

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2016-000077

Tony King and Rosella King,

Appellants,

v.

Christopher T. Miller

Respondents.

INITIAL BRIEF OF APPELLANT

R. Jamison Tinsley Jr.
212 Oak Ave.
Greenwood, SC 29646
(864) 223-0770
Attorney for Appellants

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON KING'S NEGLIGENCE CLAIM WHERE EVIDENCE SUPPORTS THAT MILLER BREACHED A DUTY THAT HE ASSUMED AND CAUSED KING TO FALL OFF A LADDER AND SUFFER INJURIES.

STATEMENT OF THE CASE

This appeal is from the circuit court's grant of summary judgment to Christopher Miller ("Miller") on Nov. 9, 2015. (Summary judgment order.) Tony King ("King") commenced this negligence action against Miller by filing the summons and complaint on Mar. 26, 2014, and subsequently serving Miller. (Complaint.) Miller answered the complaint by denying that he was negligent and claiming that King's injuries were caused by the negligence of King or a third party. (Answer p. 1, ¶9-p. 3, ¶18.)

After the parties engaged in discovery, Miller filed a motion for summary judgment. (Mot. for Summary Judgment.) The circuit court held a hearing on that motion on Feb. 4, 2015. The circuit court then issued an order on Nov. 9, 2015, that granted summary judgment to Miller because it found no genuine issue of material fact and no scintilla of evidence or legal theory to hold Miller liable to King. (Order p. 5.) This order was filed with the clerk of court on Nov. 13, 2015. (Order.) King then filed a motion to alter or amend that asked the circuit court to reconsider its decision to grant Miller summary judgment. Rule 59(e), SCRCP. The circuit court denied King's motion via a Form 4 dated Dec. 4, 2015, and filed Dec. 16, 2015. (Form 4.) King then served his notice of appeal on Miller on Jan. 12, 2016. (Notice of Appeal.)

STATEMENT OF FACTS

King has done roof patching jobs for Miller at Miller's house dating back to 2010. (Depo. King p. 34, l. 20-p. 35, l. 15; p. 37, ll. 10-18.) A third party, Freddie Pope ("Pope"), would set up the job and deal with Miller, refer it to King, and assist King with the job. (Id. p. 35, l. 16-p. 36, l. 24.) King has worked in the roofing business his whole life and first did jobs for or with Pope in the 1970s. (Id. p. 39, l. 11-p. 40, l. 8.) On January 8, 2013, Pope and King came to Miller's house to perform a patching job on the front and back of the roof because of leaks and missing shingles. (Depo. Miller p. 7, ll. 20-24; p. 10, ll. 5-18.; Aff. Freddie Pope ¶2.) This job followed the normal pattern of Miller contacting Pope, who then contacted King to actually perform the repairs and assisted King. (Depo. Miller p. 9, ll. 9-21; p. 11, ll. 14-20; Depo. King p. 58, ll. 7-20.)

When King and Pope arrived that morning, they first replaced shingles on the roof above the front porch. (Depo. King p. 58, ll. 21-22.) Pope held the ladder while King climbed it and performed the shingle replacements. (Id. p. 58, ll. 9-20.) While King was working on the front of the house, Miller expressed concern about King being up on the roof because of King's knee stiffness. (Depo. King p. 59, ll. 8-22; Depo. Miller p. 32, ll. 2-9.) King testified that he assured Miller by telling him "Don't worry about it, as long as I got somebody to hold the ladder." (Depo. King p. 59, ll. 19-20.) King further testified that he would never do a roof job unless someone was holding the ladder. (Id. p. 63, ll. 8-10.)

Sometime that afternoon around 5:00, when it was getting close to dark, King and Pope finished the portion of the job on the front porch and went around to the back porch, which was a composite deck, to replace a shingle on that part of the roof. (Depo. King p.

59, ll. 6-13; Depo. Miller p. 16, ll. 2-15; p. 33, ll. 9-12.) King climbed the ladder to replace one shingle, while Pope again held the ladder. (Depo. King p. 70, ll. 15-24; p. 71, ll. 10-12.) The parties dispute whether the lights on the back porch were turned on at this time, with Miller testifying his wife turned them on and King testifying that Miller failed to turn them on despite agreeing to after being asked to by King. (Depo. King p. 69, l. 22-p. 70, l. 14.; Depo. Miller p. 16, l. 16-p. 17, l. 23.) While King was on the ladder doing the roof job, Pope walked away from the ladder after being called away by Miller to discuss the price of the job. (Depo. King p. 71, l. 25-p. 72, l. 6; p. 73, ll. 5-10; Aff. Pope ¶3.) After Pope walked away from the ladder, it came out from under King, who fell to the deck and suffered a broken ankle. (Depo. King p. 71, ll. 13-24; p. 72, l. 11-p. 73, l. 4.) While Miller denied he was the reason Pope let go of the ladder and walked away, Miller admitted he and Pope were talking when the ladder came down with King on it without Pope holding it. (Depo. Miller p. 18, l. 14-p. 20, l. 5.) King eventually had to have surgery and wear a cast for his severe ankle injury. (Depo. King p. 78, ll. 13-25.)

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear “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.” Rule 56(c), SCRPC. In a case where the burden of proof is a preponderance of the evidence, “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 Company, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009). Appellate courts utilize the same standard of review as the trial court to review the grant of

summary judgment. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the light most favorable to the non-moving party below. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

ARGUMENT

THE CIRCUIT COURT ERRED IN GRANTING MILLER SUMMARY JUDGMENT WHERE THE EVIDENCE SHOWS HE UNDERTOOK A DUTY TO ASSIST KING AND HIS BREACH OF THAT DUTY CAUSED KING TO FALL OFF A LADDER AND SUFFER INJURY.

King brought a negligence action against Miller. A plaintiff must establish the following elements in a negligence cause of action: “1) the defendant owes a duty of care to the plaintiff, 2) the defendant breached the duty by negligent act or omission, 3) the defendant’s breach was the actual and proximate cause of the plaintiff’s injury, and 4) the plaintiff suffered an injury or damages.” Moore v. Weinberg, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009). The circuit court erroneously found that Miller did not owe King any duty beyond the standard duty owed based on premises liability and granted summary judgment in Miller’s favor.

A. Miller owed King a duty of care based on Miller’s voluntary undertaking.

When someone voluntarily acts on behalf of another then that person must act with due care. See Madison ex. rel. Bryan v. Babcock Ctr. Inc., 371 S.C. 123, 638 S.E.2d 650 (2006). “The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of

law and fact to be resolved by the fact finder.” Vaughan v. Town of Lyman, 370 S.C. 436, 446-47, 635 S.E.2d 631, ___ (2006).

The evidence in the present case shows Miller voluntarily undertook a duty to assist King in completing his job. Miller testified that when King and Pope went around to the back porch to complete the job, Miller told them “Well, let me go back inside and turn on the lights.” (Depo. Miller p. 16, ll. 14-15.) Then, when viewing the evidence in the light most favorable to King, Miller failed to turn on the lights. King testified “I don’t know why he didn’t cut [the lights] on. That’s what he supposed to have been doing.” (Depo. King p. 70, ll. 3-5.) Not only did Miller fail to turn on the lights as he explicitly promised to do, he also interfered with Pope holding the ladder as King climbed the ladder. (Depo. King p. 71, l. 25-p. 72, l. 6; p. 73, ll. 5-10; Aff. Pope ¶3.)

Miller had a duty to act with the reasonable care an ordinary person would in assisting King in the roofing job once Miller voluntarily assisted in the job. See Madison. Miller breached this duty when he did not turn on the lights as he said he would and was asked to do so by King. (Depo. King p. 69, ll. 9-12; p. 70, ll. 6-11.) Miller further breached his duty of due care when he distracted Pope from his job of holding the ladder on the back deck. King had told Miller earlier in the day that he would be fine on the ladder as long as someone was holding it at the bottom after Miller expressed concern with King being able to complete the job. (Depo. King p. 59, ll. 19-20; Depo. Miller p. 32, ll. 2-9.) Despite this knowledge, Miller distracted Pope from holding the ladder by talking to him about the price of the job when Miller knew King was on the ladder and needed someone to hold the ladder for safety. (Depo. King p. 71, l. 25-p. 72, l. 6; p. 73, ll. 5-10; Aff. Pope ¶3.)

The ladder kicked out and came out from under King because Miller breached his duty to properly assist King in the job, and as a result King suffered a severely broken ankle. (Depo. King p. 71, ll. 13-24; p. 72, l. 11-p. 73, l. 4.) King reasonably relied on Miller assisting him in a proper manner when King climbed the ladder. King testified that he thought Miller was turning on the lights when he began climbing the ladder with Pope holding the ladder, and he had no inkling that Miller would interfere with Pope holding the ladder. King testified that he would have come down immediately off of the ladder if he had known Pope was not holding the ladder while talking to Miller. (*Id.* p. 73, ll. 2-4.) It was foreseeable to Miller that the ladder could fall with King on it if someone was not holding it because King testified that he told Miller he was fine doing the work as long someone held the ladder when he was on it. But evidence shows Miller disregarded this warning after volunteering to help King and interfered with Pope holding the ladder. As King argued at the hearing, Miller's failure to turn on the lights and interference with Pope holding the ladder combined to cause the ladder to fall and severely injure King. (Tr. p. 16, ll. 11-21.)

B. The erroneous analysis by the circuit court.

The circuit court incorrectly found that King failed to produce a mere scintilla of evidence that Miller breached a duty owed to King. King was an invitee to Miller's property as he performed the roof repairs for Miller's benefit so Miller owed him the duty to avoid creating unreasonable risks and to take safety precautions to warn of or eliminate any unreasonable risks. See Lane v. Gilbert Const., 383 S.C. 590, 681 S.E.2d 879 (2009). King does not dispute the circuit court's finding that he was not injured by a latent or hidden danger that Miler had superior knowledge of. (Order p. 4)

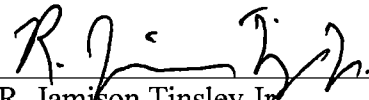
The circuit court, however, failed to recognize the duty of due care Miller assumed by voluntarily assisting King with the job as discussed above. See Madison. The circuit court held that Miller did not owe King a duty to turn on the lights. (Id. p. 5) The circuit court erred in making this finding because Miller explicitly assumed a duty to turn on these lights. Further, it held that even if Miller owed such a duty to Plaintiff, Miller did not breach this duty because King was already on the ladder working without the lights being on.

The circuit court misconstrued the facts in Miller's favor rather than viewing the evidence in the light most favorable to King. A jury could reasonably find that King acted appropriately when he began climbing the ladder a short time after Miller told him he was going to turn on the lights. (Depo. King p. 70, ll. 6-11.) A jury could infer that King reasonably believed that Miller was going to turn the lights on before he got up to the roof and began working and, therefore, acted appropriately. Furthermore, the circuit court erred in finding that King's actions excuse Miller of any breach of duty. (Order p. 5.) Such a finding could point to comparative negligence by King but is inappropriate for a court to rely upon in granting summary judgment because the court must look at the evidence and all inferences to be drawn from it in the light most favorable to King. Sauner at 404, 581 S.E.2d at 165. King produced evidence so that a jury could find his actions reasonable, making summary judgment inappropriate. The circuit court, therefore, erred in finding that King did not produce a mere scintilla of evidence to create a genuine issue of material fact.

CONCLUSION

As discussed above, the circuit court erred in granting Miller summary judgment because King produced at least a scintilla of evidence showing a genuine issue of material fact as to whether Miller breached a duty he assumed and injured King. The Court should, therefore, reverse the circuit court's grant of summary judgment and remand it to the circuit court so the parties can proceed with the litigation.

Respectfully submitted,



R. Jamison Tinsley Jr.
212 Oak Ave.
Greenwood, SC 29646
(864) 223-0770
Attorney for Appellant

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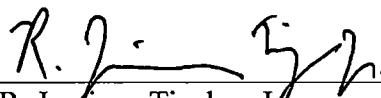
Christopher T. Miller,

Respondent.

PROOF OF SERVICE

I certify that I have served Initial Brief of Appellants and Designation of Matter on counsel for the Respondent by depositing a copy of it in the United States Mail, postage pre-paid, on March 2, 2016, addressed to Helen F. Hiser, Esq. at 735 Johnnie Dodds Blvd. Mount Pleasant, South Carolina 29465 and Doc Morgan, Jr., Esq. and Amanda L. C. Bradley, Esq. at PO Box 2980 55 E. Camperdown Way, Suite 300 (29601) Greenville, SC 29602.

March 2, 2016



R. Janfison Tinsley, Jr.
212 Oak Avenue
Greenwood, South Carolina 29646
Phone: (864) 223-0770
FAX: (864) 377-8278
Email: Tinslerj@gmail.com
Attorney for Appellants

Tinsley & Tinsley, P. C.
Attorneys at Law
212 Oak Avenue
Greenwood, South Carolina 29646
(864) 223-0770
FAX: (864) 377-8278

March 2, 2016

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Columbia, South Carolina 29211

Re: Tony King and Rosella King, Appellants
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Dear Court of Appeals:

Enclosed please find Initial Brief of Appellants and Designation of Matter in the above-referenced case along with Proof of Service.

Please contact me should you have questions or concerns.

Yours truly,



R. Jamison Tinsley, Jr.

RJTJr/cct

Enclosures as indicated

Cc: Helen F. Hiser, Esq.
Doc Morgan, Jr., Esq.
Amanda L. C. Bradley, Esq.

Tinsley & Tinsley, PC
Attorneys at Law
212 Oak Avenue
Greenwood, SC 29646



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