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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Court of Appeals Unpublished Opinion No. 2013-UP-010
Court of Common Pleas Case No. 09-CP-10-6574

NESHEN MITCHELL, individually and as the next friend of her minor child, HAKEEM T. M., ... Petitioners,

vs.

JUAN P. MARRUFFO d/b/a LIBERTY EXPRESS, ADRIAN MORALEZ, RET PARTNERSHIP, WILLIAM T. MCQUEENEY, CARL E. ROBERTS, KARL R. HENDERSON, and STEVEN PARHAM, ... Defendants,

OF WHOM RET PARTNERSHIP, WILLIAM T. MCQUEENEY, CARL E. ROBERTS, KARL R. HENDERSON, and STEVEN PARHAM, are the ..... Respondents.

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STATEMENT OF ISSUES ON APPEAL

1. Did the courts below err as a matter of law by holding that Respondents owed no duty of care to Petitioner Hakeem T. M. despite the undisputed evidence that Respondents retained ownership, possession, and control of the subject property and knew of a dangerous condition existing thereon?

2. Did the trial court err as a matter of law by concluding that a tractor trailer obstructing both lanes of travel along a heavily traveled roadway was not an artificial condition rather than properly submitting the question to the jury?

3. Did the courts below err as a matter of law by holding that Respondents owed no duty of care to Petitioner Hakeem T. M. despite the fact that Respondents were jointly liable with the tenant under the terms of a residential lease for such dangerous conditions?

STATEMENT OF THE CASE

This case arises from of a motor vehicle collision on March 3, 2009, wherein the Petitioner Hakeem T. M. ("Hakeem") was injured when the car in which he was a passenger collided with a tractor trailer truck on U.S. Highway 17 South in Ravenel, South Carolina. At the time of the collision, the truck driver was backing onto the adjacent property to connect with a semitrailer parked on the premises.

On October 19, 2009, Petitioner Neshen Mitchell, the natural mother of Hakeem, filed a Complaint alleging negligence against Adrian Moralez, the truck driver; Juan P. Marruffo d/b/a Liberty Express, the trucking company which employed Defendant Moralez; RET Partnership, the owner of the property leased to J. Jose Valdez and used by Moralez and Marruffo; and William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham, the general partners of RET Partnership ("Respondents"). On December 8, 2009, Respondents served their Answer denying any negligence on their part.

On March 8, 2010, Respondents sought summary judgment on the ground that they owed no duty to Hakeem for injuries he sustained while on the public highway. Petitioners opposed the motion, and a hearing was held on December 9, 2010. The parties were given the opportunity to conduct additional discovery, and a subsequent hearing was held on May 2, 2011. Thereafter, on June 3, 2011, the trial court issued its Order granting summary judgment to the Respondents. Petitioners received written notice of the entry of the Order on June 17, 2011. On June 27, 2011, Petitioners filed a Motion to Alter or Amend, which was summarily denied without a hearing by Order dated July 27, 2011, and received by counsel for Petitioners on August 4, 2011.

Petitioners filed a Notice of Appeal on August 30, 2011.

The Court of Appeals heard oral argument on December 13, 2012, and issued a *per curium* opinion affirming the grant of summary judgment to Respondents. Petitioners then served a Petition for Rehearing or Rehearing *En Banc*, which was denied by Order of the Court of Appeals filed February 27, 2013.

FACTS

This case arises from a collision on March 3, 2009, which caused serious and permanent injuries to the minor child, Hakeem. The collision occurred when the vehicle in which Hakeem was an occupant crashed into a tractor trailer truck backing across both lanes of travel on U.S. Highway 17 South in Ravenel, South Carolina, in order to connect with a semitrailer parked on the property owned by Respondents and known as 5858 Savannah Highway ("subject property"). Petitioners brought an action for negligence against Respondents and the driver of the tractor trailer and his employer.

On January 30, 2009, Respondents entered into a Lease Agreement with J. Jose Valdez. (App. pp. 506-510). Valdez was a man who appeared to be of Mexican descent and whose native language was Spanish. (App. p. 355, lines 3-4). Respondents did not conduct any background check or otherwise do any due diligence to ascertain Valdez's intended use of the property. (App. p. 357, lines 7-25). Nor did Respondents ever surrender total possession and control of the property to their tenant. (App. p. 137, ¶ 13; p. 345, lines 12-23).

At the time of the collision, Respondents knew that their property was being used for dangerous activity and acquiesced in such dangerous activity. (App. p. 351, line 8-p. 352, line 22; p. 358, line 10-p. 359, line 16). Tractor trucks were routinely seen by the general public parked on the property and also backing across Savannah Highway onto the Respondents' property to load and unload semitrailers. (App. pp. 150, 41, 56). Semitrailers alone are 53 feet long, without the tractor truck attached. (App. p. 351, lines 13-16). In fact, it appeared to several persons in the area that the property was being used especially for the purpose of dropping tractor trailers. (App. pp. 148-149, 167-169). The

Respondents had notice[1] that there were tractor trucks and trailers on the property on at least four different occasions while Valdez was leasing the home on the property. (App. p. 340, line 16–p. 341, line 9; p. 350, lines 24-25). Moreover, tractor trailers were parked on the property on numerous occasions for nearly six months after the collision. (App. pp. 152-153).

In addition, the Respondents saw tractor trucks and semitrailers on the property on at least two occasions *prior to the collision*. (App. p. 364, lines 12-15). The very first time Respondents saw the tractor truck and semitrailer on the property they knew that Valdez was a trucking operator. (App. p. 356, lines 13-18). On that occasion, they spoke to Valdez and told him to move it. (App. p. 352, lines 11-25). The second time Respondents saw the tractor truck and semitrailer on the property they left a note on the windshield of the truck to move it. (App. p. 353, lines 12-25). When Respondents returned to the property, the truck was still parked there but Valdez was not at home. (App. p. 360, line 19–p. 361, line 10). However, there was another Hispanic man on the property who said he would give Valdez the message. (App. p. 361, lines 2-22). Respondents do not know the identity of this person. (App. p. 361, lines 11-25). There were potentially two separate tractor trucks and semitrailers using the subject property for loading and offloading. (App. p. 362, line 19–p. 363, line 15; p. 511). Respondents knew that the driver was backing the tractor truck across the adjacent highway to get the semitrailers on and off their property, and *admittedly knew that this activity was dangerous*, especially since that portion of the highway is heavily traveled. (App. p. 347, lines 23-25; p. 351, line 8–p. 352, line 22; p. 358, line 10–p. 359, line 4; p. 392). Even

[1] Notice to or knowledge of one partner operates as notice to or knowledge of the partnership. S.C. Code Ann. § 33-41-340.

though Respondents were aware that the activity of backing onto the property was dangerous, their main objective in prohibiting the parking of the tractor trailers was so they could have full access to the driveway and rear portion of the property to store their recreational vehicles. (App. p. 351, line 8–p. 352, line 25).

Despite the fact that Respondents knew their property was being used to conduct an admittedly dangerous activity by a third party, they acquiesced in the dangerous use of the property and failed to exercise reasonable care to make it safe. Respondents understood that, as the landlord, they had the right to prohibit Valdez from parking the tractor trucks and semitrailers on the property. (App. p. 359, lines 5-9). Despite their knowledge that they could place prohibitions on the use of the property as a place to park tractor trucks and semitrailers, Respondents did nothing to enforce the prohibition. (App. p. 359, lines 5-22). Even though Respondents were aware that the tenant was conducting a dangerous activity on their property, they did not ask the tenant to vacate the premises nor did they bring any action for ejectment. (App. p. 359, lines 10-22).

Under the terms of the Lease, the tenant was to "occupy the premises only as a dwelling unit and [was] not to create or permit any nuisance" on the property. (App. p. 509, ¶ 25). The Lease further provided: "Tenant agrees to observe faithfully all rules and regulations that the Landlord now has, or may hereafter adopt for the uses of the premises...." (App. p. 509, ¶ 25) Although the Lease allowed the Landlord to terminate the Lease if Tenant failed to remedy any breach "affecting health, safety, or the physical condition of the property,"[2] Respondents failed to avail themselves of this default provision and statutory right. (App. p. 508, ¶ 22) Furthermore, according to the lease

[2] This lease incorporates the remedies available to a landlord under the Residential Landlord and Tenant Act, S.C. Code Ann. § 27-40-710 (2007).

agreement, both the Respondents and their tenant are jointly responsible for all obligations set forth in the lease, which by its terms, includes the nature of the use of the premises. (App. pp. 508-509, ¶¶ 20, 25).

At all times relevant hereto, Respondents had ownership, possession, and control of 5858 Savannah Highway. (App. p. 137, ¶ 13). Respondents purchased the subject property as an investment. (App. p. 337, lines 5-16). Soon after the purchase, Respondents constructed a warehouse on the rear portion of the premises to store their recreational vehicles and other personal property of the individual partners. (App. p. 338, lines 4-15). The property was one single parcel and was never subdivided. (App. p. 344, lines 16-19). The rear portion of the premises was commercial, and the front part consisted of a small building which could be used as a home or an office. (App. p. 343, lines 9-20). At the time of the Respondents' depositions, the property was listed for sale as commercial property. (App. p. 343, lines 11-20).

Despite entering into a lease agreement with Valdez, Respondents maintained both possession and control of the subject property. Throughout the lease term, Respondents retained possession of the large majority of the property, including the driveway, and could come onto the property at any time without notice to the tenant. (App. p. 345, lines 12-23). In fact, the only portion of the property subject to the lease was the small home/office located toward the front of the property. (App. p. 349, lines 3-11). Respondents continued to occupy and use the warehouse on the rear of the property for their own benefit. (App. p. 348, lines 12-19). In addition, the tenant was allowed only a small portion of the driveway to park his vehicle because Respondents needed most of the driveway to drive their recreational vehicles on and off the rear of the property. (App.

p. 350, line 18–p. 239, line 7). Respondents also continued to maintain the general physical condition of the land by performing such tasks as cutting the grass and weed eating. (App. p. 339, lines 10-23).

The area in which the property is located is zoned Neighborhood Commercial. (App. p. 519, ¶ 2). Under this zoning provision, both the parking of tractor trailers and recreational vehicles on the property would be non-conforming uses. (App. pp. 519 ¶ 2, 559 ¶ 5). Because there is insufficient space on the property to accommodate the loading and unloading of these tractor trailers, the operator(s) would have to back across the highway, which is highly dangerous. (App. pp. 555-556 ¶ 8). The highway adjacent to the property experiences heavy vehicular traffic. (App. p. 347, lines 23-25; p. 392).

On March 3, 2009, Hakeem was in a vehicle which was traveling down U.S. Highway 17 South when the vehicle collided with the tractor truck backing onto Respondents' property. At the time of the collision, Hakeem was only eleven years old. (App. p. 303). He sustained permanent brain damage during the collision. As a result, he is wheelchair bound and unable to care for his personal hygiene. (App. pp. 303-304). He also needs assistance to eat. (App. p. 303). He is able to say some words, but cannot talk conversationally. (App. p. 304). His injuries and impairments are permanent. (App. p. 304). Hakeem's medical expenses already exceed $550,000; however, that does not include a recent back surgery. (App. p. 304). That figure also does not account for the ongoing care that he will need for the rest of his life. (App. p. 304).

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

The appellate court must review a grant of summary judgment under the same standard of review applied by the trial judge. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496-97, 662 S.E.2d 606, 607-08 (Ct. App. 2008) aff'd, 387 S.C. 280, 692 S.E.2d 523 (2010) (citing Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005)). "Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law." Id. (citing S.C.R. Civ. P. 56(c)) When determining whether a material issue of fact exists, the appellate court must view all evidence and the inferences to be drawn in a light most favorable to the non-moving party. Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009), reh'g denied (Aug. 25, 2009) (citing Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003)). If more than one inference can be drawn, then the task is one for the jury, and summary judgment should not be granted. Id. (citing Vaughan v. Town of Lyman, 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006).

II. THE COURTS BELOW ERRED BY DISREGARDING CONTROLLING LEGAL PRINCIPLES AND THE FACTUAL RECORD TO HOLD THAT RESPONDENTS OWED NO DUTY OF CARE TO PETITIONER HAKEEM T. M.

The courts below committed reversible error in granting summary judgment to the Respondents based on the clearly erroneous conclusion that Respondents owed no duty of care to Hakeem as a result of permitting an artificial and dangerous condition to exist on Respondents' property. Under the relevant facts of this case and a proper application of the law, the duty owed by Respondents is clear, and the question of their negligence is solely for the jury to determine.

A. The Courts Below Erred in Failing to Acknowledge and Apply the Duty of Ordinary Care Owed by Owners of Land Adjacent to a Highway.

Petitioners' cause of action against Respondents seeks compensation for injuries sustained by Hakeem as a result of Respondents' negligence. Generally, in a negligence action, a plaintiff must show that the (1) defendant owed a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). It embodies the well-founded principle of tort law that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care. Id.

In Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 524, 681 S.E.2d 871, 873 (2009), this Court held that an owner of land adjacent to a public highway owes a duty of care to the travelers thereon for individual and business activity which creates an artificial and dangerous condition on the highway. A landowner may avoid liability *only* where the alleged conditions are normally and naturally occurring. Id. The common law in South Carolina *will* impose a duty of care on a landowner who "has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." Id. This recognition of this duty is not unique to South Carolina. See, e.g., Whittaker v. Honegger, 674 N.E.2d 1274, 1276 (Ill. App. Ct. 1996) (Landowners have a duty to exercise ordinary care "to prevent conditions on their land from migrating onto the highway and thereby

creating hazards to the motoring public.")[3]; Kolba v. Kusznier, 599 A.2d 194, 199 (N.J. Super. Ct. Ch. Div. 1991) ("The *Restatement,* reflecting the common law, makes it clear that where an artificial condition causes injury to another person outside of the land, the property owner is liable."); Weber v. Madison, 251 N.W.2d 523, 527 (Iowa 1977) ("[A landowner] may be subject to liability for physical harm caused by an ...artificial condition on his land which is so near an existing highway that he realizes or should realize it involves an unreasonable risk to highway travelers using reasonable care."). The Skinner court, likewise adopting the view of several other jurisdictions, observed that allowing smoke to drift from one's property onto the adjacent roadway, or creating a traffic jam on the highway, are both examples of artificial conditions for which a landowner may be liable to motorists. Id. at 525, 681 S.E. 2d at 874.

B. The Courts Below Erred in Failing to Submit to a Jury the Question of Whether an Artificial Condition Existed.

This case arises out of the harm suffered by Hakeem as a passenger in a vehicle that collided with a tractor truck backing across Highway 17 South onto Respondents' property to connect with a trailer parked on the premises. The trial court's finding that such activity does not create an artificial and dangerous condition is incorrect. (App. 118) The courts below refused to acknowledge that a large tractor truck backing across a highway could be an artificial condition, simply because it was factually distinguishable from the examples mentioned in Skinner. (App. 119) The Skinner case certainly does not

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[3] The Whittaker Court noted that no: use, instead "The reasoning behind our decision [to impose this duty] today is hardly novel. Indeed, one can look back to English common law for the proposition that a defendant may be liable for damaging another with a thing or activity on his land which becomes unduly dangerous when located in an inappropriate place or when damage is done to the person or property of another by the activity or thing. *Rylands v. Fletcher,* 3 H.L. 330 (1868)...." Whittaker v. Honegger, 674 N.E.2d at 1277.

preclude a finding that an artificial condition was also created under the facts of this case. The two examples referenced in Skinner are merely that, examples. They are by no means an exhaustive list of possible artificial conditions that may be created by a landowner.

In reaching its decision, the Skinner court examined the case of Holiday Rambler Corp. v. Gessinger, 541 N.E.2d 559, 562 (Ind. Ct. App. 1989), which is instructive. Similar to this case, the plaintiff in Holiday Rambler was injured in a collision with a motorcycle that was trying to avoid hitting two other vehicles leaving the subject property. However, the Rambler court did not dismiss the collision as simply a traffic accident on the adjacent highway, nor did it ever refer to the condition as a "traffic jam." Instead, in denying the landowner's motion for summary judgment, the court ruled that

> the owner of land adjacent to a highway owes the duty to the traveling public to prevent injury to travelers upon the highway from any unreasonable risks created by the property's dangerous condition which the landowner knew or should have known about. Whether this duty was discharged is a question of fact for the jury.

Holiday Rambler, 541 N.E.2d at 562.

The Skinner court also relied on the case of Pitcairn v. Whiteside, 34 N.E.2d 943, 949-50 (Ind. Ct. App. 1941). In Pitcairn, the court imposed a duty of care on a landowner adjacent to the highway for allowing smoke to be blown from its property across the nearby highway, obscuring the vision of motorists. The Pitcairn court held that a landowner owed a duty of care not to create or maintain a condition on his right of way which created a risk of harm to the traveling public, particularly where the resulting harm is foreseeable, and the landowner could have easily prevented the danger. Id. at 946-47,

949-50. Under those circumstances, the issue of the landlord's negligence is properly submitted to the jury. Id.

This Court announced in Skinner that "the owner of land which abuts a highway is not liable to the traveler for conditions occurring on that highway which are normal and natural...." 383 S.C. at 575, 681 S.E.2d at 874. Here, the courts below did not make a finding that a tractor truck obstructing both lanes of travel was a normal and natural condition, which is necessary for the Respondents to avoid liability to Hakeem. Rather, the trial court came to the unsupported conclusion that "[t]his was simply a traffic accident whereby one vehicle blocked the lane of another and a collision resulted." (App. 118-119). The Court of Appeals failed to correct this erroneous determination. The actual facts establish that this activity was not an isolated event. In this case, the property was routinely used, with the Respondents' knowledge, to load and unload tractor trailers, which by necessity resulted in regular obstruction of the adjacent roadway. (App. p. 150; pp. 152-153; pp. 167-168; p. 351, line 8–p. 352, line 22; p. 358, line 10–p. 359, line 4).

Based on these facts, the trial court erred in concluding that the dangerous activity permitted by the Respondents on their property did not constitute an artificial condition, especially when such a determination is one for the jury. E.g., Cultee v. City of Tacoma, 977 P.2d 15, 24-25 (Wash. Ct. App. 1999) ("Depending on what 'condition(s)' the jury finds caused [plaintiff's] death, either the 'condition' was 'artificial' as a matter of law or there is a genuine issue of material fact as to whether the condition was 'artificial.' Either way, summary judgment was inappropriate."); Keith v. Beard, 464 S.E.2d 633, 637 (Ga. Ct. App. 1995) ("We have not found a Georgia case which has applied the artificial

condition theory to a driveway, ... [so the issue of whether plaintiff's] maintaining a commercial driveway so situated constitutes a danger subjecting users of the public highway to risk of injury as an artificial condition is a question for the jury."); Harris v. Woolworth, 824 S.W.2d 31, 34 (Mo. Ct. App. 1991) ("The evidence and the reasonable inferences therefrom were sufficient to make a submissible case on whether defendant had caused the grease to be present in the alley and thereby had created an artificial condition or made a special use of the alley which caused plaintiff to fall."); Clarke v. Edging, 512 P.2d 30, 34 (Ariz. Ct. App. 1973) ("We therefore hold, on this issue, that the eroded gully on Mr. Clarke's leased property as described by the various witnesses could be determined by the jury under proper instructions from the court to be an artificial condition...."); Ritgers v. City of Gillespie, 113 N.E.2d 215, 218-19 (Ill. Ct. App. 1953) (In considering the issue of whether ice formed on a sidewalk from a leaky down-spout was a natural or artificial condition, the court determined that the circumstances were "questions of fact ... that must be decided by a jury or a court sitting as a jury."); Carlton v. Pac. Coast Gasoline Co., 242 P.2d 391, 395 (Cal. Ct. App. 1952) ("Whether or not the condition created by a possessor of land constitutes a trap or pitfall and whether it is an artificial condition, of such a nature and so near an existing highway that such possessor should have realized that it involved an unreasonable risk to users of the highway, are generally questions of fact to be determined by the jury.").

C. The Courts Below Erred in Finding Respondents Owed No Duty of Care to Petitioner Hakeem T. M. Where Respondents Retained Possession, Ownership, and Control of the Subject Property and Had Actual Notice of a Dangerous Condition On It.

Although Skinner is applicable to the determination of whether a duty exists in this case, it is not the sole legal standard that must be considered by the Court. The

Skinner decision does not and should not foreclose the application of other South Carolina law governing a landowner's duty of care in the use of his property.[4]

In South Carolina, "[o]ne who controls the use of property has a duty of care not to harm others by its use." Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (citing Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947); Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930)). "'The liability of an owner or occupant of real estate in reference to injuries caused by a dangerous or defective condition of the premises depends in general upon his having control of the property. In fact, such liability depends upon control, rather than ownership, of the premises.'" Dunbar v. Charleston & W. C. Ry. Co., 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (quoting 38 Am. Jur. Negligence § 94). Even where the landowner is not a full-time occupant of the property, he nonetheless has a duty to ensure that the use of his property is not injurious to others. "In determining whether an individual has sufficient control of premises so as to impose a duty to inspect the premises, a court generally will look to factors such as whether the individual has authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee the management of the property. Cook v. Lowe's Home Centers, Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (citing Benjamin v. Wal-Mart Stores, Inc., 413 F. Supp. 2d 652 (2006)). A person in control of property will also be liable for a dangerous condition created by a third party if

[4] In addition to Skinner, the trial court relied on only two other cases to support its sweeping conclusion that Respondents are absolved of any liability to Hakeem. However, neither of those cases lends support to the argument that these Respondents owe no duty here. The holding in Mahle v. Wilson, 283 S.C. 486, 487, 323 S.E.2d 65, 66 (Ct. App. 1984), was limited to the conclusion that the defendants "owed no duty to the plaintiff with respect to the parking of cars on the shoulder of the road opposite its place of business or to request the Highway Department to post speed limit signs or furnish a pedestrian crosswalk in front of its place of business...." In Ford v. S.C. Department of Transportation, 328 S.C. 481, 486, 492 S.E.2d 811, 814 (Ct. App. 1997), this Court recognized "the rule that a landowner in a residential or urban area has a duty to others outside the property to prevent an unreasonable risk of harm," but refused to extend the duty to rural landowners.

he knew of the dangerous condition and failed to remedy it. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); Restatement (Second) of Torts § 364 (1965). In short, under South Carolina law, a landowner who retains control of his leased property, and has notice of a dangerous condition thereon, will be liable to those who suffer injuries as a result of the dangerous condition.

Accordingly, a landowner is not exempt from this duty merely because a third party allegedly caused the harm. Restatement (Second) of Torts § 364 (1965). Even where there is evidence a landowner did not himself create a dangerous condition on the highway, he may nonetheless be liable to a motorist for acquiescing in the activity or failing to remedy the danger. Id.; Clark v. Blue Circle, Inc., 514 S.E.2d 473, 476 (Ga. Ct. App. 1999) (cited in Skinner, 383 S.C. at 525, 681 S.E.2d at 874). The dangerous activity need not be for the benefit of the landowner or conducted with his express consent. Restatement (Second) of Torts § 364, cmt. h. Rather, liability will attach where "he knows that *the other* is creating or is about to create it, and could prevent its creation by asserting his authority as possessor, as where he knows that he could cause the third party to desist by ordering him to do so or to leave the land." Id. (emphasis added). This duty is in keeping with the duty of care traditionally imposed in negligence actions in this state.

Furthermore, a landowner may not necessarily seek the protection of a rental agreement to avoid his liability to third parties where he fails to surrender full possession and control to the tenant. Although this Court has not yet considered a case which is factually analogous to the present one, Respondents' duty of care is inescapable under the

well settled law of liability for persons who control real property and are aware of the existence of a dangerous condition on that property.

Other jurisdictions which have considered similar factual scenarios have relied on the same principles espoused in South Carolina jurisprudence in holding a landlord liable for the dangerous activity of the tenant where the landlord maintained control of the premises, knew of the danger, and failed to remedy it. "An owner cannot escape his duty of exercising reasonable care to maintain his property adjoining a highway in reasonably safe condition unless he parts with the entire possession and control of the premises." Klepper v. Seymour House Corp. of Ogdensburg, Inc., 158 N.E. 29 (N.Y. Ct. App. 1927). "The legal concepts concerning a landlord's liability for a tenant's activities have been expanded to the point where a landlord may be responsible for the wrongdoing of a tenant when the landlord continues to exercise control over the premises." Muhammad v. Bucknor, 228 A.D.2d 333, 335 (N.Y. 1996). Therefore, the common law will impose a duty on a landowner who maintains control of his property, even though it is subject to a lease, in order to provide a full remedy to a plaintiff who is injured while traveling on the adjoining roadway.

The rationale underlying the imposition of a duty of care on a landlord is best explained in the case of Bober v. New Mexico State Fair, 808 P.2d 614 (N. Mex. 1991). There, the defendant leased a portion of its property to organizers for a rock concert. Id. at 616. The plaintiff was injured by an attendee who was attempting to make a left turn onto the highway where the plaintiff was traveling. Id. The plaintiff alleged that the defendant landowner was negligent in permitting an activity on its property which would obviously result in a large volume of traffic attempting to enter onto the roadway from a

single location, thereby creating a danger to the motoring public. Id. at 618. Defendant sought summary judgment on the basis that it owed plaintiff no duty. Id. at 616. The court, however, was quick to find that the defendant does in fact have a duty of care based on the basic principles of negligence, which is: "'Every person has a duty to exercise ordinary care for the safety of the person and the property of others.'" Id. at 618 (quoting SCRA 1986, 13–1604 (Uniform Jury Instruction (UJI)—Civil 1604)). This rule alone is sufficient to formulate "the duty of a landowner to exercise ordinary care to avoid creating, or permitting, an unreasonable risk of harm to others...." Id. It arises independently of any other factors unique to the case including: the character of the landowner's property interest; whether the property is subject to a lease; the legal identity of the plaintiff; or the mere happenstance that the collision and resulting injury occured off the property. Id. at 618-19. The Bober court recognized that the duty was clear as a matter of law and the question of defendant's breach of the duty was a proper one for the jury. Id. at 620-21.

Likewise, in another case factually similar to the one at bar, the Rhode Island Supreme Court imposed a duty of care on a landlord to oversee the use of his property for the protection of those who are rightfully traveling on nearby roadways. In Moretti v. C.S. Realty, Co., 82 A.2d 608 (R.I. 1951), the court ruled that a landowner could be held liable for injuries sustained by a nearby pedestrian who was injured because of a hazardous condition on the property. The tenant in Moretti, without the consent of the landowner, partitioned the first floor of the building which he leased and then sublet the additional space to a commercial tenant. Id. at 610. In subdividing the property, he left an old, rusty fan exposed, and a blade of the fan detached, flew out of the opening which the

tenant had created, and hit and injured a passerby. Id. There, the duty of care owed by the landlord to travelers on the highway originated from the rule of law in the Fourth Circuit:

> The public has the right to the unobstructed use of the highway free of unnecessary hazards, and it is the duty of owners and occupiers of property abutting thereon to use it so as not to endanger members of the public while they are exercising such right. Weilbacher v. J. W. Putts Co., 123 Md. 249, 91 A. 343; King v. Hartung, 123 Va. 185, 96 S.E. 202.

Id. at 611. When a person traveling on the highway is injured as a result of a dangerous condition existing on the property, then there is a presumption that the landlord breached his duty. Id. (citing Pindell v. Rubinstein, 115 A. 859 (Md. Ct. App. 1921)). An important factor to consider is whether the landlord, prior to the accident, had the opportunity to control the premises and remedy the danger. Id. at 612-13.

The Rhode Island court, like the courts of South Carolina, was concerned with the general principle of tort law that the plaintiff should not suffer a harm which is foreseeable and which can be avoided by the defendant's exercise of reasonable care. Snow, 305 S.C. at 554, 409 S.E.2d at 803; accord, Moretti, 82 A.2d at 611 ("The justice of this rule lies in the circumstance that the principal evidence of the cause of the accident is accessible to the party in control of the premises and inaccessible to the victim of the accident.")

More recently, in the case of Estate of Mickelson v. North-Wend Foods, Inc. and S&S Properties, LLC, 274 P.3d 1193 (Alaska 2012), a restaurant patron attempted to make an illegal left turn, over two lanes of highway, into a narrow driveway serving as an exit from a drive-through window at a Wendy's restaurant. He collided with Mickelson, who was traveling straight on a motorcycle. Mickelson's estate brought a wrongful death

action against both the owner of the property and the lessee (collectively "Wendy's"), alleging that the exit lane was a structure or artificial condition that posed an unreasonable harm to travelers. Wendy's argued that it had no control over third parties to prevent car accidents or improper driving. The trial court granted Wendy's motion to dismiss, but the supreme court reversed. In determining whether a duty exists, it was necessary to consider the relationship between the parties as well as fairness and equity in requiring a party to act in a specified way so as to avoid undue risk of harm to third parties. The court there determined it was fair to place a duty on Wendy's because its customers regularly drove across two lanes of oncoming traffic to reach the restaurant via the exit lane, a condition likely to result in traffic accidents and serious injury. Wendy's was in a much stronger position to bear the burden of avoiding the risk than travelers on the highway. The duty, put simply, was "to maintain its property in a reasonably safe manner in view of all the relevant circumstances." Id. at 1202. And, this duty was specifically owed to those who might be harmed by the improper ingress and egress.

The cases relied on by the Respondents to avoid liability are inapposite to this litigation. In Naumann v. Windsor Gypsum, 749 S.W.2d 189, 190 (Tex. Ct. App. 1988), the plaintiff was injured by a truck driver, an independent contractor, who had completely left the defendant's property and traveled 264 feet down the highway before colliding with another vehicle. There, the court likened the defendant to a mere bystander which, because it had no control over the driver and did not create the danger, had no affirmative duty to act. Id. at 192. The facts in Naumann stand in great contrast to the evidence established in this case, which is that the Respondents had control over the subject property and the dangerous condition created by its improper use. Accordingly,

Naumann provides no reasonable basis to excuse the Respondents from their legal duty as a landowner. In addition, the wreck at issue here occurred right in front of the Respondents' property. In fact, two of the tractor truck wheels were already on the curb between Respondents' property line and the highway at the time the collision took place. (App. 512-513).

The case of Estes v. Peels, 2000 WL 1424808 (Tenn. Ct. App. 2000) is also unavailing and fails to yield any sound line of reasoning for this Court to absolve Respondents. In that case, the plaintiff was injured when an employee, leaving her job with the defendant plant, pulled onto the highway into the path of an oncoming car. Id. at *1. That court recognized the general rule that "[a] duty to act with due care arises when a risk is unreasonable." Id. at *3. However, there was no evidence that anything, whether another vehicle or a structure on the property, had obstructed the vision of the defendant driver, and the wrongdoing lay solely on the driver. Id. at *6. Accordingly, the court held that summary judgment was properly granted to the defendant plant. Id. at *7. Again, these facts are contrary to the evidence in this case. Here, it was the very use of the property, that the Respondents controlled, which caused injury to the minor Appellant. Furthermore, both Naumann and Estes were based primarily on a theory of negligent design. Of course, that claim has not been made here. The subject property was not intended for use by tractor trucks and semitrailers. Such activity was in violation of local zoning ordinances and would knowingly create a danger on the adjacent highway. (App. p. 146; p. 62; p. 347, lines 23-25; p. 351, line 6-p. 352, line 10; p. 358, line 10-p. 359, line 4; p. 392; App. pp. 558-576).

The facts of the within action demand a proper application of the law. The relevant and undisputed evidence is that Respondents never surrendered ownership, possession, or control of 5858 Savannah Highway to their tenant; that they knew prior to the collision the property was being used to park tractors and trailers; that the use of the property necessarily involved backing those tractors and trailers across both southbound lanes of the adjacent highway; that this activity created an artificial condition which was dangerous to travelers on the highway; that the Respondents knew, prior to the collision, that this activity was dangerous; that the Respondents had, and knew they had, the authority to prohibit the dangerous use of the property; that the tenant continued to use the property to park tractors and trailers after the serious collision which injured Hakeem; and that Respondents made no meaningful effort to make the tenant stop the dangerous use of their property or to make him leave the premises. Under these facts and the applicable law discussed above, the Respondents indisputably owed Hakeem a legal duty of care and may be held liable for the injuries he sustained.

The courts below ignored these relevant facts which necessitate the imposition of a legal duty on the Respondents. In excusing the Respondents from any culpability, the trial court relied primarily on the following facts: Respondents did not operate a trucking terminal on the subject property (App. 114); the activity was not for the benefit of Respondents (App. p. 118); Defendant Moralez was not a tenant under the lease (App. p. 114); Respondents did not control the manner in which Defendant Moralez chose to maneuver his tractor trailers onto the property (App. p. 118); and Respondents never gave Defendant Moralez or anyone else permission to drive tractor trailers on and off the property. (App. p. 118) These factual findings are irrelevant to the duty owed by

Respondents. Instead, the only questions to be answered are whether the Respondents had control of the use of the property and whether they had notice of the dangerous activity. The Respondents readily concede that they did. (App. p. 137 ¶ 13; p. 345, lines 12-18; p. 351, line 8–p. 358, line 22). Moreover, the conclusion that the Respondents failed to remedy the danger is unavoidable given the fact that Hakeem sustained grievous injuries as a result.

It is also irrelevant that the Respondents did not possess or control the highway adjacent to their property, as Skinner does not establish that possession or control of the highway is a necessary requirement for landowner liability to attach. Rather, it was the use of Respondents' property that caused an artificial and dangerous condition on the highway. Respondents concede that Skinner "imposes a duty for highway conditions where an individual or business has undertaken an activity that creates an artificial condition on the highway which is dangerous to travelers." 383 S.C. at 3, 681 S.E.2d at 873. (App. pp. 117, 302). The courts below failed to impose that duty on Respondents here after having concluded that Respondents did not undertake or permit the dangerous activity. (App. pp. 117-118). That conclusion fails to correctly apply the law of this state.

Finally, the trial court held that landowners are under no duty "to predict who will visit their residential tenant" or "to predict or direct the manner in which such visitors will maneuver their vehicles onto the leased property." (App. p. 118) According to the trial court, such a requirement "would create an undue burden and an impractical result." (App. p. 118). However, that is not the duty which the Petitioners seek to impose. Petitioners are not asking this Court to create a new duty, but merely to impose the

simple and long recognized responsibility of landowners to use due care to ensure that the property under their control is not used in such a way that it could harm others.

The concerns of the trial court are misplaced. There is no undue burden on a landowner who retains control of the property to remedy a dangerous condition of which he is aware, particularly here where the only potential cost would be lost rental income. Further, the holdings of the lower courts would yield the impractical result that landowners in control of their property could turn a blind eye to dangerous, or even criminal, activity on their land, continue to enjoy the benefits of ownership while collecting rent, and yet claim immunity when a third party suffers injury because of dangers the landowner chose to ignore. The courts' conclusion effectively invalidates the well settled law in South Carolina regarding the duties of property owners.

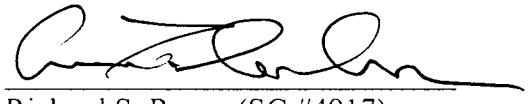
D. Because the Lease Also Creates a Duty of Care, the Courts Below Erred in Granting Summary Judgment to the Respondents.

In addition to the duty imposed by law, Respondents have contractually agreed to share liability with their tenant for any dangerous condition existing on their property. (App. 508, 509, ¶¶ 20, 25). By their own admission, permitting tractor trucks to routinely back across a heavily traveled highway to pick up and drop off semitrailers creates a clear danger to motorists on Highway 17 South. (App. p. 347, lines 23-25; p. 351 line 8–p. 352, line 22; p. 358, line 10–p. 359, line 4). Accordingly, the trial court erred in granting summary judgment to the Respondents where the lease itself created a duty upon Respondents. The Court of Appeals' Opinion does not address this issue.

CONCLUSION

For the reasons stated, this Court should reverse the Order of the trial court granting summary judgment to Respondents and the Opinion of the Court of Appeals affirming that Order.

Respectfully submitted,



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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Court of Appeals Unpublished Opinion No. 2013-UP-010
Court of Common Pleas Case No. 09-CP-10-6574

NESHEN MITCHELL, individually and as the next friend of her minor child, HAKEEM T. M..... Petitioners,

vs.

JUAN P. MARRUFFO d/b/a LIBERTY EXPRESS, ADRIAN MORALEZ, RET PARTNERSHIP, WILLIAM T. MCQUEENEY, CARL E. ROBERTS, KARL R. HENDERSON, and STEVEN PARHAM, ... Defendants,

OF WHOM RET PARTNERSHIP, WILLIAM T. MCQUEENEY, CARL E. ROBERTS, KARL R. HENDERSON, and STEVEN PARHAM, are the ..... Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Petitioners' Brief and Appendix on Respondents RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham by regular U.S. Mail, postage prepaid, on September 5, 2014, addressed to their attorneys of record as follows:

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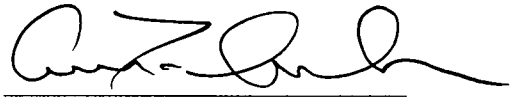
September 5, 2014

By: 

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