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

72640

RECEIVED
JUN 25 2014
SC Court of Appeals

Yossi Haina,

Appellant,

v.

Beach Market, LLC, Respondent.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 221 (a) of the South Carolina Appellate Court Rules, Appellant respectfully petitions the Court for Rehearing and/or to Alter its Unpublished Opinion No. 2014-UP-215 (filed June 11, 2014). This Opinion affirmed the trial court's decision grant the Defendant's motion for Summary Judgment. Appellant also respectfully petitions and suggests the desirability of rehearing by the Court *en banc* because the proceeding involved questions of exceptional importance.

The heart of this matter concerns whether the case of *Callander v. Charleston Doughnut Corp.,* 305 S.C. 123, 406 S.E.2d 361 (1991) and its adoption of Restatement (Second) Torts § 343A is still good law in South Carolina. The trial court's decision, and

this honorable Court's affirmation of the trial court's decision, indicate that *Callander* is no longer good law in South Carolina.

The general ruling in *Callander*, cited by this Court's unpublished opinion, is "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Id.* at 126, 362. The opinion in *Callander* explains the basis for this rule, and adopted Section 343(A) of the Restatement (Second). *Id.* The opinion in *Callander* goes on to specifically point out that "Comment (f) to § 343(A) points out that an owner may be required to warn the invitee, or take other reasonable steps to protect him, if the 'possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, ... or fail to protect himself against it.'" *Id.*, citing Restatement (Second) Torts § 343A, comment (f) at 220-221 (1965).

The full text of comment (f), including the illustrations, is as follows:

> f. There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact

that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

- Illustrations:

2. The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.

3. The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B.

4. Through the negligence of A Grocery Store a fallen rainspout is permitted to lie across a footpath alongside the store, which is used by customers as an exit. B, a customer, leaves the store with her arms full of bundles which obstruct her vision, and does not see the spout. She trips over it, and is injured. If it is found that A should reasonably have anticipated this, A is subject to liability to B.

5. A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.

Restatement (Second) Torts § 343A, comment (f) at 220-221 (1965) (emphasis added).

In the Appellant's case, the facts as shown by the record unquestionably comply with the standard set forth by *Callander* and the Restatement (Second) Torts § 343A. To summarize:[1]

- Appellant was a business invitee of Beach Market and arrived at the premises of

[1] All facts listed below are located in the records and have been previously cited in all briefs to this Court. The facts are not necessarily in dispute, only the application of the law in light of these

Beach Market on August 17, 2010 for the purposes of working on the premise of Beach Market.

• Mr. Stever, an owner of Beach Market, was at the premises of Beach Market that morning. After Appellant was finished drilling holes in the concrete, Mr. Stever asked Appellant to fix a leak in the roof.

•According to Mr. Stever, the roof was in a dangerous condition that morning. 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. Mr. Stever had full knowledge that the roof was wet on the morning of August 17th.

• Due to Appellant's employment with Respondent,[2] Mr. Stever knew that Appellant was going to fix the roof directly after Mr. Stever asked him to.

• Mr. Stever had full knowledge of the exact route that Appellant was going to take to access the roof, and testified regarding the exact route that Appellant must take in order to reach the location on the roof that needed to be repaired.

• Appellant suffered great injury when he slipped and fell off the roof.

No court has given any explanation as to why these facts (all of which are in the record and cited to repeatedly) don't justify an imposition of a legal duty to warn on the part of the Respondent by virtue of the Court's ruling in *Callander* and the Restatement (Second) Torts § 343A. Mr. Stever, an owner of Respondent, had every reason to believe that Appellant would be harmed by the slippery roof after he asked Appellant to go fix a leak on the roof. Appellant was working directly for Mr. Stever, Mr. Stever knew the roof was in an

---

facts.

[2] Appellant has also argued that Appellant's personality and his prior military service put Respondent

exceedingly dangerous condition, and Mr. Stever told him to go up on the roof that morning. Mr. Stever knew that Appellant's only alternative to taking the risk of walking on the roof that was "as slick as ice" was to forego his employment to fix the roof as his employer required.

If there was any question as to whether the employee/ employer relationship could form the basis for Mr. Stever's anticipating Appellant would be injured under these circumstances, Illustration 5 of Restatement (Second) Torts § 343A, comment (f) removes all doubt. Applying Illustration 5 to the facts: Beach Market owns a commercial retail building, in which he hired Appellant to fix specific problems on the premises for business purposes. The only approach to the problem on the roof that Beach Market asked Appellant to fix is over a roof made very slippery due to foliage, whose condition is visible and quite obvious. Appellant, employed by Beach Market, attempts to walk on the roof to get to his assigned task, and on his way to the roof area to be repaired, slips on the roof, and is injured. Appellant's only alternative to taking the risk was to forgo his employment.

By a reading of the Unpublished Opinion affirming the trial court's ruling on summary judgment, there is no indication as to in what manner the facts of this case is deficient in finding a duty under in *Callander* and the Restatement (Second) Torts § 343A. In applying the facts of this case to the law as set forth in *Callander* and the Restatement (Second) Torts § 343A, Beach Market had a duty to warn Appellant of the dangerous condition of the roof and breached that duty.

Respondent has argued that the case of *Peterson v. Porter*, 389 S.C. 148, 154, 697

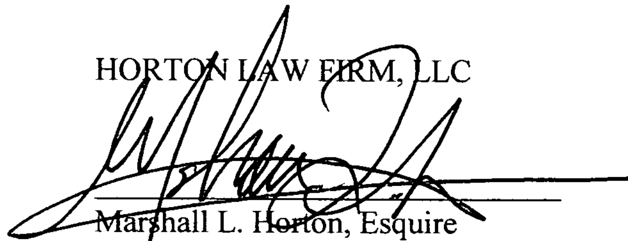
---

on notice that Appellant would fix the roof immediately.

S.E.2d 656, 659 (Ct. App. 2010), is the controlling law on this matter, and that in the case of a business invitee being injured while falling off a roof, there can be no liability under South Carolina law. The argument advanced by Respondent[3] is a departure from the law established by *Callander* and the Restatement (Second) Torts § 343A; however, the trial court agreed with Respondent and appears to have adopted this rule. As a result, in its application today, it appears that *Callander* and the Restatement (Second) Torts § 343A cannot be relied upon anymore and are no longer good law.

It does not appear that this Court intended to overturn established South Carolina law in Unpublished Opinion No. 2014-UP-215. However, this Unpublished Opinion states, in essence, that Appellant as an individual cannot rely upon established South Carolina law in pursuing his theory of liability. Thus, Appellant respectfully requests this Court allow a rehearing, *en banc*, to reconsider the Court's affirmation of the trial court's granting of summary judgment in this case.

HORTON LAW FIRM, LLC



Marshall L. Horton, Esquire
Lindsay Y. Goodman, Esquire
49 Boundary Street, Second Floor
Post Office Box 3766
Bluffton, South Carolina 29910
(843) 757-6190
ATTORNEYS FOR THE APPELLANT

Bluffton, South Carolina
This 25th day of June, 2014

[3] Respondent also argues that Mr. Stever did not actually tell Appellate to get on the roof that morning. This argument is totally absurd. Appellate, in his deposition, states "And I saw Jay [Stever] and he told me, I mean, if I can fix the leak in the roof. I said yes." *See* Record, Page 54, lines 17-22.

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

RECEIVED
JUN 25 2014
SC Court of Appeals

Yossi Haina,

Appellant,

v.

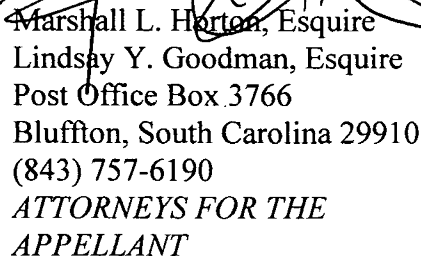
Beach Market, LLC, Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Beach Market, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on June 25, 2014, addressed to their attorneys of record, John H. Tiller, Esquire, and Sarah P. Spruill, Esquire, Post Office Box 340, Charleston, South Carolina 29402 on June 25, 2014.

June 25th, 2014

HORTON LAW FIRM, LLC



Marshall L. Horton, Esquire
Lindsay Y. Goodman, Esquire
Post Office Box 3766
Bluffton, South Carolina 29910
(843) 757-6190
ATTORNEYS FOR THE APPELLANT