

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

RECEIVED

DEC - 3 2014

S.C. Supreme Court

Yossi Haina.....Petitioner,

vs.

Beach Market, LLC.....Respondent.

**RETURN OF RESPONDENT BEACH MARKET, LLC TO YOSSI HAINA'S
PETITION FOR A WRIT OF CERTIORARI**

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INTRODUCTION

This Petition arises from a unanimous, unpublished *per curiam* opinion of the Court of Appeals. (App. at 123-24). It does not present any novel question, does not raise a substantial constitutional issue, and is not in conflict with any prior decision of this Court or the Court of Appeals. Haina's Petition overlooks the case of *Peterson v. Porter*, 389 S.C. 148, 697 S.E.2d 656 (Ct. App. 2010), misrepresents the testimony in this case, and fails to acknowledge that the existence and scope of duty are questions of law for the Court. Given the foregoing, this case does not warrant discretionary review by this Court pursuant to Rule 242, SCACR.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF BEACH MARKET, LLC, IN THIS CASE WHERE THE DANGER WAS OPEN AND OBVIOUS?

COUNTER-STATEMENT OF THE CASE AND 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. (App. at 52-52, 63). Haina is a self-employed handyman and had performed many projects for Beach Market tenants. (App. at 100, 51). Haina's previous projects included work on the roof of Beach Market. (App. at 55, 66-67). Haina was not, however, a regular employee of Beach Market.

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. (App. 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. (App. at 55, 66-67). Stever gave no specific

instruction to Haina as to how or when to repair the leak. (App. at 59-60, 111-12, 67-68, 74).

Haina left Beach Market to pick up supplies and returned to begin the project later that morning. (App. at 55). He climbed a ladder to the roof to diagnose the source of the problem. (App. at 58). As he returned to the ladder, he slipped and fell off the roof resulting in injuries. (App. 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. (App. at 108-10). He further testified that he was not being supervised or directed at the time of the accident. (App. at 60).

On these facts, the trial court granted summary judgment, which was affirmed by the Court of Appeals in an unpublished opinion issued pursuant to Rule 220, SCACR. (App. at 2-3, 123-24). The Court of Appeals summarily denied Haina's Petition for Rehearing.¹ (App. at 132).

ARGUMENT

The parties agree that Haina was a business invitee at the time of the accident and that the slippery condition of the roof was open and obvious. (App. at 33-34). 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. (App. at 2-3). Issues of existence and scope of duty 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).

¹ Contrary to the Certificate of Counsel in Haina's Petition, the Court of Appeals did not withdraw its opinion in this matter, nor was a substituted opinion issued.

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*. In that case, 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.” The Court of Appeals 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. There is no testimony that Stever knew or should have known Haina would attempt to perform the work that day. The testimony cited by Haina in his Petition to argue that Beach Market had some reason to anticipate the harm comes from Haina, not Stever, and does not attribute knowledge to Stever or to Beach Market. Instead, Haina testified:

Q: And he mentioned to you—

A: Fix leak and—

Q: And take a look at the roof?

A. Yeah.

Q: He didn't say I want you to do it now or I want you to do it tomorrow?

A: No, no. But, like I say, I'm the kind of person, you know, from the military, you know, tell me something to do, I'll do it.

(App. at 111). Thus, the testimony cited merely reflects Haina's assessment of his own personality and shows that Beach Market did not direct the work.

In support of his Petition, Haina cites to *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 406 S.E.2d 361 (1991) and specifically its adoption of Restatement

(Second) of Torts §343(A). In *Callender*, this Court found a duty to warn existed, notwithstanding an open and obvious defect in the form of a stool missing its seat in a doughnut shop frequented by elderly patrons who backed onto the stools to sit, because the property owner should have anticipated the harm. In reaching that result, the *Callender* court noted, “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.” (Quotation omitted). This is not a distraction case.

Haina points instead to the next portion of Comment (f), which provides, “[s]uch 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.” Comment (f) imposes a reasonable person, objective standard. There is no evidence in the record that Beach Market had reason to expect that a reasonable person in Haina’s position would have undertaken the roof work at issue given the apparent risk.²

He further cites to Illustration 5 under Comment (f), which reads as follows:

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.

² The only evidence referenced in Haina’s Petition on this point is Haina’s own testimony that “like I say, I’m the kind of person, you know, from the military, you know, tell me something to do, I’ll do it.” (App. at 111). No evidence in the record shows Beach Market had any reason to anticipate the harm.

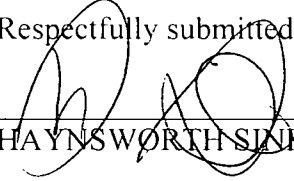
This illustration is inapplicable in this case because Beach Market did not attempt to supervise or control Haina's work, nor was he given a deadline for completion of that work. Haina did not face a choice between performing the work when the roof was wet and losing his ability to do the work. There is no evidence in the record that Haina's "only alternative to taking the risk was to forgo [his] employment." This distinction places this case firmly into the realm of *Peterson*. See also *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 234, 743 S.E.2d 858, 860 (Ct. App. 2013) (quoting *Callender* and finding no duty in case where plaintiff "testified she knew it was raining when she entered Piggly Wiggly. The fact that the sidewalk was wet and slippery when she left the store should have been apparent.").

In this case, there was no reason to anticipate the harm and thus no duty to warn. 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. Here, as in *Peterson*, the Court of Appeals correctly found that Beach Market did not have a duty to warn Haina and affirmed the trial court's grant of summary judgment.

CONCLUSION

Haina has failed to present any argument in his Petition that implicates the considerations listed in Rule 242(b), SCACR. Nothing about the opinion of the Court of Appeals is inconsistent with *Callender*. Therefore, the Petition must be denied.

Respectfully submitted,



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December 3, 2014

Attorneys for the Respondent

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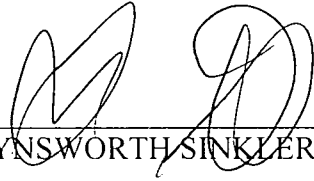
Beach Market, LLC.....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on this the 3rd day of December, 2014, he/she served counsel of record with a copy of the *RETURN OF RESPONDENT, BEACH MARKET, LLC, TO YOSHI HAINA'S PETITION FOR A WRIT OF CERTIORARI* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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Respectfully submitted,



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December 3, 2014

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, The Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

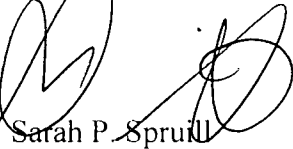
Re: Yossi Haina v. Beach Market, LLC
Case No. 2011-CP-07-2300
Appellate Case No. 2014-002197
HSB File No. 02296.1708

Dear Mr. Shearouse:

Enclosed herewith for filing, please find an original and seven (7) copies of Respondent's Return to Yossi Haina's Petition for a Writ of Certiorari in the above-referenced matter together with the Proof of Service of same. Please file the originals and return clocked copies to me via my courier.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.



Sarah P. Spruill

SPS/jmb
Enclosures

cc: Marshall L. Horton
Lindsay Y. Goodman
John H. Tiller (via email only)

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