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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,

Marshall L. Horton
Post Office Box 3677
Bluffton, SC 29910
(843) 757-6190
Attorney for Appellant/Petitioner

MLH/
Enclosure

cc: John H. Tiller, Esq. (via Regular U.S. Mail)
Haynsworth Sinkler Boyd PA
134 Meeting Street, 3rd Floor
Charleston, SC 29401

Sarah P. Spruill, Esq. (via Regular U.S. Mail)
PO Box 2048
Greenville, SC 29602

The Honorable Jenny Abbott Kitchings (via Regular U.S. Mail)
Clerk, South Carolina Court of Appeals
Post Office Drawer 11629
Columbia, South Carolina 29211

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,

HORTON LAW FIRM, LLC

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Lindsay Y. Goodman, Esq., SC Bar No. 100273
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ATTORNEYS FOR PETITIONER

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

HORTON LAW FIRM, LLC

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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.

APPENDIX

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APPENDIX INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Yossi Haina, Appellant,

v.

Beach Market, LLC, Respondent.

Appellate Case No. 2013-000158

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2014-UP-215
Heard March 06, 2014 – Filed June 11, 2014

AFFIRMED

Marshall L. Horton and Lindsay Yoas Goodman, both of Horton Law Firm, LLC, both of Bluffton, for Appellant.

John H. Tiller, of Charleston, and Sarah Patrick Spruill, of Greenville, both of Haynsworth Sinkler Boyd, PA, for Respondent.

PER CURIAM: In this negligence action, Yossi Haina appeals the circuit court's grant of summary judgment in favor of Beach Market, LLC. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Bovain v. Canal Ins.* 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009) ("An appellate court reviews the

granting of summary judgment under the same standard applied by the [circuit] court under Rule 56(c), SCRCP."); *id.* ("Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a [circuit] court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" (quoting Rule 56(c), SCRCP)); *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009) ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party."); *Larimore v. Carolina Power & Light*, 340 S.C. 438, 444-45, 531 S.E.2d 535, 538 (Ct. App. 2000) ("The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty."); *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991) ("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." (emphasis omitted) (citing Restatement (Second) of Torts § 343(A) (1965)); *Meadows v. Heritage Vill. Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 378-79, 409 S.E.2d 349, 351-52 (1991) (finding the defendant had no duty to warn of an open and obvious condition when the plaintiff invitee did not show the defendant could have reasonably foreseen her decision to encounter that condition when reasonable alternatives were available); *Peterson v. Porter*, 389 S.C. 148, 154, 697 S.E.2d 656, 659 (Ct. App. 2010) (holding the defendant property owners owed the plaintiff invitee only "the duty of reasonable care and to warn [the plaintiff] of latent or hidden dangers on their property").

AFFIRMED.

HUFF, THOMAS, and PIEPER, JJ., concur.

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

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

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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.

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.

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Lindsay Y. Goodman, Esquire
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(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.

S.E.2d 656, 659 (Ct. App. 2010), is the controlling law on this matter, and that in the case of

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

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

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The South Carolina Court of Appeals

Yossi Haina, Appellant,

v.

Beach Market, LLC, Respondent.

Appellate Case No. 2013-000158

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff, J.

Paula H. Thomas, J.

A. Ko, J.

FILED
HG 9-18-14

Columbia, South Carolina

cc:
Marshall L. Horton, Esquire
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John H. Tiller, Esquire
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MARSHALL L. HORTON
LINDSAY Y. GOODMAN

October 16, 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 enclosed a Motion for Extension to file and serve the Petition for a Writ of Certiorari and Appendix in the above-referenced matter. The current deadline to do so is October 20, 2014 and we are requesting a ten (10) day extension, making the deadline October 30, 2014. The filing fee for this motion in the amount of $25.00 is enclosed.

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

Respectfully,

Marshall L. Horton
Post Office Box 3677
Bluffton, SC 29910
(843) 757-6190
Attorney for Appellant/Petitioner

LYG/
Enclosure
cc: John H. Tiller, Esq. (via Regular U.S. Mail)
Haynsworth Sinkler Boyd PA

134 Meeting Street, 3rd Floor
Charleston, SC 29401

Sarah P. Spruill, Esq. (via Regular U.S. Mail)
PO Box 2048
Greenville, SC 29602

The Honorable Jenny Abbott Kitchings (via Regular U.S. Mail)
Clerk, South Carolina Court of Appeals
Post Office Drawer 11629
Columbia, South Carolina 29211

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,

MOTION FOR EXTENSION

The petitioner in this above referenced action, Yossi Haina, by and through his undersigned counsel, hereby files this Motion for Extension of the deadline for filing and serving the petition for a writ of certiorari and the appendix. Pursuant to Rule 240, SCACR, the Petitioner respectfully moves for an extension of time of 10 days, for the Petitioner to file and serve the petition for a writ of certiorari and the appendix.

In support of this Motion for Extension of Time, the Petitioner states the following:

1. The current deadline to file the petition for writ of certiorari and appendix is October 18, 2014 which is a Saturday making the deadline, October 20, 2014. Thus, this

current Motion for Extension has been filed before the date that the petitioner is required to respond.

2. The attorneys of record on this matter, Marshall L. Horton, Esquire, and Lindsay Y. Goodman, Esquire have had an extremely busy court schedule since the Court of Appeals denied rehearing in this matter, including twenty-four (24) family court proceedings/hearings, some of which were all day obligations or trials, three (3) circuit/magistrate court proceedings, a two (2) day family court mediation and one (1) Court of Appeals oral argument. All of these matters have necessitated considerable attorney preparation and time. This is the first request for an extension and it is not anticipated that another request will be necessary, as a ten (10) day extension will be sufficient time to complete the petition for a writ of certiorari and the appendix.

3. This Motion is made in good faith and not for purposes of delay.

4. Counsel for the Respondent has been contacted and does not object to Petitioner's request for an extension in this matter.

WHEREFORE, Petitioner respectfully requests that the Court grant this Motion and order the extension of time requested.

Respectfully Submitted,

HORTON LAW FIRM, LLC

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Lindsay Y. Goodman, Esquire
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ATTORNEYS FOR THE APPELLANT/PETITIONER

Bluffton, South Carolina
This 16th 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

RECEIVED
OCT 16 2014
S.C. Supreme Court

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 Motion for Extension on Beach Market, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on October 16, 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 October 16, 2014.

October 16, 2014

HORTON LAW FIRM, LLC

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ATTORNEYS FOR THE APPELLANT/PETITIONER

The Supreme Court of South Carolina

Yossi Haina, Petitioner,

v.

Beach Market, LLC, Respondent.

Appellate Case No. 2014-002197

ORDER

The time for serving and filing the Petition for Writ of Certiorari and Appendix is hereby extended until November 3, 2014.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

October 20, 2014

cc:
John H. Tiller, Esquire
Sarah Patrick Spruill, Esquire
Marshall L. Horton, Esquire
Lindsay Yoas Goodman, Esquire
The Honorable Jenny Kitchings

000139

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

Yossi Haina,

Appellant,

v.

Beach Market, LLC,

Respondent.

BRIEF OF APPELLANT

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ATTORNEYS FOR RESPONDENT

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUES ON APPEAL

Under South Carolina premise liability law, does Defendant Beach Market have a duty to warn Plaintiff Yossi Haina, a business invitee hired by the Defendant, of a dangerous condition that exists on a roof when Defendant Beach Market has actual knowledge of the dangerous condition and specifically instructs Plaintiff Yossi Haina to physically be on the roof?

STATEMENT OF THE CASE

This current action is a negligence action brought by Plaintiff Mr. Haina for injuries he suffered on the premises of the Defendant Beach Market, LLC. On May 26, 2011, Yossi Haina filed his summons and complaint against Beach Market, LLC in the Beaufort County Circuit Court. Plaintiff's complaint contains two causes of action, both of which are based upon the negligence theory of premise liability. Beach Market, LLC, in its timely answer, set forth a general denial as well as other related defenses.

Defendant filed a Motion for Summary Judgment on December 27, 2011 alleging "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."

On March 27, 2012, the Defendant's Motion for Summary Judgment was granted by The Honorable Carmen T. Mullen.

The Plaintiff filed their Motion to Alter, Amend, or Reconsider Judgment on May 3, 2012. The Plaintiff's Motion to Alter, Amend, or Reconsider was denied by the Honorable Stephanie P. McDonald and the Plaintiff's received written notice of entry of this judgment on January 10, 2013 (both parties consented to Judge McDonald hearing the Motion to Alter, Amend, or Reconsider Judgment). On January 21, 2013 the Plaintiff served the Notice of Appeal on the Defendant.

Prior to summary judgment being granted, the parties had substantially completed written discovery. The parties have completed depositions of all parties with knowledge of admissible, relevant facts concerning the events that led to Mr. Haina's injuries. Although no

doctor's depositions have been taken, no medical testimony seems to be required for the Court to consider the issues at hand.

FACTS

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

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

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

After Mr. Haina was finished drilling holes in the concrete, Mr. Stever asked Mr. Haina 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).

Mr. Stever 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 a kind of abrasive 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 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 Mr. Haina of the condition of the roof, nor did he instruct Mr. Haina to wait until the roof was no longer wet to perform his duties.

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

Mr. Stever testified that Mr. Haina 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).

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

Mr. Haina suffered a head injury and was mentally dazed immediately after the fall. (R. p. 72, lines 22-25- p. 73, lines 1-5). Other than Mr. Haina, there were no witnesses to Mr. Haina's fall. (R. p. 59, lines 20-23).

Mr. Haina suffered tremendous injury as a result of this fall.

ARGUMENT

I. DEFENDANT BEACH MARKET HAD A DUTY TO WARN PLAINTIFF YOSSI HAINA, A BUSINESS INVITEE HIRED BY THE DEFENDANT, OF A DANGEROUS CONDITION THAT EXISTED ON THE ROOF WHEN THE DEFENDANT BEACH MARKET HAD ACTUAL KNOWLEDGE OF THE DANGEROUS CONDITION AND SPECIFICALLY INSTRUCTED THE PLAINTIFF TO PERFORM WORK ON THE ROOF.

Defendant Beach Market is liable to Plaintiff Mr. Haina on account of their negligence for failing to warn the Plaintiff of the dangerous condition of the roof. Beach Market owed Mr. Haina a duty of care by virtue of Mr. Haina's status as a business invitee. Beach Market breached this duty of care by *failing to warn* him of the slippery conditions on the roof when Beach Market instructed Mr. Haina to get onto the roof. Mr. Haina's damages were caused by Beach Market's breach of this duty.

A. Standard of Review: Summary Judgment.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. City of Columbia v. American Civil Liberties Union, etc., et al., 323 S.C. 384 (1996). *See* Rule 56, SCRCP. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non–moving party. Id.; Manning v. Quinn, 294 S.C. 383 (1988). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330-331 (2009).

B. **Duty to Warn: The Defendant Beach Market owed Mr. Haina a duty to warn him of the dangerous condition of the roof.**

Beach Market owed Mr. Haina a duty of care by virtue of Mr. Haina's status as a business invitee and was required to warn him of the dangerous conditions of the slippery roof. A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. Peterson v. Porter, 389 S.C. 148, 153 (Ct. App. 2010), *citing* Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256, (Ct. App. 2004). The traditional "no duty to warn of the obvious" rule has been modified in South Carolina to hold that a property owner is liable for injuries to an invitee, despite an open and obvious defect, if the owner should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted. Callander v. Charleston Doughnut Corp., 305 S.C. 123, 125 (1991) (where a Plaintiff/ invitee was injured on a bar stool that did not have a seat, the S.C. Supreme Court found that the Defendants should have anticipated the harm despite the open and obvious condition of the danger and the Defendant was liable on account of their failure to warn), *also see* Creech v. South Carolina Wildlife and Marine Resources Dept., 328 S.C. 24 (1997) (where a Plaintiff fell off of a public dock because railing was only located on part of the dock, the S.C. Supreme found that the lack of railing on the dock was an open and obvious condition and the Defendant should have "anticipate[d] the harm despite such knowledge or obviousness," thus the Defendants were liable on account of their failure to warn).

An example of the application of this duty to warn is found in Meadows v. Heritage Village Church and Missionary Fellowship, Inc., 305 S.C. 375 (1991). In this case, the

Plaintiff slipped and was injured on wet grass on the premises of a hotel. The Plaintiff had the choice of a paved driveway or a sidewalk, but chose to use the grass path. The S.C. Supreme Court decided that the wet grass was an open and obvious condition. Applying the requisite rules in reference to open and obvious conditions, the Court inquired as to whether the Defendant should have anticipated the harm that the wet grass could cause to the Plaintiff (hence triggering a duty to warn). The Court found that the Defendant could not reasonably foresee that the Plaintiff would cross the wet grass as opposed to the paved walkways, thus the Defendant was not liable for failing to warn. Id. at S.C. 377-378.

Another example of the S.C. Supreme Court applying this duty to warn is found in Creech, 328 S.C. 24. In Creech, a Plaintiff fell off of a public dock because the railing was only located on part of the dock. The S.C. Supreme Court found that the lack of railing on the dock was an open and obvious condition. Next, the Court determines whether the Defendant should have "anticipate[d] the harm despite such knowledge or obviousness." The Court found that there was "ample evidence that the [Defendant] had been warned the lack of safety rails could present danger to people fishing from the dock...," thus found that the Plaintiff was not barred from recovering on the basis that the Defendants could anticipate that individuals would encounter the dangerous condition and hence the Defendants had a duty to warn. Id. at 32-33.

The case of Peterson, 389 S.C. 148, a case relied upon heavily by the Defendant in this case, is a case that further illustrates how this particular duty to warn operates. In Peterson, the Plaintiff was a business invitee workman who fell off the roof of a residential structure. The Court found that there was no evidence of any defect or dangerous condition

on the Defendants' property; hence, the Defendant could not anticipate the harm that the roof could cause the Plaintiff because there was no evidence presented that the Defendants had any reason to anticipate that anyone would fall from the roof. Id. at 153. Specifically, the Court finds that there "is no evidence of dangerous or defective conditions on the [Defendants' property]." Id. at 154. There was no dangerous condition that the Defendants could even warn the Plaintiff about, and as such the Court affirmed a ruling of summary judgment against the Plaintiff.

The facts of the case at hand are relatively simple, and they seem to establish that the Defendant had a duty to warn the Plaintiff about the dangers on the roof.

- Mr. Haina was a business invitee on the Defendant's premises. (R. p. 52, lines 3-16; pp. 53-54; p. 94).
- The Defendant asked Mr. Haina to go onto the roof that morning and knew the exact path that he would take in traversing the roof. The Plaintiff has established facts well past the required showing that the Defendants "reasonably anticipate" that the Plaintiff would encounter the dangerous condition, the facts show that the Defendant had actual knowledge of that the Plaintiff would encounter the dangerous condition. (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; pp. 78-82).
- The Defendant was aware that a dangerous condition existed on the roof, namely because of the accumulated foliage on the metal roof and that the roof was "as slick as ice." (R. p. 70, lines 19-25- p. 71, lines 1-5).
- The Defendant did not warn Plaintiff Haina about the dangerous condition.

- Plaintiff Haina fell off the roof because the roof was slippery. (R. p. 76, lines 10-15; pp. 56-61).

The facts as they exist in this case support Mr. Haina's claim for negligence on the basis for failure to warn.

C. The Circuit Court erred in granting summary judgment in favor of the Defendant by failing to acknowledge South Carolina law regarding a landowner's duty to warn.

The Circuit Court erred in granting summary judgment in favor of the Defendant by failing to acknowledge South Carolina law related to the duty to warn of dangerous conditions. Judge Mullen's Order Granting Summary Judgment states, "I find that the condition of the premises in question were open and obvious. After considering all material provided to me and the case law relied upon by the parties, I find that the plaintiff cannot prove that defendant Beach Market owed the plaintiff a duty to instruct or supervise him, and, therefore, the defendant is entitled to summary judgment as a matter of law." (R. p. 2).

This ruling ignores well established South Carolina law in which landowners have the duty to warn business invitees of any dangerous, albeit open and obvious, condition if they have reason to believe that the business invitee will encounter the dangerous condition.

In the case at hand, the facts show that the Defendant knew of a dangerous condition, they knew that the Plaintiff would encounter the dangerous condition, and the Defendant did not warn the Plaintiff of that dangerous condition. Under South Carolina law, the facts of this case support a finding of negligence against the Defendant and summary judgment against the Plaintiff was improperly granted.

D. **The Circuit Court errs in granting summary judgment using an erroneous standard of a duty to "instruct or supervise."**

The Court further errs in basing its finding on the fact that the Plaintiff cannot prove that he was owed a duty to "instruct or supervise." The Plaintiff was owed a duty to warn under Callander and subsequent case law; however, the Plaintiff does not argue that he was owed a duty to "instruct or supervise." It appears that this language was pulled from the Peterson v. Porter case, and it appears to be a misreading of Peterson to suggest that Peterson creates a new premise liability standard. Peterson, 389 S.C. 148, 153. The Court in Peterson states:

> "The circuit court determined there was no evidence of any actionable negligence on the part of the Porters. The court found there was no evidence the Porters supplied Peterson with defective equipment or that the equipment caused Peterson to fall. Furthermore, the court determined there was no evidence of any defect or dangerous condition existing on the Porters' property. The court also found the roof's steep slope was an open and obvious condition, and, thus, the Porters did not have a duty to warn Peterson. The court noted there was no evidence anyone had ever fallen from the roof or that the Porters had any reason to believe a fall was likely. ***The court determined the Porters did not have a duty to instruct or supervise Porter*** in his work and there was no evidence Peterson's lack of education prevented him from safely performing his work."

Id. *Emphasis added.*

Plaintiff argues that this sentence does not create a new standard of "instruct or supervise" in premise liability cases; moreover, the Court in Peterson was merely disposing of the various meritless arguments advanced by the Plaintiff in that case. In the case at hand, Plaintiff Mr. Haina does not argue that he was owed any duty to "instruct or supervise" only that he was owed the well established duty to warn under the circumstances of this case.

It is important to point out that the Circuit Court rested its decision solely on an "instruct or supervise" theory, which after exhaustive legal research appears to be an erroneous standard under any circumstances (i.e. there has been no found legal duty or other legal theory that would require a plaintiff to establish a duty to "instruct or supervise").

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand this case in order for Plaintiff Mr. Haina to have his case decided by a jury.

Respectfully submitted,

HORTON LAW FIRM, LLC

Marshall L. Horton, Esq., SC Bar No. 73891
Lindsay Y. Goodman, Esq., SC Bar No. 100273
Post Office Box 3766
Bluffton, South Carolina 29910
(843) 757-6190
ATTORNEYS FOR APPELLANT

Bluffton, South Carolina
This 23rd day of August, 2013

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

Yossi Haina, Appellant

vs.

Beach Market, LLC, Respondent

BRIEF OF RESPONDENT

HAYNSWORTH SINKLER BOYD, P.A.

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SARAH P. SPRUILL
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EMAIL sspruill@hsblawfirm.com

August 16, 2013

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Yossi Haina v. Beach Market, LLC
Case No. 2011-CP-07-2300
Appellate Tacking No. 2013-00518
HSB File No. 02296.1708

Dear Ms. Kitchings:

Enclosed herewith for filing, please find an original and seventeen (17) copies of Respondent's Final Brief in the above-referenced matter. Also enclosed are the original and one copy of Certificate of Counsel and Proof of Service. Please file the originals and return clocked copies to me via my courier.

Very truly yours,

Sarah P. Spruill

SPS/jlc
Enclosures

cc: (via U.S. Mail)
Marshall L. Horton, Esq.
Lindsay Y. Goodman, Esq.

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

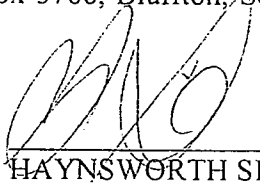
Yossi Haina.....Appellant,

vs.

Beach Market, LLC.....Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent and Certificate of Compliance on Appellant, Yossi Haina by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorneys of record, Marshall L. Horton, Esq. and Lindsay Y. Goodman, Esq., Post Office Box 3766, Bluffton, South Carolina 29910, on this 16th day of August 2013.



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Attorneys for the Respondent

August 16, 2013

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

Yossi Haina.....Appellant,

vs.

Beach Market, LLC.....Respondent.

CERTIFICATE OF COMPLIANCE

I certify that the Respondent's Final Brief in this matter comply with Rule 211(b), SCACR and the August 13, 2007 Order of the South Carolina Supreme Court relating to personal data identifiers.

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Attorneys for the Respondent

August 16, 2013

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TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT IN FAVOR OF BEACH MARKET, LLC, BASED ON ITS FINDING THAT THERE WAS NO DUTY TO PROTECT AGAINST THE OPEN AND OBVIOUS DANGER OF A SLIPPERY ROOF?

FACTS

On August 17, 2010, Yossi Haina was performing maintenance work at Beach Market, LLC ("Beach Market"), a shopping center on Hilton Head Island owned in part by Jay Stever. (R. at 52-52, 63). Haina is a handyman for his company Yossi Renovation, which had performed many projects for Beach Market tenants. (R. at 100, 51). Haina's previous projects included work on the roof of Beach Market. (R. at 55, 66-67).

On the morning of August 17, 2010, Haina worked on a project for a Beach Market tenant from 3:00 a.m. until around 8:00 a.m. (R. at 52-53). As Haina finished that project, Stever approached him about roof repairs to correct a spot that continued to leak after an earlier attempted repair. (R. at 55, 66-67). Stever gave no specific instruction to Haina as to how or when to repair the leak. (R. at 59-60, 111-12, 67-68, 74).

Haina left Beach Market to pick up some supplies and returned to begin the project later that morning. (R. at 55). He climbed a ladder to the roof to diagnose the source of the problem. (R. at 58). As he returned to the ladder, he slipped and fell off the roof resulting in injuries. (R. at 58-59, 109-10). According to Haina, the ladder slipped as he put one foot on it. (*Id.*) He does not contend the ladder was defective. (R. at 108-10). He further testified that he was not being supervised or directed at the time of the accident. (R. at 60).

STANDARD OF REVIEW

Summary judgment is warranted when there is no genuine issue of material fact and it appears that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A court must view the facts and inferences reasonably drawn from them in the light most favorable to the non-moving party. *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). A moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element with respect to which the non-moving party has the burden of proof. *Celotex Corp.*, 477 U.S. at 322. Issues of existence and scope of duty, however, are questions of law for the court. *Staples v. Duell*, 329 S.C. 503, 506-07, 494 S.E.2d 639, 641 (Ct. App. 1997).

ARGUMENT

The trial court granted summary judgment in favor of Beach Market on the grounds that Beach Market had no duty to instruct or supervise Haina or to protect him from an open and obvious danger. (R. at 2-3). The parties are in agreement that Haina was a business invitee at the time of the accident and that the slippery condition of the roof was an open and obvious condition. (R. at 33-34).

Beach Market owes its invitees "the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." *Sims v. Giles*, 343 S.C. 708, 718, 541 S.E.2d 857, 863 (Ct. App. 2001). A property owner has a duty to warn invitees of latent or hidden dangers of which the property owner has or should have knowledge. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004). "Although questions of negligence are often for the jury, when

the risk complained of is open and obvious to [Plaintiff], there is no duty to warn of that risk as a matter of law." *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 42, 674 S.E.2d 500, 504 (Ct. App. 2009).

The facts in this case mirror those in *Peterson v. Porter*, 389 S.C. 148, 697 S.E.2d 656 (Ct. App. 2010). In *Peterson*, Frank Peterson performed occasional odd jobs for the Porters. On a particular date, Peterson was pressure washing the Porters' home. The Porters supplied Peterson with the equipment to perform the task, including a ladder, but they did not give him specific instructions on how to perform the work nor did they supervise the work. Peterson was injured when he fell off the ladder. There was no evidence that the ladder or the roof was defective. On those facts, the trial court granted summary judgment to the Porters finding there was no duty.

On appeal, Peterson argued the defendants had a duty "to warn him of the inherent danger of pressure washing their home." He further contended the defendants had a duty "to provide him instructions for safely using the pressure washing equipment and with on-site supervision and guidance to mitigate any danger." This Court disagreed and held as follows:

> Here, the Porters owed Peterson the duty of reasonable care and to warn him of latent or hidden dangers on their property. The record does not contain any evidence of dangerous or defective conditions on the Porters' property. There is no evidence there were any defects associated with the Porters' ladder, pressure washer, or roof. Furthermore, Peterson failed to establish that the Porters had a duty to give him instructions and supervise his work. Peterson failed to cite any legal authorities supporting his claim that the Porters had a duty to instruct and supervise him. Thus, there is no evidence the Porters breached the duty of reasonable care owed to Peterson as an invitee. Moreover, Peterson's negligence claim also fails because he did not

> produce any evidence that the Porters' negligence proximately caused his injuries.

Peterson, 389 S.C. at 154, 697 S.E.2d at 659. This case is indistinguishable on the facts: Haina was a business invitee, he was not told how or when to undertake the work, and there was no latent or hidden defect with the roof or the ladder. Accordingly, the trial court correctly granted summary judgment in favor of Beach Market.

Haina argues on appeal that the trial court improperly focused on a duty to instruct or supervise rather than a duty to warn. However, the ruling in *Peterson* related to both a duty to instruct or supervise and a duty to warn; therefore, the result should be the same under either theory. Quite simply, Beach Market did not have a duty with respect to Haina and this open and obvious danger.[1]

In support of his argument, Haina cites to earlier cases in which the South Carolina Supreme Court found a duty to warn may exist, notwithstanding an open and obvious defect, if the property owner should anticipate the harm. *See Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 31, 491 S.E.2d 571, 574 (1997) (finding duty to warn existed for dock that only had a partial railing in light of warnings given to property owner about risks); *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362-63 (1991) (finding duty to warn existed for stool that was missing its seat). In both of those cases, something was missing (i.e., the stool and the railing) which gave rise to the duty to warn because the landowner should have

[1] Even if this Court agrees that the duty to instruct or supervise language does not apply in this case, the Court may affirm for any reason appearing in the record. Rule 220, SCACR. Under *Peterson*, the trial court's determination here that there was no duty is correct as a matter of law with respect to a duty to warn as well as a duty to instruct or supervise.

anticipated that the absence of that item could result in some harm. In this case, as in *Peterson*, there was no reason to anticipate the harm and thus no duty to warn.

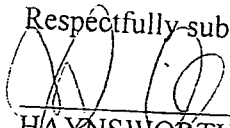
Haina also cites *Meadows v. Heritage Village Church & Missionary Fellowship, Inc.*, 305 S.C. 375, 409 S.E.2d 349 (1991), however, *Meadows* expressly found there was no duty to warn. In *Meadows*, the court found the landowner did not have a duty to warn a patron who slipped on a wet grass and gravel path because the danger was open and obvious and the landowner could not have anticipated the harm because the landowner had provided numerous routes across the property. There is no duty to warn of "a natural condition, the peril of which [is] obvious." *Id.*, 305 S.C. at 378, 409 S.E.2d at 351. Similarly, nothing in this record suggests Beach Market should have anticipated Haina would have voluntarily encountered this risk, especially in light of Haina's previous work on the roof and the absence of any deadline to complete the work.

Here, the parties agree the danger was open and obvious. The record further shows that Haina had previously performed work on the roof and Beach Market did not direct Haina to perform the work in any particular way or at any particular time. Haina does not contend the equipment provided by Beach Market was defective. These factors all combine to place this case squarely within the realm of *Peterson*. As in *Peterson*, this Court should find Beach Market did not have a duty to warn Haina about the condition of the roof.

CONCLUSION

For all of the above reasons, the trial court correctly found there was no duty and granted summary judgment in favor of Beach Market. Accordingly, this Court should affirm that decision.

Respectfully submitted,



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August 16, 2013

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

Yossi Haina,

Appellant,

v.

Beach Market, LLC,

Respondent.

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I. DEFENDANT BEACH MARKET'S RELIANCE ON PETERSON V. PORTER AND MEADOWS V. HERITAGE CHURCH IS IN ERROR, THESE CASES ILLUSTRATE THE DUTY DEFENDANT BEACH MARKET OWED TO PLAINTIFF HAINA.

Defendant Beach Market relies on two South Carolina cases in their Initial Brief: Peterson v. Porter, 389 S.C. 35, 697 S.E.2d 656 (Ct. App. 2010) and Meadows v. Heritage Village Church & Missionary Fellowship, Inc., 305 S.C. 375, 409 S.E.2d 349 (1991). Examining these cases illustrates the fact that Defendant Beach Market owed Plaintiff Yossi Haina a duty to warn him of the dangerous condition that existed on the roof.

To briefly recite the facts of this case, Plaintiff Yossi Haina was injured when he fell off of a roof while he was working on Defendant Beach Market's premises.[1] Plaintiff Haina was a business invitee on the property of the Defendant.[2] Mr. Jay Stever (an agent/ owner of Defendant Beach Market) asked Plaintiff Haina the morning of the injury to fix a problem on the roof,[3] and Mr. Stever was aware that there was a slippery film on the metal roof which made the roof as slippery as ice.[4] Mr. Stever did not warn Plaintiff Haina of the dangerous condition.

The Circuit Court dismissed this case on Defendant's motion for summary judgment finding that the Defendant did not owe a duty to supervise or instruct the Plaintiff. Plaintiff appeals on the basis that the Circuit Court refused to recognize the

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[1] *Deposition of Yossi Haina, pgs. 20-26 (R. pp. 56-61).*
[2] *Defendant's Memorandum in Support of its Motion for Summary Judgment, pg. 3 (R. p. 94).*
[3] *Deposition of Yossi Haina, pg. 18, lines 6-23; pg. 19, lines 20-25; pg. 23 lines 24-25; pg. 24 lines 1-8; Deposition of Jay Stever, pgs. 12-15, pgs. 28-29 (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).*
[4] *Deposition of Jay Stever, pg. 18, lines 19-25; pg. 19, lines 1-5 (R. p. 70, lines 19-25; p. 71, lines 1-5).*

Defendant's duty to warn of obvious dangerous conditions when the Defendant anticipates a business invitee may be harmed despite such obviousness.

A. Peterson v. Porter

As is discussed in the Plaintiffs initial brief, the case of Peterson v. Porter, 389 S.C. 35, 697 S.E.2d 656, illustrates the duty owed by the Defendant to the Plaintiff. In Peterson, the Court found that a Defendant landowner was not liable to a Plaintiff business invitee who fell off their premises' roof. Id. at 155, 660.

The Court in Peterson states the general rule concerning the duty of care of landowners: "A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. [citation omitted]. The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge. [citation omitted]. A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner should have anticipated the resulting harm. [citation omitted]. Peterson at 153, 658.

In Peterson, the Plaintiff attempted to argue numerous theories of liability. The Plaintiff in Peterson argued the Defendants: (1) knew or should have known that he was not trained to safely perform the task assigned, (2) failed to provide him with the proper training and instruction necessary to safely perform the task assigned, and (3) failed to provide the equipment and support necessary to safely perform the task. Id. at 151, 657. One of the major issues in Peterson apparently was the very low intelligence of the Plaintiff (Plaintiff presented evidence that he was basically mentally handicapped), hence the attempt of the Plaintiff to argue duties to instruct or supervise. Id. at 154, 659. In

disposing these arguments, the Court found:

> "...there was no evidence the Porters supplied Peterson with defective equipment or that the equipment caused Peterson to fall. Furthermore, the court determined there was no evidence: of any defect or dangerous condition existing on the Porters' property. The court also found the roof's steep slope was an open and obvious condition, and, thus, the Porters did not have a duty to warn Peterson. The court noted there was no evidence anyone had ever fallen from the roof or that the Porters had any reason to believe a fall was likely. The court determined the Porters did not have a duty to instruct or supervise Porter in his work and there was no evidence Peterson's lack of education prevented him from safely performing his work."

Id. at 153, 658.

In Plaintiff Haina's case, there is undisputed evidence of a defect or dangerous condition existing on the roof. The Defendant had actual knowledge that it was likely that Plaintiff Haina would encounter and be harmed by the defect or dangerous condition. Defendant did not warn Plaintiff Haina of the dangerous or defective condition. Basically, Plaintiff Haina does not argue any of the main theories of liability advanced by the Plaintiff in Peterson.

Thus, although both Peterson and the case at hand involve business invitees falling from landowner's roofs, the facts of this case and the facts in Peterson are highly distinguishable. Under the law as stated in Peterson, the Defendant had a duty to warn Plaintiff Haina of the slippery roof.

B. Meadows v. Heritage Village Church & Missionary Fellowship

Defendant also relies on Meadows v. Heritage Village Church & Missionary Fellowship, 305 S.C. 375, 409 S.E.2d 349. In Meadows, a Plaintiff business invitee was injured when she slipped and fell on wet grass on the premises of the Defendant's building. Id. at 380, 352.

The court in Meadows states that, when addressing the duty to warn of a peril which is obvious: "[i]n Callander,[5] we adopted Restatement (Second) of Torts § 343(A) (1965) which provides that a possessor of land is not liable to his invitees for physical harm 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. Since the only conclusion which could have been reached is that the wet grass constituted an open and obvious danger rather than a latent or concealed one, the trial judge should have granted PTL's motion for judgment notwithstanding the verdict, *unless plaintiff has shown that PTL should have anticipated the harm plaintiff suffered." Emphasis added.* Id. at 378, 351.

The Court goes on to find "we hold that PTL had no duty to warn Meadows, its invitee, about the wet grass because it was a natural condition, the peril of which was obvious. In contrast, a latent defect is one which an owner has, or should have, knowledge of, and of which an invitee is reasonably unaware." Id. The Court, finding that the danger was obvious, goes on to find no evidence in the record to suggest that the Defendants had, or should have had, anticipated the harm. Id.

Defendant Beach Market attempts to categorize the wet and slick roof as a natural condition, hence there is no duty to warn of its condition. The court in Meadows points out the "natural condition" nature of the grass makes it an obvious condition, as opposed to a latent defect (to which different rules apply). Id. Plaintiff Haina does not argue that the roof is a latent defect, and the Court in Meadows does not state that there is never a

[5] *Full Cite: Callendar v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991).*

duty to warn regarding natural conditions. Instead, the Court in Meadows holds that unless the Plaintiff could show that the Defendant should have anticipated the harm that resulted (concerning the obvious condition), there was no duty to warn. Id.

In the case at hand, Plaintiff Haina has not only shown that the Defendant anticipated the harm, but has actually shown the Defendant fully appreciated the exact nature of the harm. Defendant's argument that Defendant could not have reasonably anticipated that Plaintiff Haina would walk on the slippery roof - directly after the Defendant requested Plaintiff perform work on the roof - seems unpersuasive.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand this case in order for Plaintiff Mr. Haina to have his case decided by a jury.

Respectfully submitted,

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