

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT.

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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Court of Appeals Unpublished Opinion No. 2013-UP-010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.

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents have incorrectly framed the issues on appeal. This collision was not the result of a mere happenstance beyond the control of Respondents. Likewise, this litigation is not, as Respondents' contend, a "failure to yield" case. (Brief of Respondents, p. 8). Rather, the cognizable claims against these Respondents are based on the fact that these landowners allowed a known, ongoing, dangerous use of their property, which they possessed and controlled, without regard to the safety of motorists on the adjacent highway. Tractor trucks were routinely seen by the general public parked on the property and also backing across Savannah Highway onto Respondents' property to load and unload semitrailers. (App. pp. 150, 153, 168). Respondents admit that the very first time they saw the tractor truck and semitrailer on their property they knew that their tenant was a trucking operator. (App. p. 356, lines 11-18). The added detail that a party unknown to Respondents was also using the property to load and unload tractor trailers is evidence that the *jury* should be permitted to consider in determining whether Respondents breached their duty of reasonable care.

Petitioners' cause of action against Respondents is for negligence, which arises out of the well-founded principle of tort law that all persons have a duty to act reasonably so as to avoid harm to third parties. Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991). The duty of landowners to exercise due care in the use of their property arises out of this very basic rule of law. Id.; Bober v. New Mexico State Fair, 808 P.2d 614, 618 (N. Mex. 1991). Whether the duty is espoused in the narrower context of premises liability, or even nuisance law, the duty remains the same. The law of South Carolina is clear: where a landowner retains possession and control of his

property, he will be liable to third parties injured as a result of the dangerous use of that property. Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001); 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); 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)); Restatement (Second) of Torts § 364 (1965).

Respondents misconstrue the duty that is owed, and Respondents' slippery slope argument must fail. Petitioners do not seek to impose a duty on landowners "to predict or direct the manner in which . . . visitors will turn their vehicles onto the leased property." (Brief of Respondents, p. 21). Likewise, Petitioners are not asking this Court to create a new duty. Instead, Petitioners seek this Court's recognition of the long standing responsibility landowners have to exercise reasonable care in the use of their property to avoid harm to others, including persons on the premises, adjacent landowners, and the traveling public.

The critical facts in this case, which are admitted to by Respondents, are that: (1) Respondents retained ownership, possession, and control of the property known as 5858 Savannah Highway; (2) the property was being used for a dangerous activity, namely, backing across both lanes of the heavily traveled highway adjacent to the property to load and unload large tractor trailers onto the property; (3) Respondents knew how their property was being used because they observed the trucks on at least four separate occasions; (4) Respondents knew that such activity constituted a danger to the traveling public; and (5) Respondents failed to remedy the danger by eviction procedures when

they had the power and duty to do so. (App. p. 137, ¶ 13; p. 340, line 16-p. 341, line 23; p. 345, lines 12-23; p. 347, lines 23-25; p. 350, line 1-p. 352, line 13; p. 358, line 10-p. 359, line 16; p. 392). These facts alone are sufficient to impose a duty of reasonable care on Respondents. Respondents' claim that they "did not permit, promote, or otherwise authorize the activity at issue" or that they did not "operate a trucking terminal, engage in trucking activity, or even authorize trucking activity" is irrelevant to the inquiry of the duty owed. (Brief of Respondents, pp. 16, 22). Any claim that Respondents did not know about the dangerous use of their property is contradicted by their own admissions. (Brief of Respondents, p. 14). Finally, it is important to note that Respondents' use of the property was in violation of local zoning ordinances and would knowingly create a danger on the adjacent highway. (App. p. 146; p. 174; p. 347, lines 23-25; p. 351, line 6-p. 352, line 10; p. 358, line 10-p. 359, line 4; p. 392; pp. 558-76).

The crux of Respondents' arguments derives from the mistaken notion that landowners have no duty to ensure the safety of others on public highways against the negligence of third parties. The facts of this case support the imposition of a duty on Respondents in that they had control over *both* the third party and the dangerous use of Respondents' own property. As Respondents correctly concede and as the case law supports, a landowner's duty of care ends only after he parts with possession of the property. (App. p.10, n.1 (citing Dunbar, 211 S.C. 209, 44 S.E.2d 314)).

The cases relied on by Respondents to avoid liability are inapposite to this litigation and are based primarily on a theory of negligent design, which is not at issue here. 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, made a wide right turn onto a two-lane road and collided 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. This conclusion was based primarily on the rationale that a landowner has no duty to protect motorists from "an independent contractor over whom the landowner exercises no control and whose competence to perform his duties the landowner has no reason to doubt." Id. The facts in Naumann stand in great contrast to the evidence established in this case, which is that Respondents had control over the subject property and they were acutely aware of the dangerous condition created by its improper use. Naumann provides no reasonable basis to excuse Respondents from their legal duty as a landowner under South Carolina law. In addition, the wreck at issue here occurred right in front of 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. pp. 512-13).

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 of their duty to the minor Petitioner. In Estes, 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 Respondents controlled, which caused injury to the minor Petitioner. Petitioners are not asking this Court to pin liability on landowners for all car accidents that occur adjacent to their property, as Respondents suggest. Instead, Petitioners are merely requesting that this Court apply the rule of law in South Carolina that requires a landowner to exercise due care in the use of his property, which is under his control, so as to avoid harm to others, including travelers on the highway. Wintersteen, 344 S.C. at 35, 542 S.E.2d at 729; Miller, 329 S.C. at 314, 494 S.E.2d at 815; Peden, 155 S.C. at 1 151 S.E. at 907; Cook, 2006 WL 3098773; Restatement (Second) of Torts § 364 (1965).

Respondents' reliance on the case of Safeway Stores, Inc. v. Musfelt, 349 P.2d 756 (Okla. 1960), is also misplaced. There, a woman on a sidewalk was struck by an unknown third party who was backing out of a parking space across the sidewalk. The plaintiff was awarded damages by a jury, and the defendant appealed. The appellate court recognized the duty of the defendant, as the owner of the premises abutting the sidewalk, "to use only ordinary care in the maintenance and operation of its property to prevent injury to users of the sidewalk." Id. at 758. The factual evidence revealed that there was no obstruction of the sidewalk and that the defendant landowner had no connection with the unknown driver. Id. The verdict was overturned not because defendant owed no duty to the plaintiff, but because the court determined "the acts of Safeway were not the proximate cause of plaintiff's (Mustfelt's) injuries...." Id. at 759. In the instant case, as in Safeway, the duty of Respondents is clear, and the question of whether they breached that duty is for the jury.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the Court of Appeal affirming the trial court's order granting summary judgment to Respondents.

Respectfully submitted,



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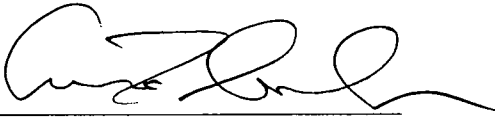
PROOF OF SERVICE

I certify that I have served a copy of Petitioners' Reply Brief on Respondents
RET Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson,
and Steven Parham by regular U.S. Mail, postage prepaid, on October 27, 2014,
addressed to their attorneys of record as follows:

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OCT 31 2014

September 5, 2014

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Neshen Mitchell, Individually and as the Next Friend of her Minor Child,
Hakeem T. M. v. Juan P. Marruffo d/b/a Liberty Express, Adrian Morales, RET
Partnership, William T. McQueeney, Carl E. Roberts, Karl R. Henderson, and
Steven Parham

Case No.: Supreme Court of South Carolina 2013-000670

Dear Mr. Shearouse:

Please find enclosed for filing an original and fifteen (15) copies of Petitioners' Reply Brief and a Proof of Service for same. If you would be so kind, please return a filed copy to me, in the enclosed self-addressed, pre-posted envelope.

Sincerely yours,



Andrew D. Gowdown

ADG/dlw
Enclosures

cc: Samuel R. Clawson, Esquire (w/enclosures)
J. Joseph Condon, Jr., Esquire (w/enclosures)