live?
15 A It's Pinckney Colony Road. It's off
16 Island.
17 Q Is that Hardeeville or Bluffton?
18 A I think it's Bluffton.
19 Q Right there on the line?
20 A Yeah, it's right there.
21 Q All right. How long have you been
22 involved with Beach Market, L.L.C.?
23 A We purchased the facility in September
24 '99.
25 Q When you say "we", could you name your

partners in this venture?

A Bruce Campbell, half owner in the facility.

Q Okay. Has there been any other partners in this venture since 1999?

A No.

Q All right. And just on the record, what is the Beach Market, L.L.C., what do y'all do?

A It's a multi-retail commercial center, if you will.

Q How many tenants are in this commercial center?

A Seven.

Q Beach Market, L.L.C., is that a member-managed L.L.C. or is it a manager-managed L.L.C.?

A Manager-managed.

Q All right. Does Beach Market, L.L.C. have any employees?

A No.

Q All right. Who does Beach Market, L.L.C. use for accounting services?

A A guy named Ed Rowland, but he just

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1 HORTON - STEVER (DIRECT EXAMINATION)

10

2 MR. HORTON: That's fine.

3 BY MR. HORTON:

4 Q All right. On August 17, 2010, were
5 you on the premises of Beach Market?

6 A Yes.

7 Q Okay. What were you doing there?

8 A I normally get down there early in the
9 morning, every morning, generally, check things
10 out, pick up, do routine maintenance, things
11 like that.

12 Q Okay. What time do you usually get
13 there?

14 A It will vary, but anywhere from 6:00 to
15 7:30.

16 Q Okay. And was that approximately the
17 time that you arrived that morning?

18 A Probably around 7:00.

19 Q Okay. And are you generally there
20 every morning?

21 A Yes.

22 Q Do you work any other jobs besides for
23 your involvement with --

24 A No.

25 Q Okay. So Beach Market is what you do?

1 HORTON - STEVER (DIRECT EXAMINATION)

11

2 A Well, I own other commercial
3 facilities.

4 Q Do you own any commercial facilities in
5 the area, in Beaufort County?

6 A Yes.

7 Q Which ones?

8 A The Arrow Center, 130 Arrow Road, and
9 10 Office Way which is --

10 Q That's the 10 Office Way right there by
11 the Sea Pines Circle?

12 A Yes.

13 Q All right. Do you remember what the
14 weather was August 17th?

15 A Yes.

16 Q Can you tell me?

17 A It had rained the night before lightly,
18 and it was cleared up by the morning.

19 Q When you arrived on August 17th, who
20 all was present at the facilities?

21 A Well, Yossi was there early in the
22 morning. When he arrived, I do not know but it
23 was extremely early because he was drilling,
24 core drilling the slabs in the plaza. By the
25 time I got there, he was still working. I went

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1 HORTON - STEVER (DIRECT EXAMINATION)

12

2 about my normal routine and came back later and
3 and he was gone, and so I went downstairs in the
4 garage area, did some more work and came back up
5 after that, and that's shortly within probably a
6 minute or two, two minutes of when he fell.

7 Q Did you have any conversation with him
8 that morning at all?

9 A Yes.

10 Q Okay. What did y'all speak of?

11 A Well, he was working on the core and it
12 was extensive work, like he said. He had a
13 special machine doing it.

14 Q Okay. Did y'all have any conversations
15 about the roof in question here?

16 A Yossi had repaired the roof vent; it
17 was a plumbing vent that sticks through the roof
18 and it had been leaking.

19 Q You're going to have to tell me what a
20 plumbing vent is because I don't know.

21 A Well, a vent that goes through the roof
22 is primarily there to relieve the air that's in
23 the plumbing system so the water flows properly,
24 okay?

25 Q All right.

A And these things usually extend through the roof line and they're either a 3-inch or a 4-inch PVC pipe, and there is a rubber boot and a flange system that sits over the PVC pipe that keeps the water out, and you tie it into the roof so the water doesn't penetrate the roof system. And Yossi had repaired that two, three months prior, he replaced part it and caulked it and so forth. And shortly thereafter with rain we had learned that it was still leaking; it wasn't near as bad as it was before but it was still leaking. And on several locations I mentioned to him that the vent was still leaking, and he said when he had time he would get up there and recaulk it primarily.

Q Okay. That morning did you discuss the plumbing vents with Yossi?

A Yes.

Q Okay. Did you ask him to fix it that morning?

A No.

Q All right. When you discussed it with him, did you believe that he was going to do it that morning?

1 HORTON - STEVER (DIRECT EXAMINATION)

14

2 A No.

3 Q Okay. Did you believe he was going to
4 do it at a later time?

5 A Yes.

6 Q Okay. And why do you believe that?

7 A Well, I've had experience with Yossi,
8 you know, and generally he will do what he says
9 he will do, you know. The reason that he
10 hadn't, you have to understand that this was in
11 August, and during the winter season he had done
12 extensive work on Daniel's, but once the
13 season -- they finished up a lot of the work,
14 and once the season, the tourist season, starts,
15 everybody shuts down their construction work and
16 gets ready for the season. So I had not seen
17 him very often at the Beach Market because he
18 had finished the primary work he was down there
19 for. But on a couple occasions I ran into him
20 when he would be down there with his wife having
21 dinner, and I would say -- you know, I might
22 say, you know, they still have the roof in,
23 because I didn't -- it wasn't like I was nagging
24 him or anything like that, it's just that I
25 didn't have an opportunity to talk to him very

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1 HORTON - STEVER (DIRECT EXAMINATION)

15

2 often.

3 Q Okay. Just so I'm 100 percent clear,
4 the reason that he probably didn't do it was
5 because he was very busy because it was the
6 season, or because he wasn't at the plaza very
7 much because he was doing other things?

8 A He was not at the facility very often
9 after he had finished the work from the
10 wintertime.

11 Q All right. And was that reason -- I
12 don't want to put words in your mouth, that
13 reason was because it was the season and there
14 just wasn't that much work to do, it wasn't the
15 busy season for workmen?

16 A Well, it's the nature of the beast that
17 what we do is we actually have -- we don't have
18 definitive rules but we ask people not to do any
19 construction work when the tourist season
20 starts.

21 Q I can guess, but why is that?

22 A Primarily because it interferes with
23 clientele and the customers coming to the plaza;
24 it's disruptive.

25 Q All right. Approximately what time did

1 HORTON - STEVER (DIRECT EXAMINATION)

18

2 morning?

3 A No.

4 Q Okay. Were you surprised to see Yossi
5 there?

6 A No.

7 Q Okay. After your conversation with
8 Yossi around 7:00, 7:30, did you return to the
9 premises to look for Yossi?

10 A I was doing my normal routines down
11 there and so I was in and around the facility,
12 yes.

13 Q Okay. That morning were you concerned
14 that Yossi was going to go up on the roof for
15 any reason?

16 A I would have thought that he would
17 never even have considered it.

18 Q And why is that?

19 A Because if you had any experience with
20 metal roofs, metal roofs, there is -- we have a
21 lot of foliage in and about the Beach Market and
22 therefore there's a film that accumulates on
23 metal roofs. When they are absolutely dry, they
24 act as kind of an abrasive that you can walk on
25 them with no problem, but when it's wet it's

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1 HORTON - STEVER (DIRECT EXAMINATION)

19

2 like walking on ice.

3 Q And were you concerned that the roof
4 was wet that morning?

5 A I knew the roof was wet that morning.

6 Q Okay. Was the pavement wet?

7 A Yes.

8 Q Was it wet from the weather or was it
9 wet from something else?

10 A It was partially wet from the weather,
11 but it was extremely wet from the drilling of
12 the holes. One, was he uses -- there's a water
13 application to the drill bit to keep it from
14 burning up; and, two, is that he had to clean
15 the facility off because of all the debris that
16 gets accumulated from the drilling procedure.

17 Q Okay. Specifically that morning after
18 you had first spoken to Yossi around 7:00 or
19 7:30, did you look for him to tell him not to go
20 on the roof?

21 A No.

22 Q All right. The ladder, are you still
23 in possession of this ladder that we're talking
24 about?

25 A Correct.

1 HORTON - STEVER (DIRECT EXAMINATION) 21

2 about the facility. I was coming back up from
3 -- I was down in the garage area working. I
4 came back up and I would say based on seeing
5 him, I had to get there within two to three
6 minutes of his fall. And Kevin, the cook at
7 Daniel's, his wife was there with -- I guess his
8 son; they were in a carriage. And she did not
9 see him fall but I think she heard him fall.
10 She immediately summoned her husband Kevin. He
11 came out with a bunch of cloths and towels.
12 because he was bleeding profusely from the head,
13 and we had talked to him and tried to determine,
14 you know, what status he was in and Yossi on
15 several occasions said, I'm not going to the
16 hospital. And we started looking at -- he said
17 that he couldn't move his leg because of the
18 pelvic, and we determined that he had something
19 wrong with his left wrist; and at that point
20 Kevin called immediately 911 and that's when it
21 all started.

22 Q Okay. And you've already answered a
23 couple of questions I was going to ask here, but
24 what condition was Yossi in when you found him?

25 A He was dazed. He was conscious but,

1 HORTON - STEVER (DIRECT EXAMINATION)

22

2 you know, the strike to the head had dazed him.
3 That's when we immediately discussed between
4 Kevin and myself, we knew that we weren't going
5 to rely on him to make any decisions, so.

6 Q That's probably a good decision.

7 A Yes.

8 Q Were you there when the paramedics
9 showed up?

10 A Yes.

11 Q Okay. After the paramedics left, when
12 was the next time that you saw Yossi?

13 A I saw him -- and I'm not clear. I
14 either saw him that night or the next night at
15 the hospital, Memorial Hospital.

16 Q Okay. And why did you visit him at the
17 hospital?

18 A To see how he was doing.

19 Q How was he?

20 A You know, he was still in shock a
21 little bit, you know, not like medical shock,
22 but he was still stunned about all of it and
23 they were still in the process of trying to
24 decide what they were going to do when, and
25 dah-da-dah, and so forth but --

1 A Yes.

2 Q How does she know him?

3 A She knows Nicki, Monique.

4 Q Nicki and Monique are the same person,
5 right?

6 A Right.

7 Q All right. You were present for
8 Yossi's deposition testimony just a few minutes
9 ago, correct?

10 A Correct.

11 Q Okay. And you listened to what he had
12 to say; is that correct?

13 A Correct.

14 Q Okay. Do you disagree with any of the
15 accounts that he talked about?

16 A I didn't disagree with anything he
17 said, other than he was vague about certain
18 facts and I cleared those up in my testimony.

19 Q Okay. So you specifically deny telling
20 him to get up on the roof that morning?

21 A Correct.

22 Q But you do not deny that you discussed
23 with him that the work needed to be done that
24 morning?

1 HORTON - STEVER (DIRECT EXAMINATION)

29

2 A Yes, that it didn't need to be -- it
3 was, again, a reiteration of telling him that we
4 still had a problem with the roof. But I gave
5 him no specific instructions to get up there
6 that day.

7 Q All right. I'm going to ask you some
8 general questions and they are not meant to be
9 offensive. Is Beach Market involved in any
10 other lawsuits?

11 A No.

12 Q Has Beach Market been involved in a
13 lawsuit in the last ten years?

14 A Yes.

15 Q Okay. What lawsuit?

16 A We had a lawsuit against a prior
17 tenant, Hinchey's.

18 Q Is that why Hinchey's moved down the
19 street?

20 A No, his lease was up.

21 Q Okay. Were you the plaintiff in that
22 action?

23 A Yes.

24 Q Was it an eviction action?

25 A No.

2 arriving?

3 A Correct.

4 Q What was the condition of the ladder?

5 A The ladder had come down off of its
6 roof position and it was laying on the ground.

7 Q Okay. And did you have an opportunity
8 to observe the roof line?

9 A Yes.

10 Q And what, if anything, did you observe
11 on the roof itself?

12 A One is you could see the skid marks
13 where he slipped, and two is, is that in his
14 effort to brace himself he had bent the gutter.

15 Q And you believe that was from trying to
16 brace his fall?

17 A Yes.

18 Q I'm going to ask you look at what was
19 marked as Defendant's Exhibit 1 to Mr. Haina's
20 deposition and using the pen that you have
21 beside you there, could you mark on that roof
22 line where you saw what you described as the
23 skid marks?

24 A There was one right in here, and there
25 was another one right in here.

1 TILLER - STEVER (CROSS-EXAMINATION)

35

2 Q Is the area that was to be repaired
3 reflected in Exhibit 1?

4 A No.

5 Q Did you provide Mr. Haina with any
6 instruction or direction whatsoever on the day
7 of this incident?

8 A No.

9 MR. TILLER: Thank you, sir.

10 MR. HORTON: A brief follow-up.

11 REDIRECT EXAMINATION

12 BY MR. HORTON:

13 Q Do you have any -- I know that there's
14 a date on here. Do you have any idea when these
15 photographs were taken?

16 A I would say about a month later.

17 Q Okay. Were there any repairs done to
18 the roof between Yossi's fall and these
19 photographs that were taken?

20 A No.

21 Q So your testimony is that this is
22 basically the condition that it would have been
23 that morning that Yossi had fallen?

24 A Yes, but we did repair the gutter.

25 Q Okay. Do you know who repaired the

2 gutter, do you remember?

3 A No. It may have been me.

4 Q Is there any sort of record that Beach
5 Market would potentially have that would
6 indicate for sure who did it or not?

7 A No.

8 Q Okay. You testified that the plumbing
9 vent that Yossi was going to fix is not
10 indicated in this picture that was marked at
11 Exhibit 1. Where is it on the roof? Let's use
12 the one that actually is going to be an exhibit
13 here.

14 A Okay, the reason he put the ladder here
15 is there's a valley that runs up this way, you
16 know, with this gable here. The valley goes up
17 there and then he probably would have walked
18 along this edge here. This is where the
19 building is at.

20 Q Do you mind just writing on there the
21 edge where you said he would walk on?

22 A Can I --

23 Q Mark it up; go crazy.

24 A So, to me, and because it would be the
25 safest way to go, he would go like that; then he

1 HORTON -- STEVER (REDIRECT EXAMINATION)

37

2 would go like that.

3 Q For the record, you're drawing a line
4 along the roof line there, one arrow that sort
5 of goes from your left and then another arrow
6 that goes to your right; correct? I'm trying to
7 preserve a record so we know what we're talking
8 about later when we read this thing.

9 A See, this is a different angle, but you
10 can see the valley; this is the valley here that
11 forms this gable. See, this valley that goes up
12 there?

13 Q Yeah, I see it.

14 A So that's what he would probably do is
15 walk up there because it would be the safest
16 place to walk up, and he would walk up this
17 surface here to get to the top of the roof,
18 which is here. It's going to hurt the tree
19 here, but it's going to be the vent is on the
20 back side of the roof down probably 5, 6 feet
21 from the peak on the other side of that roof
22 line.

23 Q So we're clear, so you think he would
24 have gone through this valley here and then he
25 would have walked on the roof line here?

1 HORTON -- STEVER (REDIRECT EXAMINATION)

38

2 A Yes, he would have walked up there,
3 walked up there.

4 Q I'm going to write valley right here.
5 And that's accurate where I wrote it; correct?

6 A Yes.

7 Q And the roof line would be here;
8 correct?

9 A Right.

10 Q I'm going to write roof line where you
11 said that.

12 MR. HORTON: And we'll mark this
13 as Plaintiff's Exhibit 1. I think
14 that's all I need from you. Thank you
15 very much.

16 (Whereupon, Plaintiff's Exhibit
17 Number 1 was marked for
18 identification.)

19 (Whereupon, the deposition of
20 Jay Stever was concluded at
21 approximately 11:50 a.m.)

22
23
24
25



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DEFENDANT'S
EXHIBIT
1217 1 CF

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Yossi Haina,

Plaintiff,

v.

Beach Market, LLC

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2011-CP-07-2300

**NOTICE AND MOTION
FOR SUMMARY JUDGMENT**

TO: PLAINTIFF AND HIS ATTORNEY, MARSHALL L. HORTON, ESQUIRE

YOU WILL PLEASE TAKE NOTICE that the Defendant through its undersigned attorneys, will move a time and place to be arranged by Court and counsel involved for an Order granting it summary judgment. This Motion is made pursuant to S.C.R.C.P. 56 on the basis that there is no genuine issue of material fact for trial because Plaintiff cannot prove the Defendant had a duty to instruct or supervise him and any alleged dangerous condition was open and obvious.

This Motion will be supported by applicable law, the arguments of counsel, deposition testimony and other materials the Court may receive.

HAYNSWORTH SINKLER BOYD, P.A.

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Charleston, SC 29402-0340

(843) 722-3366 (Telephone)

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By:

John H. Tiller

Elizabeth F. Bailey

Attorneys for Defendant

December 22, 2011

(MLT)

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

YOSSI HAINA,

Plaintiff,

vs.

BEACH MARKET, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2011-CP-07-2300
)
)
)

) PLAINTIFFS' MEMORANDUM
) IN OPPOSITION TO THE DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
)
)
)
)
)
)

OPY

Introduction

This memorandum is being submitted by Plaintiff Mr. Yossi Haina ("Mr. Haina") in opposition to the Defendant Beach Market LLC's ("Beach Market") Motion for Summary Judgment filed on December 27, 2011. The basis for the Mr. Haina's opposition is that there is sufficient factual evidence to establish negligence on the part of Beach Market. Specifically, the facts establish that Beach Market owed a duty to Mr. Haina and that Beach Market breached that duty.

This action was filed by Mr. Haina on May 26, 2011. Beach Market filed its timely Answer on July 12, 2011. Written discovery has been substantially completed, and depositions of most of the major fact witnesses have been completed. Mediation has not occurred.

The main cause of action being asserted by Mr. Haina is negligence based on a theory of premise liability. The Plaintiff was seriously injured on the premises of Beach Market, and has underwent medical treatment which exceeds \$85,000.00.

Facts

- Mr. Haina makes a living as a handyman and had frequently done miscellaneous work on the premises of Beach Plaza.¹
- Jay Stever ("Mr. Stever"), an owner of Beach Market, occasionally hired Mr. Haina to do various projects.²
- Mr. Haina arrived at the premises of Beach Market on August 17, 2010 at or around 3:00 a.m. for the purposes of drilling holes in the concrete sidewalks of the premise of Beach Market.³
- Mr. Stever was at the premises of Beach Market that morning.⁴
- After Mr. Haina was finished drilling holes in the concrete, Mr. Stever asked Mr. Haina to fix a leak in the roof.⁵
- According to Mr. Stever, when the metal roof was dry, it acted as a kind of abrasive and there was no problem walking on it. When it was wet, it was like walking on ice because of a film that was caused by foliage.⁶
- Due to Mr. Haina's personality and his prior military service, Mr. Stever should have known that Mr. Haina was going to fix the roof directly after Mr. Stever asked him to.⁷
- Mr. Stever did not warn Mr. Haina of the condition of the roof, nor did he instruct Mr. Haina to wait until the roof was no longer wet to perform his duties.

¹ Deposition of Yossi Haina, pg. 15, lines 1-18

² Deposition of Jay Stever, pg. 7, lines 20-22

³ Deposition of Yossi Haina, pg. 16, lines 3-16

⁴ Deposition of Jay Stever, pg. 10, lines 4-6

⁵ Deposition of Yossi Haina, pg. 18, lines 6-23; Pg. 24, lines 4-7; Deposition of Jay Stever, pg. 13, lines 14-22

⁶ Deposition of Jay Stever, pg. 18, lines 19-25; pg. 19, lines 1-5.

⁷ Deposition of Yossi Haina, pg. 40, lines 11-13.

- Mr. Haina made preparations that morning to fix the roof by first going to Grayco to get materials, and then retrieved a ladder located on the premises of Beach Plaza.⁸
- There was no rain on that day.⁹ The sidewalk was wet underneath the roof where Mr. Haina would have to put the ladder on account of water used by Mr. Haina to work the drilling machinery.¹⁰
- Mr. Stever had full knowledge that the sidewalk was wet on the morning of August 17th.¹¹
- Mr. Stever had full knowledge that the roof was very slippery because of it being wet and because of the film left by the foliage that accumulates on the metal roof.¹²
- Mr. Stever had full knowledge of the exact route that Mr. Haina was going to take to access the roof, and testified regarding the exact route that Mr. Haina must take in order to reach the location on the roof that needed to be repaired.¹³
- Mr. Haina testified that the ladder slipped on the wet concrete when he was coming off the roof.¹⁴
- Mr. Stever testified that Yossi was on the metal roof when he slipped because there were skid marks actually on the roof and the gutter was bent.¹⁵
- Mr. Haina suffered a head injury after the fall and was dazed immediately after the fall.¹⁶

⁸ Deposition of Yossi Haina, pg. 18, lines 17-23, Pg. 11-23.

⁹ Deposition of Yossi Haina, pg. 21, lines 13-19

¹⁰ Deposition of Jay Stever, pg. 19, lines 8-16

¹¹ Deposition of Jay Stever, pg. 19, lines 6-16

¹² Deposition of Jay Stever, pg. 18, lines 19-25, pg. 19, lines 1-5

¹³ Deposition of Jay Stever, pgs. 36-38

¹⁴ Deposition of Yossi Haina, pg. 33, lines 7-21

¹⁵ Deposition of Jay Stever, pg. 34, lines 10-15

¹⁶ Deposition of Jay Stever, pg. 21, lines 22-25; pg. 22, lines 1-5

- There were no witnesses to Mr. Haina's fall.¹⁷
- Mr. Haina suffered great injury as a result of this fall.¹⁸

Legal Analysis

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *City of Columbia v. American Civil Liberties Union, etc., et al.*, 323 S.C. 384 (1996). See Rule 56, SCRPC. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Id.*; *Manning v. Quinn*, 294 S.C. 383 (1988). 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 in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-331 (2009).

I. BEACH PLAZA IS LIABLE FOR MR. HAINA'S INJURIES BECAUSE OF BEACH PLAZA'S NEGLIGENCE

The following sections address Beach Plaza's negligence. (A) Beach Plaza owed Mr. Haina a duty of care by virtue of Mr. Haina's status as a business invitee. (B) Beach Plaza breached this duty of care. (C) Mr. Haina's damages were caused by Beach Plaza's breach of their duty.

A. Beach Plaza owed Mr. Haina a duty of care by virtue of Mr. Haina's status as a business invitee.

Beach Plaza owed Mr. Haina a duty of care by virtue of Mr. Haina's status as a business invitee. A property owner owes an invitee or business visitor the duty of

¹⁷ Deposition of Yossi Haina, pg. 23, lines 20-23

¹⁸ This fact appears uncontested at this time.

exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. *Peterson v. Porter*, 389 S.C. 148, 153 (Ct. App. 2010), citing *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, (Ct.App.2004). 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. *Id.* 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. *Id.* In the event that a defect is considered open and obvious, a property owner is liable for injuries to an invitee if the owner should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted. *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123 (1991). A latent defect is one which an owner should have, or has, knowledge of, and which an invitee is reasonably unaware, and is one that careful inspection will not reveal. *Meadows v. Heritage Village Church and Missionary Fellowship, Inc.*, 305 S.C. 375 (1991),

An excellent example of the application of this duty is found in *Meadows*. In this case, the Plaintiff slipped and was injured on wet grass on the premises of a hotel. The Plaintiff had the choice of a paved driveway or a sidewalk, but chose to use the grass path. The S.C. Supreme Court first decided that the grass was not a latent (or hidden) condition because wet grass is a natural condition that is obviously slippery. Next the Court decided that the grass was an open and obvious condition. Applying the rules that apply to open and obvious conditions, the Court inquired as to whether the Defendant could anticipate the harm that the wet grass could cause to the Plaintiff. The Court found that the Defendant could not reasonably foresee that the Plaintiff would cross the wet

grass as opposed to the paved walkways, thus the Defendant was not liable. *Id.* at S.C. 377-378.

An interesting example that the Defendants rely on in their seeking summary judgment is *Peterson, infra*. In *Peterson*, the Plaintiff was a workman who fell off the roof of a residential structure. The S.C. Appellate Court determined that the condition of the roof was an open and obvious condition; however, the Defendant could not anticipate the harm that the roof could cause the Plaintiff because there was no evidence presented that that the Defendants had any reason to anticipate that anyone would fall from the roof. Interesting, and slightly confusing, the Court also found that there was no evidence of any defect or dangerous condition on the Defendants' property, which raises the question as to whether it was necessary for the Court to continue the inquiry to apply the rules of latent defect or open and obvious condition. *Id.* at 153.

An example of the Courts finding facts that comply with the "anticipated harm" exception to the open and obvious rule was *Creech v. South Carolina Wildlife and Marine Resources Dept.*, 328 S.C. 24 (1997). In *Creech*, a Plaintiff fell off a public dock because railing was only located on part of the dock. The S.C. Supreme Court does not address whether this was a latent condition, but finds that the lack of railing on the dock was an open and obvious condition. Next, the Court determines whether the Defendant should have "anticipate[d] the harm despite such knowledge or obviousness." The Court found that there was "ample evidence that the [Defendant] had been warned the lack of safety rails could present danger to people fishing from the dock..." thus found that the Plaintiff was not barred from recovering on the basis of the open and obvious rule. *Id.* at 32-33.

B. Beach Plaza breached the duty owed to Mr. Haina.

i. In the event that the Court finds that the condition of the pavement and the roof was open and obvious, Beach Market should have anticipated the resulting harm.

Mr. Haina's injuries were caused by the condition of the metal roof and pavement. The metal roof was slippery on account of the weather and the film left by the foliage. The pavement was wet because of the water left over from the pavement work and/or the weather.

Mr. Haina was told by Mr. Stever, an owner of Beach Market, to perform work that would cause Mr. Haina to be on the roof that morning. Mr. Stever was fully aware of the condition of the premises, and testified that he knew it was dangerous. Furthermore, Mr. Stever testified that he knew the exact route that Mr. Haina would take in order to reach the spot on the roof that needed work.

Mr. Stever did not warn Mr. Haina of any dangers regarding the premises.

These facts establish that Beach market should have anticipated the harm suffered by Mr. Haina on account of his being on a ladder resting on wet pavement and a slippery roof. Thus, Beach Market breached their duty owed to Mr. Haina despite the open and obvious condition of the premises.

ii. The facts of this case are sufficient to find that the condition of the roof was a latent defect.

Mr. Stever testified that the roof became slippery when it was wet because of a film left by foliage in and around Beach Market. He testified that this film left the roof as slippery as ice. There is evidence that suggests that the slippery roof contributed to Mr. Haina's fall.

Mr. Stever did not warn Mr. Haina of any dangers regarding the slippery roof. It is unclear that a reasonable inspection of the premises would have discovered this condition, and there is no evidence that Mr. Haina had any knowledge of this condition.

This fact, in a light most favorable to the Plaintiff, establishes that the roof had a latent defect and that Beach Market should be held liable for the harm it caused Mr. Haina.

C. Mr. Haina's damages were caused by Beach Plaza's breach of their duty.

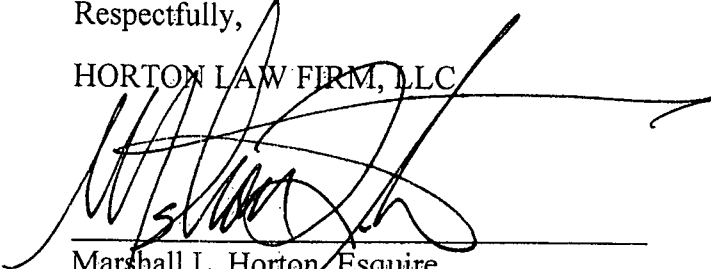
It does not appear to be contested in this motion that Mr. Haina's injuries were caused by his fall from the roof of Beach Plaza. As Beach Plaza owed a duty to Mr. Haina, and that duty was breached, Beach Plaza should be liable to Mr. Haina for all legally recoverable damages that resulted from this breach of duty.

Conclusion

For the reasons stated above, the Plaintiffs request that the Defendant's motion for summary judgment be denied.

Respectfully,

HORTON LAW FIRM, LLC



Marshall L. Horton, Esquire

Lindsay E. Yoas, Esquire

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Post Office Box 3766

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(843) 757-6190

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ATTORNEYS FOR THE PLAINTIFF

Bluffton, South Carolina
This 27th day of March, 2012

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Yossi Haina,

Case No.: 2011-CP-07-2300

Plaintiff,

v.

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Beach Market, LLC,

Defendant.

Defendant Beach Market, LLC submits this Memorandum of Law in support of its Motion for Summary Judgment on the grounds that there is no genuine issue of material fact for trial because Plaintiff cannot prove Beach Market had a duty to instruct or supervise him and any alleged dangerous condition was open and obvious. Therefore, Beach Market, LLC is entitled to judgment as a matter of law.

STATEMENT OF FACTS

On August 17, 2010, Plaintiff was performing maintenance work at Beach Market. He is a handyman for his company Yossi Renovation, which performed many projects for Beach Market tenants. *See* Plaintiff's deposition at pp. 11, 15. On the morning of his fall, Plaintiff began work in front of tenant Daniels restaurant at 3:00 a.m. and finished around 8:00 a.m. *See* Plaintiff's deposition at pp. 16-17. Prior to the date of the accident, Plaintiff had performed work on the roof vent but it was still leaking. *See* Plaintiff's deposition at p. 19; Jay Stever's deposition at pp. 12, 13. Jay Stever, owner of Beach Market, asked Plaintiff to repair the leak. *See* Plaintiff's deposition at p. 19. He gave no specific instruction to Plaintiff as to how or when

to repair the leak. Plaintiff climbed the ladder to the roof, looked at the leak and came back to the ladder. *See* Plaintiff's deposition at p. 22. Plaintiff claims he put one foot on the ladder but it slipped causing him to fall. *See* Plaintiff's deposition at pp. 22, 35. Plaintiff agrees that the ladder was not defective but he slipped. *See* Plaintiff's deposition at pp. 29, 33.

Beach Market is a commercial center on Hilton Head Island with seven tenants. *See* Jay Stever's deposition at p. 8. Plaintiff admits that no Beach Market employee directed or supervised his work on the date of his fall. *See* Plaintiff's deposition at pp. 23-24, 40-41. Beach Market owner Jay Stever did not demand that Plaintiff go on the ladder or repair the leak the morning of the accident. *See* Jay Stever's deposition at pp. 13-15, 28, 34-35.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), S.C.R.C.P. Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact; however, the moving party need not support its motion with affidavits or other similar materials negating the opponent's claims but must clearly establish by the record the absence of a triable issue of fact. *Baughman v. American Tel & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party's case. *Id.*

After the moving party has met his initial burden, Rule 56(e) of the South Carolina Rules of Civil Procedure requires the opposing party to "do more than simply show that there is some

metaphysical doubt as to the material facts." *Id.* In response to a properly supported motion for summary judgment, the opposing party "must come forward with specific facts showing there is a genuine issue of material fact." *Id.* Thus, "the non-moving party may not rest on the mere allegations or denial of pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact." *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E. 2d 659, 661 (Ct. App. 1994) (quoting *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C.311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993); Rule 56(c), S.C. R. Civ. P.

ANALYSIS

In order to assert negligence against Beach Market, Plaintiff must prove that Beach Market owed him a duty, it breached that duty, and the damages proximately resulted from the breach. *Bloom v. Ravoir*, 339 S.C. 417, 529 S.E.2d 710 (2000). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Doe v. Batson*, 345 S.C. 316, 322-23, 548 S.E.2d 854, 857 (2001). "A legal duty is that which the law requires to be done or forbore with respect to a particular individual or the public at large. Without a violation of such a legal duty, there is no negligence." *Byerly v. Connor*, 301 S.C. 441, 443 415 S.E.2d 796, 798 (1992).

Beach Market did not owe Plaintiff duty of care because the roof was an open and obvious condition

The current action is a premises liability case. Here, Plaintiff is a business visitor, which is an invitee whose purpose for being on the property is directly or indirectly connected with business dealings with the owner. *Sims v. Giles*, 343 S.C. 708, 717-718 (Ct. App. 2001); *see also Parker v. Stevenson Oil Co.*, 245 S.C. 275 (1965) (explaining the term "invitee" in premises liability cases usually means the same thing as a business visitor and refers to one who enters

upon the premises of another at the express or implied invitation of the occupant, especially when he is there about a matter of mutual interest or advantage); *Hoover v. Broome*, 324 S.C. 531, 535, 479 S.E.2d 62, 65 (Ct. App. 1996) ("Business visitors are considered invitees as long as their purpose for entering the property is either directly or indirectly connected with the purpose for which the property owner uses the land")

Beach Market owes to Plaintiff, as a business visitor, "the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Sims*, 343 S.C. 708 at p. 718. Beach Market has a duty to warn Plaintiff as an invitee only 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 (Ct. App. 2009) (citing *Miller v. City of Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994) (stating negligence is mixed question of law and fact with existence and scope of duty being questions of law and breach of duty being a question for the jury)).

In *Meadows v. Heritage Village Church*, 305 S.C. 375, 409 S.E.2d 349 (1991), the plaintiff brought a negligence action against the defendant because of injuries she sustained when she slipped on some wet grass while walking to her hotel. The Supreme Court held that because the plaintiff had other options -- for example, she could have moved her car closer to the hotel rather than walk across the wet grass or she could have taken other paths provided by the defendant -- she had not shown that defendant could reasonably have foreseen that she would choose to try to cross the wet grass instead of using one of the other ways back to the hotel. *Id.* at

351. The wet grass constituted an open and obvious danger rather than a latent or concealed one, therefore, the defendant was not liable. *Id.*

Recently, the South Carolina Court of Appeals decided a case with similar facts. *Peterson v. Porter*, 389 SC 148, 697 SE2d 656 (Ct. App. 2010), cert denied *Peterson v. Porter*, 2011 S.C. LEXIS 297 (Sept. 8, 2011). In *Peterson*, the plaintiff performed occasional odd jobs for the defendants around their home. The plaintiff would contact the defendants whenever he wanted to do odd jobs and make extra money. He generally worked once a month. On a particular date, the plaintiff was pressure washing the defendants' home. The defendants supplied the Plaintiff with the equipment, including a ladder, but they did not give him specific instructions on how to perform the work nor did they supervise the work. Plaintiff was injured after he fell off the ladder. The circuit court determined that the plaintiff was an invitee, but granted summary judgment because the defendants did not breach any duty owed to him. *Id.* at 151. The Court of Appeals affirmed because the roof's slope was an open and obvious condition. *Id.* at 153. In addition, there was no evidence that the ladder or roof was defective. Furthermore, the defendants did not have a duty to instruct or supervise the plaintiff. Therefore, the defendants' actions did not proximately cause his injuries. *Id.* at 154; see also *Neil v. Byrum*, 288 S.C. 472, 343 S.E.2d 615, 616 (1986) (holding that the icy condition of the landing was easily discoverable to the plaintiff and was not the proximate cause of his injuries.)

As in *Meadows* and *Peterson*, Beach Market owes a duty of reasonable care to Plaintiff to warn of latent defects. There is no evidence to indicate that the ladder or roof were defective. In addition, like the grass in *Meadows* and the roof in *Peterson*, any 'dangerous condition, including the height of the building or whether the roof was slick, would be open and obvious. As in *Peterson*, Plaintiff chose to climb the roof without any direction or supervision of Beach

Market. See Plaintiff's deposition at pp. 23-24, 40-41; Jay Stever's deposition at pp. 13-15, 28, 34-35. Therefore, Beach Market is entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing, the Defendant Beach Market, LLC respectfully requests that the Court issue an Order granting it summary judgment on the ground that there is no genuine issue of material fact for trial.

HAYNSWORTH SINKLER BOYD, P.A.

for By 

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Telephone: 843.722.3366
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Email: jtiller@hsblawfirm.com
bbailey@hsblawfirm.com

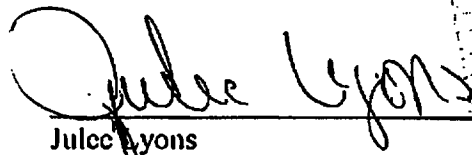
Attorneys for Defendant

March 23, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, Julee Lyons of Haynsworth Sinkler Boyd, P.A., attorneys for the Defendant hereby certify that I have this date mailed via U.S. Mail, postage pre-paid, a copy of the foregoing Memorandum in Support of Motion for Summary Judgment to all counsel of record as follows:

Marshall L. Horton, Esquire
Horton Law Firm, LLC
17 Lawton Street
P.O. Box 3766
Bluffton, SC 29910


Julee Lyons

March 23, 2012
Charleston, South Carolina

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IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

YOSSI HAINA,
Plaintiff,

vs.

CIVIL ACTION NUMBER
2011-CP-07-2300

BEACH MARKET, LLC,
Defendant.

COPY

-----/

The deposition of YOSSI HAINA, a witness
in the above-entitled cause, taken pursuant to
Notice and agreement, before Cathy M. Knoettner,
Certified Court Reporter and Notary Public, at
the Horton Law Firm, 17 Lawton Street, Bluffton,
South Carolina, on the 1st day of December,
2011, commencing at or about the hour of
10:15 a.m.

COASTAL COURT REPORTING & VIDEO SERVICES
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HILTON HEAD - BEAUFORT - SAVANNAH
843-785-7739 - 843-525-9600 - 912-232-6161

1 TILLER - HAINA (DIRECT EXAMINATION)

11

2 A Yes.

3 Q So you're not a citizen?

4 A No.

5 Q Okay. And how long have you had your
6 green card?

7 A A long time ago, like eight years,
8 maybe.

9 Q Okay. So you basically did 12 years of
10 school in Israel?

11 A Yeah.

12 Q Then went in the Army?

13 A Three years, yeah.

14 Q Okay. No education after the school in
15 Israel?

16 A It's because you have to go to the Army
17 right away so, you know, no matter what.

18 Q Okay. What do you call your handyman
19 business?

20 A Yossi Renovation.

21 Q Innovation?

22 A Renovation.

23 Q Renovation?

24 A Yes.

25 Q And what are you currently working on?

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1 TILLER - HAINA (DIRECT EXAMINATION)

15

2 Q -- at Beach Market?

3 A I did a lot of them. I mean, fixing
4 the deck over there, fixing electrical. I did
5 other stuff.

6 Q Okay. And would you do different work
7 for different tenants?

8 A For different people, yeah.

9 Q Right. I understand you did a bunch of
10 work for Aviv?

11 A Yes, I did the restaurant over there.
12 It's Daniel's which is the restaurant I did over
13 there.

14 Q All right. And have you done work for
15 other tenants there?

16 A Yeah, I did a bar over there. I built
17 a small bar over there for one of the
18 restaurant, and I fixing small stuff over here
19 and over there, you know, for people.

20 Q I'm not trying to offend you. I ask
21 everybody these questions. Do you have any sort
22 of criminal record?

23 A No.

24 Q Ever been treated for any drug or
25 alcohol abuse?

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1 TILLER - HAINA (DIRECT EXAMINATION)

16

2 A No.

3 Q Okay. Let's talk a little bit about
4 August 17th of 2010. Is that the day of this
5 accident?

6 A Yes.

7 Q Okay. And from what I understand, you
8 had gone there early that morning?

9 A Yes.

10 Q What time of morning?

11 A Probably it was -- probably at three
12 o'clock in the morning.

13 Q Okay. And I don't -- you're going to
14 have to tell me, but I understood you were
15 drilling some holes --

16 A Yes, in the concrete. It's concrete,
17 it's like 12 inches deep, you know, so it takes
18 time to drill it.

19 Q Okay. And what was the purpose of
20 drilling the holes in the concrete?

21 A They have a lot of -- when it's
22 raining, it's the water stay in the area over
23 there, so we do drain over there so the water
24 doesn't stay in the concrete.

25 Q Okay. And who were you doing that work

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000102

1 TILLER - HAINA (DIRECT EXAMINATION)

17

2 for?

3 A For Aviv.

4 Q Okay. And so I haven't, myself, been
5 there. Is the place where you were drilling the
6 holes in the concrete near the Daniel's
7 restaurant?

8 A Yes.

9 Q Okay. And at what time did you
10 complete that work?

11 A Probably it was pretty much eight
12 o'clock, something around, you know.

13 Q Okay. And was Aviv there when you were
14 doing the work?

15 A No.

16 Q Okay. Was anyone there when you were
17 doing that work?

18 A The drilling --

19 Q Right.

20 A -- no. The reason I go over there,
21 because I cannot do it in the morning because it
22 make a lot of noise and, you know, there are
23 people, so.

24 Q Okay. And were you working by yourself
25 that day?

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1 TILLER - HAINA (DIRECT EXAMINATION)

2 A Yes.

3 Q Okay. And you had done some work
4 around the skylight?

5 A Skylight?

6 Q Well, tell me, what had you done on
7 that roof before.

8 A There was another leaking over there I
9 fix before, and one day I clean all the window
10 over there for the other -- Jay asked me to
11 clean the window along the building over there,
12 one of the building.

13 Q Okay. And at some point after you did
14 that initial work, did he tell you that it was
15 still leaking?

16 A I don't remember.

17 Q Okay. He may or may not have?

18 A I don't remember, to be honest with
19 you.

20 Q Okay. So after he asked you about
21 fixing the leak, you said you went to Grayco?

22 A Yeah, to pick up a few stuff, yeah.

23 Q To get some supplies?

24 A Yes.

25 Q Okay. And what time did you get back

1 TILLER - HAINA (DIRECT EXAMINATION)

2 wearing.

3 Q So you got up on the roof and you
4 looked at the leak?

5 A Well, I look in the place that, you
6 know, he's talking about, and I came down and my
7 ladder slide over there and I fell.

8 Q Okay. Had you already done the work
9 yet?

10 A Not yet, no.

11 Q So the first time you went up there you
12 were basically --

13 A To see -- yeah, to see --

14 Q -- diagnosing the problem?

15 A Yes.

16 Q Okay. So was it your intent to come
17 down to get your supplies to go back up?

18 A Yes.

19 Q Okay. So you were on the roof and you
20 came back down and you got on the ladder --

21 A And the ladder slide and I fell, and I
22 tried to grab the gutter over there but I
23 couldn't.

24 Q There's a gutter on there?

25 A Yes.

1 TILLER - HAINA (DIRECT EXAMINATION)

23

2 Q Okay. So you were at the top of the
3 ladder?

4 A Yes.

5 Q Did you have the ladder tied off in any
6 way?

7 A No.

8 Q But it's your feeling that the feet on
9 the ladder which were on the concrete slipped?

10 A Probably, yeah.

11 Q Okay. Did anybody see you fall?

12 A After I fell, I know -- I remember
13 Kevin wife, one of the chef over there, she saw
14 me over there on the floor.

15 Q You were already down?

16 A Yeah.

17 Q Okay. Was that the chef -- the chef's
18 wife from Daniel's?

19 A Yes.

20 Q Okay. So nobody was present when you
21 fell?

22 A No. She saw me on the floor over
23 there; that's all I remember.

24 Q Okay. And did anyone from Beach Market
25 tell you how to fix the leak?

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1 TILLER - HAINA (DIRECT EXAMINATION)

24

2 A No.

3 Q That was your job?

4 A I mean, he told me to do it, yeah.

5 Q But you're the one who would know how
6 to fix it as opposed to Jay or someone else from
7 Beach Market?

8 A Yeah.

9 Q Okay. You weren't being supervised by
10 anybody?

11 A No.

12 Q You weren't being directed by anybody?

13 A No.

14 Q Okay. Who was the first person to come
15 to your assistance; the chef's wife?

16 A She saw me, I remember that, yeah.

17 Q Okay. And did she come to your side?

18 A She come and -- I remember she came and
19 I asked her to help me to get up, but, no, she
20 called Kevin, it's the guy over there -- the
21 chef, I mean. And he come, helped me to get up,
22 you know.

23 Q Okay. And do you know who called the
24 emergency personnel?

25 A I believe -- I have no idea. I have no

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1 TILLER - HAINA (DIRECT EXAMINATION) 29

2 probably what's happened, you know, exactly, I
3 mean. I mean, what's happened exactly,
4 probably.

5 Q Okay. But you don't remember what may
6 have been said?

7 A No.

8 Q Okay. Was there any problem with the
9 ladder itself? In other words, did it fail in
10 any way or it just slipped?

11 A I think it slipped.

12 Q Okay. And the concrete was dry that
13 day?

14 A Yeah, pretty much, yeah. I don't
15 remember, but it was not rainy over there in the
16 same day pretty much, so.

17 Q Who are Joel and Barbara Beaudry?

18 A It's the other restaurant over there.

19 Q Anglers?

20 A Yes.

21 Q What do they know about your accident?

22 A They know that just I fell, that's it.

23 Q I'm sorry?

24 A They know that I fell over there.

25 Q Okay. And do you recall seeing either

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1 TILLER - HAINA (DIRECT EXAMINATION)

33

2 A I don't think so because by the time I
3 owed all the money for people, you know.

4 Q Who had asked you to do the drilling
5 work on the concrete; Aviv?

6 A It's Aviv, yeah.

7 Q Okay. I'm reading some of these
8 answers that you had given to us to some of
9 these written questions. When we'd asked about
10 the detail about how the fall had happened, it
11 says, Mr. Haina fell approximately 15 feet on
12 the hard concrete when the ladder slipped on the
13 wet concrete while he was climbing to access the
14 roof. You'd actually been on the roof, though?

15 A Yeah, that's what I'm saying, I go to
16 roof and came down. When I came down, I
17 slipped.

18 Q Okay. So you weren't going up?

19 A No, no, I was up and come down. I was
20 up already and then came down and I slipped.

21 Q Okay. Now, this indicates that the
22 concrete was wet. Was it not wet?

23 A I don't remember what -- I don't
24 remember, to be honest with you, I mean, if it's
25 wet or not, because it was not raining over

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1 TILLER - HAINA (DIRECT EXAMINATION)

35

2 A And I got a scar over here (indicates).

3 Q All right. Any other scarring?

4 A No, that's it. This one here, if you
5 can see it (indicates).

6 Q What did they do for your hip?

7 A The hip have to fix by itself pretty
8 much, you know.

9 Q No surgery?

10 A No surgery but you just have to take it
11 easy, that's it, pretty much.

12 Q Okay. Do you recall telling any of the
13 emergency people that you had lost your footing
14 and fell off the roof?

15 A I don't remember, to be honest with
16 you. I don't remember.

17 Q Did you fall off the roof?

18 A Yes.

19 Q Okay. But your feet were on the
20 ladder?

21 A When they -- probably when one feet
22 maybe -- maybe one feet -- I think when I got
23 down, it was one feet pretty much on the ladder,
24 you know, and then it slipped. This what I
25 remember, you know.

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1 TILLER - HAINA (DIRECT EXAMINATION)

40

2 A I don't remember where the conversation
3 came; either down, up, either way. I don't
4 remember.

5 Q And he mentioned to you --

6 A Fix leak and --

7 Q And take a look at the roof?

8 A Yeah.

9 Q He didn't say I want you to do it now
10 or I want you to do it tomorrow?

11 A No, no. But, like I say, I'm the kind
12 of person, you know, from the military, you
13 know, tell me something to do, I'll do it.

14 Q And that was the only time you saw him
15 that day?

16 A Jay, yeah.

17 Q Okay. Did you see anybody that was
18 either an employee of Beach Market or one of the
19 tenants when you came back from Grayco that day?

20 A No, no.

21 Q And in terms of him mentioning the roof
22 issue, you knew where the ladder was?

23 A Yes, because I used it before.

24 Q So he didn't have to direct you to get
25 the ladder or anything?

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1 TILLER - HAINA (DIRECT EXAMINATION)

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2 A No.

3 Q And again I think I asked you this as
4 well, but Jay would not have told you how to
5 repair the roof?

6 A No.

7 Q Had any accidents since this fall?

8 A No.

9 Q Been in the hospital for any reason
10 since then?

11 A No.

12 Q Have any current medical appointments
13 to see anybody related to this fall?

14 A No.

15 Q Okay. Do you think you've reached kind
16 of maximum recovery?

17 A Yeah. Yes and no.

18 Q Are there things you could do before
19 you can't do now?

20 A With my hands it's killing me in the
21 wintertime. It's a lot of pain now.

22 Q And it's mainly when it's cold?

23 A Yeah.

24 Q Okay. And are you right-handed or
25 left-handed?

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IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

YOSSI HAINA,
Plaintiff,

vs.

CIVIL ACTION NUMBER
2011-CP-07-2300

COPY

BEACH MARKET, LLC,
Defendant.

-----/

The deposition of JAY STEVER, a witness
in the above-entitled cause, taken pursuant to
Notice and agreement, before Cathy M. Knoettner,
Certified Court Reporter and Notary Public, at
the Horton Law Firm, 17 Lawton Street, Bluffton,
South Carolina, on the 1st day of December,
2011, commencing at or about the hour of
11:05 a.m.

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1 HORTON - STEVER (DIRECT EXAMINATION) 8

2 partners in this venture?

3 A Bruce Campbell, half owner in the
4 facility.

5 Q Okay. Has there been any other
6 partners in this venture since 1999?

7 A No.

8 Q All right. And just on the record,
9 what is the Beach Market, L.L.C.; what do y'all
10 do?

11 A It's a multi-retail commercial center,
12 if you will.

13 Q How many tenants are in this commercial
14 center?

15 A Seven.

16 Q Beach Market, L.L.C., is that a
17 member-managed L.L.C. or is it a manager-managed
18 L.L.C.?

19 A Manager-managed.

20 Q All right. Does Beach Market, L.L.C.
21 have any employees?

22 A No.

23 Q All right. Who does Beach Market,
24 L.L.C. use for accounting services?

25 A A guy named Ed Rowland, but he just

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1 HORTON - STEVER (DIRECT EXAMINATION) 12

2 about my normal routine and came back later and
3 and he was gone; and so I went downstairs in the
4 garage area, did some more work and came back up
5 after that, and that's shortly within probably a
6 minute or two, two minutes of when he fell.

7 Q Did you have any conversation with him
8 that morning at all?

9 A Yes.

10 Q Okay. What did y'all speak of?

11 A Well, he was working on the core and it
12 was extensive work, like he said. He had a
13 special machine doing it.

14 Q Okay. Did y'all have any conversations
15 about the roof in question here?

16 A Yossi had repaired the roof vent; it
17 was a plumbing vent that sticks through the roof
18 and it had been leaking.

19 Q You're going to have to tell me what a
20 plumbing vent is because I don't know.

21 A Well, a vent that goes through the roof
22 is primarily there to relieve the air that's in
23 the plumbing system so the water flows properly,
24 okay?

25 Q All right.

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1 HORTON - STEVER (DIRECT EXAMINATION)

13

2 A And these things usually extend through
3 the roof line and they're either a 3-inch or a
4 4-inch PVC pipe, and there is a rubber boot and
5 a flange system that sits over the PVC pipe that
6 keeps the water out, and you tie it into the
7 roof so the water doesn't penetrate the roof
8 system. And Yossi had repaired that two, three
9 months prior, he replaced part it and caulked it
10 and so forth. And shortly thereafter with rain
11 we had learned that it was still leaking; it
12 wasn't near as bad as it was before but it was
13 still leaking. And on several locations I
14 mentioned to him that the vent was still
15 leaking, and he said when he had time he would
16 get up there and recaulk it primarily.

17 Q Okay. That morning did you discuss the
18 plumbing vents with Yossi?

19 A Yes.

20 Q Okay. Did you ask him to fix it that
21 morning?

22 A No.

23 Q All right. When you discussed it with
24 him, did you believe that he was going to do it
25 that morning?

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1 HORTON - STEVER (DIRECT EXAMINATION)

14

2 A No.

3 Q Okay. Did you believe he was going to
4 do it at a later time?

5 A Yes.

6 Q Okay. And why do you believe that?

7 A Well, I've had experience with Yossi,
8 you know, and generally he will do what he says
9 he will do, you know. The reason that he
10 hadn't, you have to understand that this was in
11 August, and during the winter season he had done
12 extensive work on Daniel's, but once the
13 season -- they finished up a lot of the work,
14 and once the season, the tourist season, starts,
15 everybody shuts down their construction work and
16 gets ready for the season. So I had not seen
17 him very often at the Beach Market because he
18 had finished the primary work he was down there
19 for. But on a couple occasions I ran into him
20 when he would be down there with his wife having
21 dinner, and I would say -- you know, I might
22 say, you know, they still have the roof in,
23 because I didn't -- it wasn't like I was nagging
24 him or anything like that; it's just that I
25 didn't have an opportunity to talk to him very

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1 HORTON - STEVER (DIRECT EXAMINATION)

15

2 often.

3 Q Okay. Just so I'm 100 percent clear,
4 the reason that he probably didn't do it was
5 because he was very busy because it was the
6 season, or because he wasn't at the plaza very
7 much because he was doing other things?

8 A He was not at the facility very often
9 after he had finished the work from the
10 wintertime.

11 Q All right. And was that reason -- I
12 don't want to put words in your mouth; that
13 reason was because it was the season and there
14 just wasn't that much work to do, it wasn't the
15 busy season for workmen?

16 A Well, it's the nature of the beast that
17 what we do is we actually have -- we don't have
18 definitive rules but we ask people not to do any
19 construction work when the tourist season
20 starts.

21 Q I can guess, but why is that?

22 A Primarily because it interferes with
23 clientele and the customers coming to the plaza;
24 it's disruptive.

25 Q All right. Approximately what time did

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1 HORTON - STEVER (DIRECT EXAMINATION)

28

2 A Yes.

3 Q How does she know him?

4 A She knows Nicki, Monique.

5 Q Nicki and Monique are the same person,
6 right?

7 A Right.

8 Q All right. You were present for
9 Yossi's deposition testimony just a few minutes
10 ago; correct?

11 A Correct.

12 Q Okay. And you listened to what he had
13 to say; is that correct?

14 A Correct.

15 Q Okay. Do you disagree with any of the
16 accounts that he talked about?

17 A I didn't disagree with anything he
18 said, other than he was vague about certain
19 facts and I cleared those up in my testimony.

20 Q Okay. So you specifically deny telling
21 him to get up on the roof that morning?

22 A Correct.

23 Q But you do not deny that you discussed
24 with him that the work needed to be done that
25 morning?

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1 TILLER - STEVER (CROSS-EXAMINATION)

34

2 arriving?

3 A Correct.

4 Q What was the condition of the ladder?

5 A The ladder had come down off of its
6 roof position and it was laying on the ground.

7 Q Okay. And did you have an opportunity
8 to observe the roof line?

9 A Yes.

10 Q And what, if anything, did you observe
11 on the roof itself?

12 A One is you could see the skid marks
13 where he slipped; and two is, is that in his
14 effort to brace himself he had bent the gutter.

15 Q And you believe that was from trying to
16 brace his fall?

17 A Yes.

18 Q I'm going to ask you look at what was
19 marked as Defendant's Exhibit 1 to Mr. Haina's
20 deposition and using the pen that you have
21 beside you there, could you mark on that roof
22 line where you saw what you described as the
23 skid marks?

24 A There was one right in here, and there
25 was another one right in here.

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1 TILLER - STEVER (CROSS-EXAMINATION)

35

2 Q Is the area that was to be repaired
3 reflected in Exhibit 1?

4 A No.

5 Q Did you provide Mr. Haina with any
6 instruction or direction whatsoever on the day
7 of this incident?

8 A No.

9 MR. TILLER: Thank you, sir.

10 MR. HORTON: A brief follow-up.

11 REDIRECT EXAMINATION

12 BY MR. HORTON:

13 Q Do you have any -- I know that there's
14 a date on here. Do you have any idea when these
15 photographs were taken?

16 A I would say about a month later.

17 Q Okay. Were there any repairs done to
18 the roof between Yossi's fall and these
19 photographs that were taken?

20 A No.

21 Q So your testimony is that this is
22 basically the condition that it would have been
23 that morning that Yossi had fallen?

24 A Yes, but we did repair the gutter.

25 Q Okay. Do you know who repaired the

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Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 7, 2013

/s/ Marshall L. Horton

Marshall L. Horton, Esq., SC Bar No. 73891

Lindsay Y. Goodman, Esq., SC Bar No. 100273

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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,

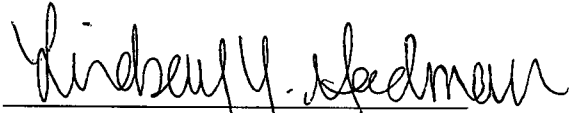
Respondent.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Beach Market, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on August 7, 2013, addressed to their attorneys of record, John H. Tiller, Esquire, and Sarah P. Spruill, Esquire, Post Office Box 340, Charleston, South Carolina 29402 on August 7, 2013.

August 7, 2013

HORTON LAW FIRM, LLC



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