THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Case No. 2014-CP-21-441

Bernice Britt, as Personal Representative of the Estate of Lonnie William Britt, and Bernice Britt, Appellant(s).

v.

Marshalls Marine, Inc, Respondent.

INITIAL BRIEF OF APPELLANT(s)

October 23, 2015

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO SUBMIT THE ISSUES TO A JURY WHEN MORE THAN ONE REASONABLE INFERENCE COULD BE DRAWN FROM THE EVIDENCE?

2. DID THE TRIAL COURT ERR IN FAILING TO VIEW THE EVIDENCE AND INFERENCE IN A LIGHT MOST FAVORABLE TO THE NONMOVING PARTY?

STATEMENT OF THE CASE

On February 24, 2014, Lonnie William Britt and Bernice Britt brought this action alleging personal injuries and damages as the result of an accident which occurred on the premises of Respondent, Marshall's Marine, Inc., on or about July 3, 2013. Respondent filed an answer on April 7, 2014 alleging that Respondent was not negligent or liable for the injuries sustained in the July 3, 2013 accident on their premises. Respondent filed a Motion for Summary Judgment on December 29, 2014 which was heard before the Florence County Court of Common Pleas and The Honorable Thomas A. Russo on March 18, 2015. An order was entered by The Honorable Thomas A. Russo on April 28, 2015 granting summary judgment on behalf of the Respondent stating that there was no breach of duty owed to Appellant and declined to submit the issues to a jury.

In January, 2015, Mr. Britt died, and Appellant filed a Motion for Substitution to name Bernice Britt as Personal Representative for the Estate of Lonnie William Britt. An order was entered on March 18, 2015 substituting the Plaintiff, Lonnie William Britt with Bernice Britt, Personal Representative for the Estate of Lonnie William Britt. On May 19, 2015, a Notice of Appeal was served

upon Respondent, Marshall's Marine, Inc.

FACTS

Appellant, Lonnie William Britt, was a long-time customer of Defendant for services and maintenance on his boats and watercraft for over 20 years (Memo in Opposition p. 1). In June, 2013, Mr. Britt brought his aluminum fishing boat to Marshall's Marine sometime for a repair to the steering column (Memo in Opposition p. 1). Specifically, Mr. Britt was having difficulty with the steering stick in his boat, and Marshall's Marine fabricated a solution to assist Mr. Britt in steering the boat (Memo in Opposition p. 1). On or about July 3, 2013, Mr. Britt, received numerous phone calls from Marshall Altman, owner of Marshall's Marine to let him know that his boat was ready to be picked up (Complaint p. 2). Mr. Britt took his brother Mackey, to Marshall's Marine with him to pick up the boat (Memo in Opposition p. 2). On July 3, 2013, Mr. Britt traveled to Marshall's Marine to pick up his boat (Memo in Opposition p. 2). Plaintiff had refused prior requests to retrieve his boat at this time due to inclement weather conditions making it dangerous to retrieve the boat until weather subsided (Complaint p. 2). After adamant insistence by defendant's agents, plaintiff Lonnie Britt responded to defendant's location to retrieve his boat (Complaint p. 2). Defendant's agent requested plaintiff to perform a test drive of the watercraft before leaving, to ensure the accuracy of the repair (Complaint p. 2) Plaintiff performed the requested test drive of the boat in spite of the persistent inclement weather and his expressed objections (Complaint p. 2). Defendant failed to offer plaintiff any

assistance or make any extra precautions for plaintiff while on the wet dock or while entering or exiting the boat, despite the poor weather conditions and plaintiff's already articulated safety concerns (Complaint p. 2). While exiting the boat, plaintiff slipped and fell on the wet dock, receiving substantial injuries In the course of Mr. Britt's visit to Marshall's Marine, Mr. Britt did sustain severe injuries in an accident that occurred on the dock (Complaint p. 3). Mr. Britt died from health complications on January 15, 2015 (Order Granting Motion to Substitute Plaintiff, p. 1).

ARGUMENTS

I. BECAUSE MORE THAN ONE REASONABLE INFERENCE COULD HAVE BEEN DRAWN FROM THE FACTS, THE TRIAL JUDGE SHOULD HAVE SUBMITTED THE ISSUE TO THE JURY AND SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

South Carolina courts have held that "A cognizable claim for the recovery of damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, requires a 'plaintiff to show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or 92) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it." *Garvin v. Bi-Lo, Inc,* 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001). In this case, all parties knew that it had been raining and storming substantially in the 24 hour time period prior to this accident. The parties were aware that a thundercloud had risen and that more rain was imminent.

However, Mr. Britt objected and protested taking the boat out on the test lake. Upon the insistence of Mr. Altman, they took an aluminum boat out in a test lake with an active lightning storm approaching and had to rush back to the wet dock in order to avoid even greater potential harm. But for the dangerous condition created by Mr. Altman in the insistence of taking the boat out on the dock instead of trusting his long-time customer and friend, Mr. Britt would not have been harmed. He potentially would even be alive today but for this accident.

The facts in this case are similar to *Graham v. Whitaker*, 321 S.E.2d 40, 282 S.E. 393. In *Graham*, the Supreme Court ruled in favor of a Plaintiff who was injured when she fell at a doctor's office after receiving eye drops without being given any warning of the potential side effects. The Court focused on the premises liability portion of this claim and ruled that this matter should have been given to the jury for a determination when there were different views of the factual allegations put forth by both parties. The court in *Graham* cites, "Obviously, with such divergent versions of the occurrence of the incident, the issue of contributory negligence was a factual matter for the jury and not a question or law for the court" (citing *Kimbrell v. Bi-Lo*, 248 S.C. 365, 150 S.E.2d 79 (1966). They also note that "if more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit these issues to the jury. *Id* at 282.

In our present case, there is evidence that there was a dangerous condition that existed on the property at the time prior and leading up to the accident that

was known and obvious to the premises owner. A genuine issue of material fact exists as to whether or not a dangerous condition was created due to the fact that the premises owner here required, encouraged, insisted or otherwise coerced Mr. Britt into taking a test drive which he did not want to take in which case would give rise to liability under the Restatement (Second) of Torts §343A (1965). The Restatement (Second) of Torts §343A (1965) adopted the decision of the South Carolina Supreme Court in *Callander v. Charleston Doughnut Corp.*, 305 S.C. at 126, 406 S.E.2d at 362. §343A states "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." There is a genuine issue of material fact as to whether or not given the facts that the Respondent should have anticipated the harm that could be caused due to the obvious weather conditions that existed at the time of the test drive. Interestingly enough, counsel for Respondent quoted from the Restatement (Second) of Torts §343A as follows, "Which provides that a possessor of land is not liable to his invitees for physical harm to them by any activity or condition of the land whose danger is known or obvious to them." (Hearing Tr. p. 9). Counsel for Respondent did not continue and complete that statement as noted by counsel for Appellant. "He, he stated the first portion of that, but there was a portion of that that was left off. So, for the record, I'm going to read the entire thing. The second restatement of torts section 343(s) – excuse me – states that: '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 added). (Hearing Tr. p. 14). Counsel for Respondent argues any allegations based on the Restatement (Second) of Torts §343(A) by discussing whether or not any duty to warn was breached based on there being an open and obvious danger. (Hearing Tr. p. 10). However, in the dispute being argued in the Motion for Summary Judgment, the main issue concerned whether a duty of care was breached by taking a man who had a prosthetic leg and failing health and taking him on a test drive that he did not want to go on in poor weather conditions which may have created a dangerous condition which would have been known and obvious to the Respondent at the time they took him out on the boat. In a claim for negligence, the Plaintiff must show that a duty of care was breached, and the degree of care that is required of the premises owner is commensurate with the particular circumstances involved, including the age and capacity of the invitee. *Henderson v. St. Francis Cmty. Hosp.*, 303 S.C. 177, 399 S.E.2d 767 (1990). (Memo in Opposition p. 9). In this case, a genuine issue of material fact exists as to whether or not a known and obvious danger existed which would have required that the Respondent owe a duty of care given the nature and circumstances surrounding Mr. Britt, the weather conditions and whether that duty was breached by the actions of the Respondent in the insistence on taking the boat on a test drive prior to allowing Mr. Britt to take the boat home.

More than one inference can be drawn from the facts in this particular case. Even the trial judge struggled with whether or not the insistence of the Respondent may have raised a genuine issue of material fact (Hearing Tr. p. 31). The issue of negligence is not settled in this matter and should have gone before the jury. "Other questions for the jury are the issues of negligence, contributory negligence, and proximate cause, and, if more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit these issues to the jury." *Graham v Whitaker*, 341 S.E.2d 40, 282 S.C. 393 (citing *Kennedy v. Custom Ice Equipment Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978).

II. SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE IF THE EVIDENCE AND INFERENCES WHICH CAN BE DRAWN FROM THE FACTS ARE VIEWED IN A LIGHT MOST FAVORABLE TO THE NONMOVING PARTY, THE CONCLUSIONS AND INFERENCES DRAWN FROM THE FACTS ARE STILL IN DISPUTE MAKING SUMMARY JUDGMENT INAPPROPRIATE.

In a determination regarding whether to grant summary judgment, the Court has provided guidance that a grant of summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. *Etheridge v. Richland County School Dist. One*, 341 S.C. 307, 534 S.E.2d 273 (2000). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. *Id.* In this case, the Defendant has filed its Motion for Summary Judgment

alleging that there is no other inference that can be taken from the evidence than that no negligence occurred on behalf of the Defendant. Plaintff(s) argue that more than one reasonable inference can be taken from the evidence in the file and therefore, this matter should be submitted to the jury.

On July 3, 2013, Mr. Britt slipped and fell when he was required to test drive his boat that was serviced by Marshall's Marine before taking the boat off the lot. Mr. Britt protested having to get in and test drive the boat; however, Marshall Altman, owner of Marshall's Marine insisted that he see what they had done with the boat. In fact, they discussed how proud they were of the work in deposition testimony (Complaint pp. 1-2). In the deposition testimony of Lonnie William Britt, Mr. Britt testified to the following:

> Q. Okay, So y'all go out to where the boat's in the test lake?
>
> A. That's correct.
>
> Q. All right. And what took place?
>
> A. Well, when we got out there, there was a cloud came up and Marshall wanted me to go drive the boat. And I told him, I said, let's just wait. And he said, let's drive it. I said two or three times, let's just wait a minute. And I said, if it ain't right, I'll bring it back. I believe that was the stat - - - words I made. And - - but you know, he - - he - - he was

really proud of what he had done for me and everything. And so, well, I finally give in to him and I went ahead and got in the boat. (Tr. of Lonnie Britt p. 60).

In the deposition testimony of Stewart Altman regarding why Marshall insisted on test driving the boat, he stated the following:

A. We - - we probably did recommend, because I'm going to be honest with you, I - - I think Marshall is extremely proud - - I know I was in the fabrication job of the steering for Bill - - I mean, proud ...

Q. Okay. Go ahead and finish.

A. Marshall had fabricated something for Mr. Bill and Mr. Bill's boat that would - - would solve his problem. And I'm sure that he was - - he was proud of that and wanted to show Bill that that - - that this is - - this is it, this is - - I mean, and I was proud of what they had done, the - - my fabrication department and Marshall, when I saw it. (Tr. of Stewart Altman, p. 36).

The Defendant would argue that they did not create a dangerous condition leading to the injuries sustained by the Plaintiff. However, the deposition

testimony of Mr. Marshall Altman, owner of Marshall's Marine inconsistently paints a different picture. At first, Mr. Altman testified the following regarding call procedures to pick up boats:

> Q. Okay. And what is your procedure to let someone know when you're going to pick it up?
>
> A. We have some call the customer and let them know their boat's ready.
>
> Q. Okay. Who is that normally?
>
> A. Wade Altman.
>
> Q. The same Wade Altman that's part of Altman Brothers?
>
> A. That's correct.
>
> Q. Okay. Do you believe it might have - - that it was Wade Altman that contacted Mr. Britt when he needed to get his boat picked up?
>
> A. Not sure.
>
> Q. Okay. Do you have any - - you don't have any knowledge of who that might have been?
>
> A. I do not.
>
> Q. Okay. Do you have any idea of when a call was made to Mr. Britt to pick up his boat?

A. I do not. (Tr. of Marshall Altman, p. 11).

Just a few minutes later in Mr. Altman's deposition, he testified the following:

Q. Did you ever have a conversation with Mr. Britt about picking up the boat?

A. I did.

Q. When was that conversation?

A. The day of the accident.

Q. Okay. Tell me about that conversation.

A. I called him and told him that - - that I had just tested his boat and it was ready for him to come pick up.

Q. Okay. Do you believe that someone from the business also called him to let him know it was ready? Or do you think that you were the only person that called him about the boat?

A. Not sure of that, but it is possible someone else may have called him.

Q. Okay. Did you call him from your cell phone or from the business?

A. My cell phone. (Tr. of Marshall Altman, p. 21).

Not only was Mr. Altman's testimony inconsistent, he broke the normal protocol regarding how customers are to be contacted and called Mr. Britt from his cell phone, trying to get him to come pick up the boat. Mr. Britt's testimony above noted protest about test driving the boat because "cloud" was coming up. Regarding the weather, approximately eight inches of rain had fallen in the time period before and during this accident. (Ex. J to Memo. In Opposition). "It is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range...It was, therefore, a jury question whether the defendant had provided reasonably safe premises . . . for the use of the . . . invitee." *Hughes v. Children's Clinic, PA,* 237 S.E.2d 753, 269 S.C. 389. It was an obvious danger that the dock had been wet for some time and that it would be dangerous to take any customers out in the boats or on the deck during such heavy precipitation. Mr. Britt's injuries clearly lie within the "reasonable gamut" of dangers as outlined in the *Hughes* case.

The facts in this case are similar to *Graham v. Whitaker*, 321 S.E.2d 40, 282 S.E. 393. In *Graham*, the Supreme Court ruled in favor of a Plaintiff who was injured when she fell at a doctor's office after receiving eye drops without being given any warning of the potential side effects. The Court focused on the premises liability portion of this claim and ruled that this matter should have been given to the jury for a determination when there were different views of the factual allegations put forth by both parties. The court in *Graham* cites, "Obviously, with such divergent versions of the occurrence of the incident, the

issue of contributory negligence was a factual matter for the jury and not a question or law for the court" (citing *Kimbrell v. Bi-Lo*, 248 S.C. 365, 150 S.E.2d 79 (1966). They also note that "if more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit these issues to the jury. *Id* at 282.

In this case, there is evidence that there was a dangerous condition that existed on the property at the time prior and leading up to the accident that was known and obvious to the premises owner. Despite Mr. Britt's attempts to protest the test driving of the boat and going to the dock, Mr. Marshall Altman made a poor judgment call to require Mr. Britt to drive the boat prior to taking it with him, which would have been safer. Mr. Altman testified that he has known Mr. Britt for over twenty-five years (Tr. of Marshall Altman, p. 16). There was a level of trust between these two gentleman, and Mr. Altman was more zealous about the pride he took in the work completed on the boat than keeping his long-time customer safe.

During the hearing on the Motion for Summary Judgment, the trial judge indicated his desire to pay some attention to whether or not there was insistence on the part of the Respondent toward Mr. Britt that influenced his behavior and created a dangerous condition which would have been known and obvious. He stated, "I was inclined to grand summary judgment, but I think - - and I'm going to look at it. You may have raised an issue that may save you from summary judgment on the insisting – insistence of the defendant that he go out there when

it's not something he wanted to do. That, that may be an issue of fact, but I need to look at the law a little closer on that" (Hearing Tr. p. 31). Even the trial judge had a concern about whether or not the encouragement and insistence of the Respondent to test drive the boat, despite objection from Mr. Britt, may have created a dangerous condition, or at a minimum, would have been a genuine issue of material fact that should have been submitted to the jury. Pursuant to *Etheridge,* Appellant argues in this appeal that if the trial judge should have viewed all evidence and the inferences which could have been drawn therefrom in a light most favorable to the nonmoving party, in this case, the Appellant (Memo. In Opposition, p. 3). Had the trial judge applied this standard to the analysis of all the facts and evidence, more than one reasonable inference could have been ascertained from the facts, requiring the trial judge to submit the issues to a jury. "If more than one reasonable inference can be drawn from the evidence, the trial judge is required to submit these issues to the jury." *Graham v. Whitaker*, 341 S.E.2d 40, 282 S.C. 393 (citing *Kennedy v. Custom Ice Equipment Co.*, 271 S.C. 171, 246 S.E.2d 176 (1978).

If taken in a light most favorable to the nonmoving party, more than one inference can be drawn from the facts. Those facts become disputed which falls outside of the guidance provided by the *Etheridge* court requiring that the facts must be undisputed in order for summary judgment to be appropriate. Given the evidence contained in the deposition testimony of the parties, the facts are clearly in dispute when taken in a light most favorable to the nonmoving party.

Therefore, the trial court should have denied summary judgment to allow the issues to be submitted to the jury for a determination.

CONCLUSION

In a Motion for Summary Judgment, the main goal of the court is to determine if there is any genuine issue of material fact. Current case law in South Carolina is well settled that if more than one inference can be drawn from the facts, then the matter should go to a jury. Our courts have given even more guidance by providing that the evidence and inferences should be drawn in a light most favorable to the nonmoving party. In this particular case, the facts are still in dispute. There is a question of genuine fact that should be given to the jury as to whether or not the premises owner in this case created or perpetrated a dangerous condition by allowing, insisting, encouraging or even possibly requiring Mr. Britt to test drive the boat in order to release it and pick it up given the weather conditions and the known physical condition of Mr. Britt. Our case law is concerned with whether or not the duty of care was breached when a known and obvious danger exists and the premises owner does nothing to remedy it. While Respondent will argue that the recent case of *Lucas v. Sysco Columbia*, 2014 WL 4976509 stands for the proposition that there is no longer a duty of care owed to invitees when an open and obvious danger exists, Appellants acknowledge that the case only discusses the duty to warn of open and obvious dangers and does not address whether or not a duty of care is breached when the actions and decisions of premises owners create a dangerous condition that would not have otherwise

existed and could have been avoided with proper decision-making and care towards their customer, an invitee. Because several inferences can be drawn from the facts on whether or not a duty of care was breached due to the actions of Respondent, Appellants argue that a genuine issue of material fact still exists which should be submitted to the jury and that if the evidence and inferences are taken in a light most favorable to the nonmoving party, then a genuine issue of material fact still exists and summary judgment should not have been appropriate in this case. For the reasons stated herein, the Court should reverse the judgment of the circuit court.

Respectfully submitted,

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October 23, 2015

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CERTIFICATE OF SERVICE

Bernice Britt, as Personal Representative of the Estate of Lonnie William Britt, and Bernice Britt, Appellant(s).

v.

Marshalls Marine, Inc, Respondent.

I, A. Lori Jones, Attorney for Appellants, do hereby certify that the foregoing Initial Brief of Appellants has this day been served by regular U.S. Mail, postage prepaid, to the following person(s), this the 23rd day of **October, 2015.**

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