

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

HONORABLE R. MARKLEY DENNIS, JR.

Case No. 2013-CP-10-7203

Appeal Case No. 2014-001907

Nationwide Property & Casualty

Insurance Company, Plaintiff/Appellant

V.

Gary McCombs and Ragan McCombs Albert,

Defendants/Respondents

Reply Brief of Appellant

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SC Court of Appeals

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II. Table of cases, statutes and other authorities.

1. Chakrabarti v. City of Orangeburg, 403 SC 308, 743 SE 2d 109 (Ct. App. 2013). [page 3]
2. Willams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E. 2d 447 (1976) [page 4]

III. Argument:

Appellant Nationwide Property & Casualty Insurance Company ("Nationwide") filed its subrogation action to recover property damage payments made to its insured Alison Smith Thornly ("Ms.Thornly"). Appellants allege the Appellees Gary McCombs and Ragan McCombs Albert ("Appellees") caused the damage by failing to keep water from leaking from their condominium on December 17, 2013. Amended Complaint para. 10 and 11 R. at 25. Plaintiff seeks to recover \$18,923.91 in payments plus interest and costs in its Amended Complaint. It should be noted that no one contends water did not leak from the above condominium and damaged the insured of Plaintiff. Rather, respondents contend that since Plaintiff cannot point to the exact

cause of the leak, they should be granted summary judgment. Although respondents have submitted affidavits that state they were unaware of the leak, it should be noted that at no time do respondents state there was not a leak from their unit to the Plaintiff's insureds unit. See Affidavit of Ragan McCombs Albert R. at 394-395 and Affidavit of Gary McCombs R. at 393.

Respondents have correctly stated that in order to prove negligence a Plaintiff must show 1) a duty of care owed by the defendant to the Plaintiff; 2) a breach of that duty by a negligent act or **omission**; and 3) damage caused by that negligent act or omission. (emphasis added) Chakrabarti v. City of Orangeburg, 403 SC 308, 743 SE 2d 109 (Ct. App. 2013). Of particular import is that a party can be held liable for negligence based on an act or an **omission**. The Appellant contends Respondents are liable for both an act and an **omission** by allowing water to leak from their unit after installation of a hot water heater and failed to stop the leak.

In the case before this Court, the trial court applied a different standard in granting the Motions for Summary judgment than the rule cited in the Chakrabarti case above. The trial court stated "you've got to prove what they did."

Tr. Pg. 8, lines 2-8, R. at 145. Affectively, the trial court ruled that a party could not be held liable for an omission, i.e stopping a leak from the upstairs apartment to the below unit. Indeed, the appellants insured testified in her deposition that the same damage occurred.

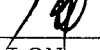
Deposition of Ms. Thornly at pages 26-30, R. at 182-188.

The same damage, Defendants admit to having caused the first time. See Brief of Respondent Ragan McCombs Albert at page 2.

Appellant has cited case law with a very similar issue. In that case, Willams v. Chesterfield Lumber Co., a repairman was injured when a machine became operational. No one was able to determine how the machine became operational and summary judgment was granted because proof of what caused the machine to malfunction or operate was not provided. The only evidence was that it became operational. Willams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E. 2d 447 (1976). The improper logic overturned in the Williams case is the same improper logic applied by the Trial Court in this case. Just as the Plaintiff in the Williams case could not establish the cause of the malfunction or how it became operational, only that it did malfunction or become operational, the Appellant in this

case established by evidence that there was a leak from the upstairs unit that damaged its insureds unit. The respondents have not submitted any evidence that the leak did not occur, nor have they submitted any evidence that the leak did not come from their unit. Thus, summary judgment should not have been granted.

Respectfully Submitted this 29 Day of April, 2015, by:

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