THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

RECEIVED
OCT 16 2014
S.C. Supreme Court

Court of Appeals Unpublished Opinion No. 2013-UP-010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. MARUFFO d/b/a LIBERTY EXPRESS, ADRIAN MORALEZ, RET PARTNERSHIP, WILLIAM T. MCQUEENEY, CARL E. ROBERTS, KARL R. HENDERSON, and STEVEN PARHAM, ... Defendants

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

---

BRIEF OF RESPONDENTS

CLAWSON AND STAUBES, LLC
Samuel R. Clawson
Timothy A. Domin
Christina R. Fargnoli
126 Seven Farms, Ste. 200
Charleston, South Carolina 29492
(843) 577-2026 (o)
(843) 724-8036 (f)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

STATEMENT OF ISSUES ON APPEAL

1. Did the courts below properly hold that a motor vehicle entering or exiting a private property is not an artificial condition of the type that would create liability on a landowner adjoining the public highway?

2. Did the courts below properly hold that an adjoining landowner is not liable for creating an artificial condition where the alleged condition was a truck backing onto the property and the truck driver was not an employee of the landowner, was not a tenant of the landowner, had no permission from the landowner, and the tenant had no permission from the landowner to have trucks on the property?

3. Did the courts below properly hold that the residential lease agreement between Respondents and their tenant did not create any legal duty or liability on the part of Respondents with respect to Petitioner's injuries?

STATEMENT OF THE CASE

This case arises from a motor vehicle collision that occurred on March 3, 2009, wherein the Petitioner Hakeem T.M. Mitchell ("Hakeem") was injured when the car in which he as a passenger collided with a tractor trailer truck on U.S. Highway 17 South in Ravenel, South Carolina. 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. Maruffo d/b/a Liberty Express, the trucking company that employed Moralez; RET Partnership, the owner of property leased to J. Jose Valdez; and William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham, the general partners of RET Partnership. On December 8, 2009, Respondents filed and served an Answer denying liability on their part.

On March 8, 2010, Defendants RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham (collectively, "Respondents") filed a Motion for Summary Judgment on the ground that, as adjoining property owners, they owed no legal duty to Hakeem for injuries sustained on the public highway. A hearing was held on December 9, 2010. After hearing arguments, the trial court afforded the parties the opportunity to conduct additional discovery and a subsequent hearing on Respondents' Motion for Summary Judgment was held on May 2, 2011. On June 3, 2011, the trial court issued an Order granting summary judgment to the Respondents. Petitioners filed a Motion to Alter or Amend, which was denied by Order dated July 27, 2011.

Petitioners filed a Notice of Appeal on August 30, 2011. The Court of Appeals heard oral argument on December 13, 2012 and, on January 9, 20112, issued an

unpublished opinion affirming the trial court's grant of summary judgment. 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 that occurred on March 3, 2009. The collision occurred when the vehicle in which Hakeem T. Mitchell was an occupant collided with the side of a tractor trailer truck driven by Defendant Adrian Moralez and owned by Defendant Juan P. Maruffo d/b/a Liberty Express. (App. 123-135). Petitioners allege that, at the time of the collision, the tractor trailer truck was backed across both lanes of travel on U.S. Highway 17 South in Ravenel, South Carolina at night without adequate lighting on the truck. (App. 123-135). Respondents RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and Steven Parham ("Respondents") owned property abutting this portion of Highway 17 at 5858 Savannah Highway, Ravenel, South Carolina (the "Subject Property"). At the time of the accident, Defendant Moralez was purportedly attempting to back a tractor trailer truck onto the Subject Property. (App. 123-135). It is undisputed that the collision did not occur on any portion of the Subject Property. (App. 123-135, 213). It is also undisputed that Respondents neither owned nor controlled the public highway on which the accident occurred.

At all relevant times, the Subject Property contained a single family residential home located towards the front of the property and a larger warehouse-type building toward the back of the property. (App. 522-548). On January 30, 2009, Respondents leased the residential portion of the property to tenant J. Jose Valdez pursuant to a residential lease, which was governed by the South Carolina Residential Landlord

Tenant Act. (App. 506-10, 522-548). The lease did not include the warehouse at the back of the property. Id. Respondents used the warehouse for personal use to house their personal RV's, campers, and the like. (App. 522-548).

The Subject Property was not a "trucking terminal," as was alleged by Petitioners in the Complaint. Respondents did not permit tractor trailer trucks to be parked on the Subject Property because parking such trucks blocked their access to the warehouse on the rear portion of the property. (App. 350-352). Respondents never gave permission to their tenant to drive or park truck tractors on the Subject Property. (App. 340, 350-353, 356, 360, 522-548, 602-606, 607-615, 616-618, 619-623). Indeed, every single time Respondents saw a truck tractor on the Subject Property, they explicitly and expressly told Mr. Valdez this was not permitted and ordered him to move the truck. Id. Specifically, Respondent Parham twice saw a truck tractor on the Subject Property prior to this incident. Id. On each occasion, he ordered Mr. Valdez to remove the truck tractor and not park it on the property again. Id. These were the only two occasions that any of the Respondents ever observed truck tractors on the property. Id. Petitioners' own expert, Jefferson C. Woodall, testified that the actions taken by Respondents in response to twice seeing truck tractors on the property were "appropriate" and "reasonable." (App. 624-626).

Defendant Moralez did not have express or implied permission from Respondents to drive a tractor trailer truck onto the Subject Property on the date of the accident or any other date. He was not a tenant under the lease. (App. 506-510).Respondents did not know Defendant Moralez, have never met Defendant Moralez, and never gave him permission to enter the property and/or drive trucks on the

property. (App. 340, 350-353, 356, 360, 522-548, 602-606, 607-615, 616-618, 619-623). Likewise, Defendant Moralez did not have express or implied permission from Respondents to back the truck tractor onto the Subject Property in such a way as would block Highway 17. Id. To this day, it is not known why Defendant Moralez was backing onto the property.

ARGUMENT

"[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). "[T]he evidence and all inferences that can reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." Moore v. Weinberg, 373 S.C. 209, 216, 644 S.E.2d 740, 743 (Ct. App. 2007). "Once the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 370 S.C. 138, 142, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 142, 634 S.E.2d at 17-18. Once the moving party carries its initial burden, the opposing party must "do more than simply show that there is some metaphysical doubt as to material facts but must come forward with specific facts showing that there is a genuine issue for trial." Baughman v. AT&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (internal quotations omitted). "The purpose of summary judgment is to expedite disposition of cases which do not require the

services of a fact finder." Grant v. Mount Vernon Mills, 370 S.C. at 142, 634 S.E.2d at 17.

I. THE COURTS BELOW CORRECTLY HELD THAT THE PROPER STANDARD AS TO WHETHER RESPONDENTS OWED A LEGAL DUTY OF CARE TO PETITIONERS IS THE LAW ESPOUSED IN SKINNER V. S.C.D.O.T.

"In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury." McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007). "An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance." Id. "Generally, there is no common law duty to act." Jensen v. Anderson County Dep't Soc. Servs., 304 S.C. 195, 199, 403 S.E.2d 615, 617 (1991). Foreseeability of injury is not sufficient to support the imposition of a duty in tort. Foster v. Greenville County Med. Soc., 295 S.C. 190, 193, 367 S.E.2d 468, 470 (Ct. App. 1988) ("in the absence of a duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability."). Whether a duty exists is a question of law for the court. Huggins v. Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). "If there is no duty, the defendant is entitled to judgment as a matter of law." Id.

It is well-settled South Carolina law that the owners of property abutting or adjoining a public highway owe no common law duty to motorists injured on the public highway, where the owners neither possess nor control the highway. Skinner v. S.C. Dep't of Transp., 383 S.C. 520, 681 S.E.2d 871 (2009) (abutting property owners owed no duty to person injured by driver who lost control when he veered onto roadway's shoulder); see also Mahle v. Wilson, 283 S.C. 486, 323 S.E.2d 65 (Ct. App. 1984)

(abutting property owners owed no duty where pedestrian was struck while attempting to cross highway from the property at issue); Ford v. S.C. Dep't of Transp., 328 S.C. 481, 492 S.E.2d 811 (Ct. App. 1997) (abutting property owners owed no duty to motorist injured when he struck a tree that had fallen from adjoining property across a public highway). The law "only 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." Skinner, 383 S.C. at 524, 681 S.E.2d at 873. This rule applies equally to both residential and commercial property, as it does not distinguish between the two. See Skinner, 383 S.C. 520, 681 S.E.2d 871 (residential and commercial property); Mahle, 283 S.C. 486, 323 S.E.2d 65 (commercial property); Ford, 328 S.C. 481, 492 S.E.2d 811 (residential property). Because it is undisputed that this accident occurred on the public highway and did not occur on any portion of the Subject Property, the rule espoused in Skinner and related cases concerning the duty of adjoining property owners is the proper standard under which to analyze this case and determine whether Respondents owed a legal duty to Petitioners.

Petitioners' citations of and discussions of cases concerning premises liability and business invitees are both misleading and irrelevant. See, e.g., Dunbar v. Charleston & W.C. Ry. Co., 211 S.C. 209, 44 S.E.2d 314 (1947) (premises liability) [1]; Cook v. Lowe's Home Ctrs., Inc., 2006 WL 3098773 (D.S.C. Oct. 30, 2006) (standard for business invitees); Wintersteen v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728 (2001) (standard for business invitees); Restatement (Second) of Torts § 364 (1965) (not the law in South Carolina). These cases involve injuries occurring on a premises owned by the defendant or on property over which the defendant has exercised some

measure of control (i.e. by making repairs). In this case, it is undisputed that the accident did not occur on any portion of the Respondents' property and there is no allegation Respondents owned or controlled the public highway where the accident occurred. Rather, the allegations concern Respondents' ownership and use of property adjoining the highway where the accident occurred, which brings this case squarely within Skinner and related cases. Thus, case law concerning the standard of care owed by a landowner to a business invitee or a licensee is inapplicable.

Therefore, the only proper inquiry in this case, under Skinner, is whether Respondents caused or created an "artificial condition" on the public highway, which is dangerous to travelers. If they did not, they cannot be held liable because they owed no legal duty to Petitioners.

II. THE COURTS BELOW PROPERLY HELD THAT THERE WAS NO "ARTIFICIAL CONDITION" ON THE PUBLIC HIGHWAY.

This incident did not constitute an "artificial condition." This was simply a failure to yield motor vehicle accident, whereby the driver of the car in which Petitioner Hakeem Mitchell was a passenger collided with a tractor trailer truck, which was blocking both lanes of traffic on a public highway and being driven by Defendant Adrian Moralez.

Our courts have not defined the term "artificial condition" as used in Skinner, 383 S.C. at 525, 681 S.E.2d at 874, and related cases. Courts across the country have consistently held that a landowner has no duty to protect against the negligent acts of third parties public highways not within the landowner's control. For example, in Naumann v. Windsor Gypsum, 749 S.W.2d 189 (Tex. App. 1988), the Texas Court of Appeals addressed a case with facts similar to this case. In Naumann, an accident

occurred on the public highway when the plaintiff's vehicle collided with a tractor trailer truck that was blocking both lanes of traffic as it was exiting property owned by Windsor. Id. at 190. The plaintiff brought suit against Windsor, the adjoining property owner, under the theory that its plant was situated in such a manner that forced tractor-trailers exiting its property to block both lanes of the public highway as they leave the plant. Id. The Texas Court of Appeals affirmed summary judgment for Defendant Windsor, finding it owed no legal duty to the plaintiff. Id. at 190-92. In so holding, the court noted that Windsor did not "discharge onto [the highway] an inanimate, incognizant, or inherently dangerous entity." Id. at 191. Rather, Windsor's independent contractor truck driver, over whom Windsor had no control, was simply involved in a traffic accident on the adjacent public way. Id. "Although Windsor knew of the propensity of truck drivers to block both lanes when turning east on [the highway], it had every right to expect them to exercise due care and enter the highway safely." Id. at 192. "An owner or occupier of property is not an insurer of the safety of travelers on an adjacent highway and is not required to provide against the acts of third persons. Id. In sum, the court affirmed summary judgment because an adjoining property owner is not bound to anticipate and prevent negligent or unlawful conduct on the public highway on the part of another. The Naumann case is nearly identical to this case and the Court should follow its reasoning in affirming summary judgment for the Respondents.

Petitioners attempt to distinguish the Naumann decision on the basis that the truck driver traveled 264 feet down the public highway before the accident occurred. However, Petitioners fail to mention that, although this is true, the accident still occurred adjacent to the Windsor property. Id. at 190-91. Specifically, the Windsor plant was

situated at the corner of Cypress Ridge Road and F.M. 78. Id. Trucks exiting the property were required to exit on Cypress Ridge and turn right onto F.M. 78 to exit the plant. Id. To effectuate the turn, drivers were forced to block both lanes of F.M. 78, which is where the accident occurred. Id. The Naumann plaintiffs alleged that Windsor was negligent in situating the plant such that drivers were forced to block both lanes of traffic when exiting the plant. Id. This is the precise allegation Petitions have made against Respondents in this case. Thus, the Naumann facts are comparable and relevant to the facts of this case, as both cases involve a traffic accident on a public roadway involving a driver blocking lanes of traffic, over which the adjoining property owner had no control.

The Naumann holding is consistent with other decisions across the country concerning this issue. For example, in Estes v. Peels, 2000 Tenn. App. LEXIS 641, *1-4 (Tenn. Ct. App. Sept. 21, 2000), the plaintiff was injured on the public highway when a vehicle exited a manufacturing plant adjacent to the highway and failed to yield to the plaintiff's right-of-way. The plaintiff sued the owner of the manufacturing plant, alleging the driveway was inadequate and caused drivers to unsafely enter the public highway. Id. The Tennessee Court of Appeals affirmed the trial court's order granting summary judgment in favor of the adjoining landowner. Id. at *19-22. The court concluded that there was nothing dangerous about the driveway or the parking lot in and of themselves. Id. The dangerous condition was the driver's failure to obey traffic laws and yield to oncoming traffic. Id. The court noted that, even if such conduct was foreseeable by the landowner, the landowner is still not liable because imposing a duty on the landowner to "prevent a driver from pulling out on a highway without yielding to

oncoming traffic would be an onerous burden." Id. at *20. Such responsibility rests with law enforcement or the government, not a private landowner. Id. Here, like Estes, there is no allegation that there is anything inherently dangerous about Respondents' driveway in and of itself.

Petitioners attempt to distinguish the Estes case on the basis that it is a negligent design case, while this case involves allegations that the Respondents' use of the property was improper. However, both cases involve an accident that occurred on the public roadway. Both cases involve a theory that a driveway adjacent to the public roadway was inadequate in some manner. And, both cases involve a driver and vehicle on the public roadway, over which the defendant property owner had no control whatsoever. Thus, just as in Estes, this was a failure to yield accident on the public roadway for which the adjacent property owner should have no duty or responsibility.

The case at hand is factually similar to both Naumann and Estes. Both decisions are consistent with South Carolina law on this issue. Just as in Nauman and Estes, this incident did not constitute an artificial condition on the roadway, but was simply a traffic accident caused by Defendant Moralez's failure to yield the right-of-way or otherwise obey traffic laws. A similar issue was considered in Safeway Stores, Inc. v. Musfelt, 1960 OK 34, 349 P.2d 756 (Okla. 1960). In Safeway, a pedestrian was injured when a driver backed out of a parking space on Safeway's property. Id. at 34, 349 P.2d at 757-58. The plaintiff alleged that the parking space was negligently situated, such that drivers were forced to back their cars over the sidewalk when exiting the parking space, which is where the plaintiff pedestrian was struck. Id. The Supreme Court of Oklahoma held that, as a matter of law, the acts of Safeway were not the proximate cause of the

plaintiff's injuries. Id. at 34, 349 P.2d at 758-59. In reaching this decision, the court stated that it is a matter of common knowledge that most residences and many business establishments have driveways that require vehicles to back up (or out) in order to leave the premises. Id. "Under these circumstances the property owner is not liable because the owner cannot control and has no right to control the drivers of the vehicles." Id. The court further noted, "the property owner has a right to expect the drivers to look before they back out." Id. In Safeway, "at most [the property owner] only furnished or created a condition making the injury possible." Id. Thus, "the property owner's negligence, if any, was not the proximate cause of the pedestrian's injuries" and, thus, is not responsible for the plaintiff's injuries." Id. This is the precise situation in the case at hand – the mere existence of Respondents' property or driveway did not cause Petitioners' injuries; rather, they were caused by driver Defendant Moralez, over which Respondents had no control. Indeed, Petitioners did not know Moralez, never met Moralez, did not give him permission to enter the property, and still do not know why he was backing onto the property. Therefore, just as in Safeway, Respondents are entitled to judgment as a matter of law.

The Naumann, Estes, and Safeway decisions are consistent with other factually similar cases across the country. See, e.g., Chouinard v. N.H. Speedway, 829 F.Supp. 495 (D.N.H. 1993) (no artificial condition where plaintiff alleged use of adjoining property created a dangerous condition on the public roadway); Owens v. Kings Supermarket, 198 Cal. App. 3d 379, 243 Cal. Rptr. 627 (Cal Ct. App. 1988) (supermarket owed no duty to pedestrian struck on adjoining public highway); Holter v. Sheyenne, 480 N.W. 2d 736 (N.D. 1992) (no duty where landowner had neither control over vehicle that struck

decedent nor authority over traffic regulation on public highway); Rosas v. O'Donoghue, 2005 U.S. Dist. LEXIS 17165 (E.D. Pa. Aug. 17, 2005), aff'd by, 216 Fed. Appx. 150 (3d Cir. Pa. 2007) (no duty to plaintiff struck on highway because landowner did not create a dangerous condition on highway); Dawson v. Ridgley, 554 So.2d 623 (Fla. Dist. Ct. App. 3d. Dist. 1989) (no duty to passing motorist on public highway where vehicle exiting shopping center collided with motorist because driver's view was obstructed by a telephone pole located off of shopping center property).

Looking to the cases cited by Skinner also provides some guidance in determining what our courts consider as an artificial condition. Specifically, the Skinner Court cited Holiday Rambler Corp. v. Gessinger, 1989 Ind. App. LEXIS 739, 541 N.E.2d 559 (Ind. Ct. App. 1989), on this issue. In Holiday Rambler, a landowner operated a factory on its property, which employed several hundred employees. Id. at 560-61. Each day at 3:00 p.m. at the end of their shifts, these several hundred employees exited the property from four driveways and entered onto the two-lane public highway with no established traffic flow pattern. Id. An accident occurred one day during this process. Id.

The facts of this case are substantially different than the Holiday Rambler incident. Here, the Moralez vehicle was not on the Subject Property prior to the accident or exiting the property at the time of the accident. (App. 123-135). Here, unlike Holiday Rambler, there is no allegation Respondents were doing anything to attract, encourage, or promote trucks to enter their property. Nor were Respondents doing anything to attract, encourage, or promote backing trucks onto the property. Petitioner's vehicle simply collided with Defendant Moralez, who was negligently blocking traffic while

attempting to enter the Subject Property, for an unknown reason without any invitation by or knowledge of Respondents.

One vehicle attempting to enter the property is not a "condition" and, moreover, is not an "artificial condition." Vehicles backing onto and off of private property are not an unusual occurrence; rather, it is a daily occurrence that happens all day, every day all over the country. Hundreds of thousands of residential homes in South Carolina are situated such that cars must back either onto or off of the property on a daily basis. Many South Carolina businesses are situated such that vehicles must slow down on the public highway to turn onto the property. And, indeed, such turns many times necessitate a tractor trailer truck utilizing (and, thus, blocking) two lanes of traffic to effectuate the turns. Daily, countless businesses and homes have packages delivered to their premises by trucks that might temporarily block traffic or sight lines when entering or exiting private property. These are not "artificial conditions." Property owners should not be put to the burden of being forced to defend claims for traffic accidents occurring on a public highway while persons are negligently entering or exiting their private property. Such a result would be too broad a reading of Skinner and companion cases. The Oklahoma Supreme Court recognized this principle in Safeway Stores, supra, when it noted that it is a matter of common knowledge that most residences and many businesses have driveways or parking lots such that vehicles must be backed up (or out) in order to leave the premises. 349 P.2d at 758. As discussed above, "[u]nder these circumstances the property owner is not liable because the owner has no control and has no right to control the drivers of the vehicles. However, the property owner has the right to expect the drivers of cars to look before they back out." Id. To hold

otherwise could potentially lead to a slippery slope and would impose an undue burden on private property owners who are ill-equipped to remedy the situation.

The Skinner Court also referenced Pitcairn v. Whiteside, 109 Ind. App. 693, 34 N.E.2d 943 (Ct. App. 1941), as constituting an artificial condition. In Pitcairn, a driver was injured when employees of the property owner started a fire on the subject property near the roadway, which caused a substantial amount of thick smoke to gather on the roadway, and obstruct the vision of drivers. Id. at 696-97, 34 N.E.2d at 945. The smoke remained on the highway for several hours and the property owner did nothing to direct traffic or otherwise attempt to minimize the effect of this condition. Id. Such facts are clearly different from the facts of this case, where the accident was caused by the manner in which Moralez chose to maneuver his truck onto the Subject Property, rather than by some inherently dangerous substance, such as smoke, on the roadway. In Pitcairn, an employee of the landowner started the fire that created the smoke and the smoke was emanating from the landowner's property onto the highway. However, here, there was nothing emanating from Respondents' property that caused this accident. Respondents' did not engage in any act on their property that attracted, encouraged, or promoted trucks to enter their property or obstruct Highway 17. Defendant Moralez's choice to enter the property and his subsequent choice in how to maneuver his vehicle onto the property did not constitute an "artificial condition on the highway" under Skinner.

The cases cited by Petitioners are distinguishable from the facts at hand. For example, Petitioners rely upon Bober v. New Mexico State Fair, 808 P.2d 614 (N. Mex. 1991), which is a case where the New Mexico State Fair leased its premises to

organizers for a rock concert. In Bober, after the concert ended, many of the more than ten thousand patrons exited the premises and a motor vehicle accident ensued on the public roadway. The issue in Bober was the plaintiff's allegation that the State Fair "permitted" an activity to be conducted on its premises that would result in a concentrated stream of traffic at a single point at one time, without adequate traffic controls. This differs from this case, as this case involves landlords who did not permit, promote, or otherwise authorize the activity at issue. Instead, they expressly forebode it. Moreover, this accident was not the result of more than ten thousand vehicles entering the roadway at one time, but was simply one car colliding with one truck.

Petitioners also rely upon Moretti v. C.S. Realty Co., 82 A.2d 608 (R.I. 1951), a case where a pedestrian on a sidewalk was injured when a fan blade accidentally flew out of a building and hit the pedestrian. The Moretti facts are in no way analogous or relevant to the facts of this case. Lastly, Petitioners rely upon Estate of Mickelson v. North-Wend Foods, Inc., 274 P.3d 1193 (Alaska 2012). In Mickelson, the plaintiff alleged a Wendy's restaurant designed its ingress and egress such that its patrons were forced to make an illegal left turn to enter the restaurant. Wendy's brought a 12(b)(6) motion to dismiss, which was granted by the trial court and reversed by the Supreme Court of Alaska. Mickelson is distinguishable for several important reasons. First and foremost, this case involves a Rule 56 motion, while Mickelson addressed a Rule 12(b)(6) motion, which required the court to confine its decision to review of only the pleadings. Second, Mickelson was a "negligent design" case and there is no such allegation in this case. Third, in Mickelson, the vehicle entering the property at the time of the accident was a Wendy's patron – meaning that Wendy's promoted, attracted, and

encouraged such an activity. Conversely, in this case, the Moralez vehicle that was purportedly entering the property was not invited or authorized by Respondents to do so. There is no evidence that Respondents promoted, attracted, and encouraged such activity.

Thus, the cases relied upon by Petitioners are not instructive as to the ultimate issue in this case – whether Respondents created an artificial condition on the public highway. Rather, The Court should look to the holdings and reasoning set forth in Skinner, Naumann, Estes, Safeway Stores, and related cases in deciding this case. Mahle v. Wilson, 283 S.C. 486, 323 S.E.2d 65 (Ct. App. 1984), is another factually similar case to be considered by this Court. In Mahle, the plaintiff was injured when she left a skating rink, crossed the highway in front of the skating rink, and was struck by an automobile on the public roadway. Id. at 487, 323 S.E.2d at 65-66. The skating rink was owned and operated by the defendant. Id. The plantiff alleged the skating rink was negligent in various ways by essentially allowing activity to take place on its property without providing adequate safety measures, such as adequate lighting and a crosswalk. Id. The Court of Appeals affirmed the trial court's dismissal of the suit on the ground that the skating rink was an adjoining property owner that owed no duty to the plaintiff, as one injured on the public highway adjacent to its property. Id. at 487-88, 323 S.E.2d at 66. Here, just as in Mahle, the trial court's Order should be affirmed because Respondents owed no duty to Petitioners to control the acts of third parties on the public highway adjacent to their property. Such responsibility lies exclusively with government and law enforcement.

III. THE COURTS BELOW COURT PROPERLY CONCLUDED THAT RESPONDENTS DID NOT "CAUSE OR CREATE" AN ARTIFICIAL CONDITION.

If an artificial condition existed (which is denied), it was not caused or created by Respondents. Respondents leased the Subject Property to tenant Jose Valdez. (App. 506-510, 522-548). The truck involved in the accident was driven by Defendant Moralez, who was not a tenant under the lease. (App. 123-135, 506-510). Respondents did not know Defendant Moralez, have never met Mr. Moralez, and never gave him permission to enter the property and/or drive trucks on the property on the date of the accident or on any other date. (App. 340, 350-353, 356, 360, 522-548, 602-606, 607-615, 616-618, 619-623). Therefore, Defendant Moralez did not have the express or implied permission of Respondents to drive a truck onto the property or, moreover, to back a truck onto the property in such a way as would obstruct Highway 17. Id. This act is simply too far removed from Respondents to hold that they caused or created the alleged artificial condition.

Likewise, the Respondents never gave Mr. Valdez permission to drive or park tractor trailer trucks on the property. (App. 340, 350-353, 356, 360, 522-548, 602-606, 607-615, 616-618, 619-623). In fact, every single time Respondents saw a tractor trailer truck on the property, they explicitly and expressly told Mr. Valdez this was not permitted and directed him to move the truck. Id.

In Naumann v. Windsor Gypsum, supra, the Texas Court of Appeals discussed whether the defendant landowner caused or created the alleged condition. The court concluded that the dangerous condition (a tractor trailer truck obstructing two lanes of traffic) was not created by Windsor, the defendant landowner. 749 S.W. at 192. Windsor

had no control over the defendant driver, an independent contractor, when the driver was not on its property. Id. at 192. Windsor was not responsible for the narrowness of the public roadway, the length of the trailer, or any other issue that could conceivably be said to have caused this condition. Id. at 192. "The same dangerous situation exists every time a tractor-trailer makes a right turn at an intersection of two-lane roads. A mere bystander who did not create the dangerous condition is not required to take action to and prevent injury to others." Id.

In Estes v. Peels, supra, the Tennessee Court of Appeals also focused on this issue. In affirming summary judgment for the landowner, the court noted the defendant landowner "had no control over the instrumentality [the vehicle] that caused [the plaintiff's] injuries; it could not prevent [defendant driver] from failing to yield to oncoming traffic as she entered the highway." 2000 Tenn. App. at *22. Therefore, even if an artificial condition existed in Naumann and Estes, the landowners were entitled to summary judgment because they did not create the condition that led to the danger. Just as in Naumann and Estes, Respondents did not do anything which can be construed as causing or creating this alleged artificial condition, as it is undisputed that they had no control whatsoever over Defendant Moralez and his choice to obstruct the highway.

The Holiday Rambler decision is instructive on this issue as well. In Holiday Rambler, as discussed above, each day, the owner of the property chose to release several hundred employees from their shift at 3:00 p.m. onto a two-lane road from four driveways on the property. Unlike this case, the Holiday Rambler property owner was actively involved in creating the purported artificial condition, as it was the property

owner that ran the manufacturing company, chose when to release its employees, chose where they should enter and exit the property, and, therefore, created the condition. That is not the situation here, as there is no evidence Respondents attracted, encouraged, or promoted the alleged condition. Rather, the record demonstrates just the opposite. Respondents never consented to allowing their tenant, Defendant Moralez, or anyone else to park a tractor trailer on the property, back a tractor trailer on the property, otherwise engage in acts that can be construed as causing or creating this condition. (App. 340, 350-353, 356, 360, 522-548, 602-606, 607-615, 616-618, 619-623).

Additionally, in Holiday Rambler, the Indiana Court of Appeals held it was a question of fact for a jury *only* because it was distinguishable from cases where there was lack of relationship between the landowner and the third person causing the injury. For example, in discussing this issue, the Holiday Rambler Court cited and discussed the case of Blake v. Dunn Farms, 274 Ind. 560, 413 N.E.2d 560 (1980). In Blake, the plaintiff was a passenger in an automobile that struck a horse on a public highway. Id. at 562-64, 413 N.E.2d at 561-62. The plaintiff brought suit against the owner of the horse and the landowner. Id. The landowner was neither the owner nor the custodian of the horse, as the horse belonged to a sub-tenant of the tenant to which the landowner was leasing. Id. The court affirmed summary judgment because "the owner of the property had no relationship to the agency causing the problem, and no duty to investigate to determine if there was a problem, emergency, or dangerous condition." Id. at 566-67, 413 N.E.2d at 564. The court expressly distinguished Blake from Pitcairn, supra, wherein the landowner itself caused the artificial condition of heavy smoke traveling

across the highway. Id. The Blake court noted that to hold the landlord responsible "would place a duty on a property owner to continually inspect the perimeters of his property along an adjacent highway, to make sure that dangerous conditions do not arise for those traveling on the highway." Id. Here, just as in Blake and as recognized by Holiday Rambler, there is a complete lack of relationship between landowners (Respondents) and the third person causing the injury (Moralez). As more fully set forth above, Respondents had no relationship whatsoever with Defendant Moralez and no control over him.

Thus, the actions and involvement of Respondents did nothing to cause or create the alleged artificial condition. They did not attract, encourage, or promote trucking activity on the property or, moreover, the act of backing a tractor trailer truck across the public highway. The record demonstrates that they did just the opposite. This accident was caused and created by Defendant Moralez and the manner in which he chose to maneuver the tractor trailer truck onto the Subject Property. Respondents' actions were too far removed from Defendant Moralez and the accident itself to be held liable. There is no proximate cause. Property owners are under no duty to predict who will visit their residential tenant. Moreover, they are under no duty to predict or direct the manner in which such visitors will turn their vehicles onto the leased property. To expand Skinner to reach such a result would open up the floodgates of litigation for every accident that occurs on the public highway while someone is purportedly entering or exiting private property.

IV. THE COURTS BELOW PROPERLY CONCLUDED THAT RESPONDENTS DID NOT OPERATE A "TRUCKING TERMINAL" OR UNDERTAKE ANY TRUCKING ACTIVITY ON THE SUBJECT PROPERTY.

Petitioners brought this suit against Respondents on the theory they were operating a commercial "trucking terminal" on the Subject Property. This theory seems to have been abandoned by Petitioners, but is addressed in this Brief in an abundance of caution.

The trial court properly held that the affidavits and depositions of Respondents revealed they did not operate a trucking terminal on the property or otherwise undertake any commercial trucking activity on the property. The Subject Property contained a single family residential home, which was leased to Mr. Valdez, and a warehouse on the back of the property, which was used to house Respondents' personal RV's and campers. (App. 506-510, 522-548).

There is no evidence in the record that Respondents operated a trucking terminal, undertook any trucking activity, or otherwise acquiesced in trucking activity. While there is some testimony in the record demonstrating that people occasionally saw a trailer and/or a truck parked on the property, this does not constitute a commercial trucking terminal. Moreover, the undisputed testimony in the record demonstrates that Respondents themselves did not operate a trucking terminal, engage in trucking activity, or even authorize trucking activity. (App. 340, 350-353, 356, 360, 522-548, 602-606, 607-615, 616-618, 619-623). However, Petitioners' mistaken belief that the Subject Property was a commercial trucking terminal has no effect on the long-standing rule that owners of property abutting a public highway owe no common law duty to motorists injured on the public highway where the owners neither possess nor control the

highway, because this rule applies equally to both residential and commercial property. See, e.g., Skinner, 383 S.C. 520, 681 S.E.2d 871 (residential and commercial property); Mahle, 283 S.C. 486, 323 S.E.2d 65 (commercial property); Ford, 328 S.C. 481, 492 S.E.2d 811 (residential property).

Petitioners' Complaint further alleges that Respondents owed a "special duty of care" because of the "commercial nature" of the Subject Property. There is no South Carolina case that imposes a special duty of care on commercial property abutting a public highway. As demonstrated above, the Skinner rule applies equally to both residential and commercial property. There is also no applicable statute, regulation, ordinance, or other law concerning trucking terminals or otherwise that creates a duty flowing from Respondents to Appellants.

Additionally, to the extent Appellants' continue to contend the property was commercial in nature, Respondents are absolved from liability under Bylerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992). In Byerly, the Supreme Court held, "when land is occupied by a lessee . . . the law of property regards the lease as equivalent to possession and control of the land to the lessee." Id. at 443, 415 S.E.2d at 798. "After the premises is surrendered in good condition, the lessor typically is not responsible for hazardous conditions which thereafter develop or are created by the lessee." Id. In other words, the lease is the equivalent of a sale for the term of the lease. Therefore, if the Subject Property is deemed "commercial property," as has been suggested by Appellants, Respondents are not liable for the accident because it was caused by a condition that developed after the premises was surrendered to Mr. Valdez.

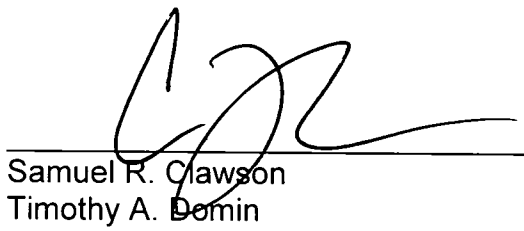
V. THE COURTS BELOW PROPERLY HELD THAT NEITHER SOUTH CAROLINA LANDLORD-TENANT LAW NOR THE LEASE AGREEMENT CREATES A LEGAL DUTY OF CARE FLOWING FROM RESPONDENTS TO PETITIONERS.

Appellants contend the lease agreement between Respondents and their tenant created a legal duty of care owed by Respondents to Appellants. There is nothing in the terms and conditions of the lease to support this allegation. (App. 506-510). Appellants cite Sections 20 and 25 of the lease in taking this position. Section 20, entitled "Joint Responsibility," states: "Each party who signs this Rental Agreement is responsible for rent and the obligations herein." (App. 508). This is a standard lease provision, which means that if more than one tenant signs the lease, each are equally responsible for the rent and the terms of the lease. To construe this language as imposing any responsibility or liability on the landlord would amount to a tortured reading of the provision. Section 25 of the lease sets forth rules and regulations that the tenant must follow. (App. 509). It does not set forth any rules, regulations, or duties that the landlord must follow. No provision of the lease creates a duty flowing from Respondents to Appellants. Nothing in the South Carolina Residential Landlord Tenant act or accompanying case law creates a duty owed by Respondents to Appellants.

CONCLUSION

For the reasons stated, the trial court properly held that Respondents owed no legal duty of care to Petitioners for injuries sustained on the public highway in this accident. Respondents respectfully request this Court affirm the trial court's Order granting summary judgment and the opinion of the Court of Appeals affirming that Order.

Respectfully submitted,



Samuel R. Clawson
Timothy A. Domin
Christina R. Fargnoli
CLAWSON AND STAUBES, LLC
126 Seven Farms, Ste. 200
Charleston, South Carolina 29492
(843) 577-2026 (o)
(843) 724-8036 (f)

ATTORNEYS FOR RESPONDENTS

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. . . . . Appellants,

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

---

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondents' Brief has been served by mailing a copy properly addressed with sufficient postage affixed thereto this 15th day of October, 2014 to the following:

Richard Rosen, Esquire
Andrew D. Gowdown, Esquire
Rosen Rosen & Hagood LLC
134 Meeting Street, Suite 200
Charleston, SC 29401

(Signature on following page)

CLAWSON AND STAUBES, LLC
Samuel R. Clawson
Timothy A. Domin
Christina R. Fargnoli
126 Seven Farms, Ste. 200
Charleston, South Carolina 29492
(843) 577-2026 (o)
(843) 724-8036 (f)

ATTORNEYS FOR RESPONDENTS