THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-2300

Yossi Haina,

Petitioner,

v.

Beach Market, LLC, Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals. Specifically, Counsel for Petitioner filed a Petition for Rehearing Pursuant to SCACR Rule 221 and Suggestion for Rehearing En Banc Pursuant to SCACR Rule 219(b) on June 25, 2014, which was received by the Court of Appeals on the same day. The Court of Appeals ruled on the Petition for Rehearing by withdrawing, substituting, and refiling its original decision on September 18, 2014.

Marshall L. Horton, Esq.
Attorney for Petitioner

STATEMENT OF ISSUES ON APPEAL

Are the holdings related to premise liability in South Carolina set forth by *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991) and its adoption of Restatement (Second) Torts § 343A still good law in South Carolina?

STATEMENT OF THE CASE

This current action is a negligence action brought by Petitioner Mr. Yossi Haina for injuries he suffered on the premises of the Respondent Beach Market, LLC. On May 26, 2011, Mr. Haina filed his summons and complaint against Beach Market, LLC in the Beaufort County Circuit Court. Respondent's complaint was based upon the negligence theory of premise liability.

On March 27, 2012, the Respondent's Motion for Summary Judgment was granted by The Honorable Carmen T. Mullen on the grounds "that there is no genuine issue of material fact for trial because Plaintiff cannot prove the Defendant had a duty to instruct or supervise him and any alleged dangerous condition was open and obvious."

The Petitioner filed their Motion to Alter, Amend, or Reconsider Judgment on May 3, 2012. Petitioner's Motion to Alter, Amend, or Reconsider which was denied on January 10, 2013. On January 21, 2013 the Petitioner served the Notice of Appeal on the Respondent.

The Court of Appeals denied the Petitioner's appeal in an unpublished opinion 2014-IP-215 dated June 11, 2014. (App., 123-124). The Court of Appeals denied Petitioner's Petition for Rehearing in a written Order dated September 18, 2014.

FACTS

This action concerns injuries that Petitioner Mr. Haina suffered on August 17, 2010 when he slipped on the Respondent Beach Market's metal roof (that was slippery due to an accumulation of foliage) and fell.

Petitioner makes a living as a handyman and frequently does miscellaneous work on the premises of Respondent. (R. p. 50, lines 17 -25-p. 51, lines 1-19). Mr. Jay Stever ("Mr. Stever"), an owner of Respondent Beach Market, occasionally hired Petitioner to do various projects. (R. p. 62, lines 20-22; p. 63, lines 1-22).

On the morning of August 17, 2010, Petitioner arrived at the premises of Respondent Beach Market at or around 3:00 a.m. for the purposes of drilling holes in the concrete sidewalks of the premises of Respondent. (R. p. 52, lines 3-16; p. 53-54). Mr. Stever, and owner of Respondent Beach Market was at the premises that morning. (R. p. 64, lines 4-15; p. 65). It is conceded that Petitioner was a business invitee. (R. p. 94). For the purposes of this Petition, the term "Respondent" refers to both Mr. Stever and Beach Market.

After Petitioner was finished drilling holes in the concrete, Respondent asked Petitioner to fix a leak in the roof. (R. p. 54, lines 6-23; p. 55, lines 20-25; p. 59, lines 24-25-p. 60, lines 1-8; pp. 66 - 69, pp. 74-75).

Respondent knew that the roof was in a dangerous condition that morning because of an accumulation of foliage that made the metal roof very slippery. According to Mr. Stever, when the metal roof was dry, it acted as an abrasive surface and there was no problem walking on it; however, when it was wet, it was like walking on ice because of a film that was caused by foliage. (R. p. 70, lines 19-25-p. 71, lines 1-5). Mr. Stever had full

knowledge that the roof was very slippery that morning because of it being wet and because of the film left by the foliage that accumulates on the metal roof. *Id.*

Mr. Stever did not warn Petitioner of the condition of the roof.

Mr. Stever had full knowledge of the exact route that Petitioner was going to take to access the roof, and testified regarding the exact route that Petitioner must take in order to reach the location on the roof that he asked Petitioner to repair. (R. pp. 78-82).

Due to Petitioner's employment with Respondent, as well as Petitioner's personality and prior military service, Mr. Stever knew that Petitioner was going to fix the roof immediately after Mr. Stever asked him to regardless of the slippery roof. (R. pp. 111, lines 1 – 13).

Mr. Stever testified that Petitioner was on the metal roof when he slipped because there were skid marks actually on the roof and the gutter was bent. (R. p. 76, lines 10-15).

Petitioner fell from the roof on the Respondent's premises while he was attempting to do the work that Mr. Stever requested. (R. pp. 56-61).

Petitioner suffered tremendous injury as a result of this fall.

ARGUMENT

I. THE COURT OF APPEALS DECISION CONFLICTS WITH SOUTH CAROLINA SUPREME COURT PRECEDENT ON THE DISPOSITIVE ISSUE OF WHETHER THE RESPONDENT LANDOWNER OWED THE PETITIONER BUSINESS INVITEE A DUTY OF CARE.

The Court of Appeal's unpublished decision conflicts with prior case law regarding the duty of care a landowner owes a business invitee. "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." *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 216, 406 S.E.2d 361, 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).

The Court of Appeals agreed with the Circuit Court that the Respondent landowner did not owe a duty to warn the Petitioner. (App. at 123-124) However, the facts of this case, as discussed below, precisely fit the illustration 5 of the Restatement (Second) Torts § 343A, comment (f).

To summarize the facts contained in the record:

- Petitioner was a business invitee of Respondent Beach Market and arrived at the premises of Respondent on August 17, 2010 for the purposes of working on the premise of Respondent. (R. p. 94), (R. p. 52, lines 3-16; p. 53-54).

- Mr. Stever, an owner of Respondent Beach Market, was at the premises of Beach Market that morning. (R. p. 52, lines 3-16; p. 53-54), (R. p. 64, lines 4-15; p. 65).

- According to Mr. Stever, the roof was in a dangerous condition that morning. (R. p. 70, lines 19-25-p. 71, lines 1-5). When the metal roof was dry, it acted as an abrasive surface and there was no problem walking on it. *Id.* When it was wet, it was like walking on ice because of a film that was caused by foliage. *Id.* Mr. Stever had full knowledge that the roof was wet on the morning of August 17th. *Id.*

- After Petitioner was finished drilling holes in the concrete, Mr. Stever asked Petitioner to fix a leak in the roof. (R. p. 54, lines 6-23; p. 55, lines 20-25; p. 59, lines 24-25-p. 60, lines 1-8; pp. 66 - 69, pp. 74-75).

- Due to Petitioner's employment with Respondent, as well as Petitioner's personality and prior military service, Mr. Stever knew or should have known that Petitioner was going to fix the roof directly after Mr. Stever asked him to do so. (R. pp. 111, lines 1 – 13).

- Mr. Stever had full knowledge of the exact route that Petitioner was going to take to access the roof, and testified that he knew the exact route on the roof that Petitioner must take in order to reach the location on the roof that he requested to be repaired. (R. pp. 78-82).

- Petitioner suffered great injury when he slipped and fell off the roof.

It is conceded that the dangerous condition that harmed Petitioner was an open and obvious condition as opposed to a latent defect. However, according to comment (f) of the Restatement

(Second) Torts § 343A, a landowner has a duty to warn an invitee despite the open and obviousness of the dangerous condition if there is some other reason why the landowner should know that the invitee will be harmed. In this case, this fact exists: the Petitioner's employment relationship with Respondent and the fact that Respondent told Petitioner to get up on the roof, for work, with Respondent knowing that the roof was in a dangerous condition.

If there was any question as to whether the employee/ employer relationship could form the basis for Respondent's anticipating Petitioner would be injured under these circumstances despite the open and obvious condition, Illustration 5 of Restatement (Second) Torts § 343A, comment (f) removes all doubt. To juxtapose the facts of this case on the language of Illustration 5: Respondent owns a commercial retail building, in which he hired Petitioner to fix specific problems on the premises for business purposes. The only approach to the problem on the roof that Respondent asked Petitioner to fix is over a roof made very slippery due to foliage, whose condition is visible and quite obvious. Petitioner, employed by Respondent, 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. Petitioner's only alternative to taking the risk was to forgo his employment. Respondent should be liable to Petitioner for his injuries.

However, although the facts applied to the restatement fit precisely, Petitioner has been left without remedy for the harms he has suffered at the hands of Respondent by the South Carolina Court system. If *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991) and its adoption of Restatement (Second) Torts § 343A are still good law in South Carolina, the landowner in this case owed Petitioner a duty to warn, breached that duty and Petitioner deserves to have his case heard by a jury.

CONCLUSION

The only conclusions that can be draw from the Court of Appeals decision are either: (1) *Callander v. Charleston Doughnut Corp.,* 305 S.C. 123, 406 S.E.2d 361 (1991) and its adoption of Restatement (Second) Torts § 343A are no longer good law in South Carolina, or (2) the Court of Appeals erred. Either conclusion results in an issue that deserves to be heard by this Honorable Court.

For the reasons stated, this Court should reverse the judgment of the South Carolina Court of Appeals and remand this case to the Circuit Court in order for Petitioner to have a trial by jury.

Respectfully submitted,

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Bluffton, South Carolina
This 31st day of October, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No.: 2011-CP-07-2300
Appellate Case No. 2013-000158
Op. No. 2014-UP-215 (S.C. Ct. App. Filed June 11, 2014)

Yossi Haina, Appellant,

v.

Beach Market, LLC, Respondent.

Of whom

Yossi Haina, Petitioner,

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Beach Market, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on November 3, 2014, addressed to their attorneys of record, John H. Tiller, Esquire, 134 Meeting Street, Third Floor, Charleston SC 29401 and Sarah P. Spruill, Esquire, Post Office Box 2048, Greenville, South Carolina 29602 on November 3, 2014.

November 3, 2014

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MARSHALL L. HORTON
LINDSAY Y. GOODMAN

November 3, 2014

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 2920

Re: Yossi Haina v. Beach Market, LLC
Case No.: 2011-CP-07-2300
Appellate Case No.: 2013-000158

Dear Mr. Shearouse:

Please find for filing the original and seven copies of the Petition for Writ of Certiorari in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier. Additionally, please find enclosed for filing two copies of the Appendix. I have also enclosed my law firm's check in the amount of $100.00 for the filing fee.

By copy of this letter, I am serving a copy of the Petition on all counsel of record as well as the Clerk of the Court of Appeals. I am also serving a copy of the Appendix on all counsel of record; however, I am not providing counsel with the Record on Appeal filed with the Court of Appeals since they are already in possession of those documents.

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

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MLH/
Enclosure

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