IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs.....Appellants,

v.

Fairway Oaks Homeowners
Association.....Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. **The Circuit Court correctly refused to carve out a new exception to the independent contractor rule, and properly held that Respondent is not liable for the negligence of an independent contractor that the Appellant himself hired.**

STATEMENT OF THE CASE

This appeal follows an Order of the Circuit Court refusing to create a new exception to the independent contractor rule and granting summary judgment in favor of Respondent Fairway Oaks Homeowners Association ("Fairway Oaks"). (Sept. 15, 2015 Order, p. 4). The material facts are undisputed. Appellant Charles Thomas Hobbs ("Hobbs") was the president of Fairway Oaks when he received a complaint about a dead limb on common areas maintained by Fairway Oaks endangering a townhouse owner's property. Hobbs – acting as the president of Fairway Oaks – personally selected and hired his friend Lee Lambright to cut the limb. The parties agree that Lambright was an independent contractor. While Hobbs stood in close proximity to the tree, Lambright cut a limb that fell and struck Hobbs on the head. As a result, Hobbs and his wife Mary Hobbs filed a complaint in the Pickens County Court of Common Pleas against Respondent on May 15, 2014.

Discovery revealed three undisputed facts: (1) Lambright was an independent contractor; (2) Hobbs made the decision to hire Lambright; and (3) no other person acting on behalf Fairway Oaks participated in the decision to hire Lambright or in the tree trimming activities on the date of the accident. Relying on these facts and application of the independent contractor rule, Fairway Oaks moved for summary judgment on January 2, 2015. (Mot. for Summ. J.) (Mem. of Law in Supp. of Def.'s Mot. for Summ. J., 3-7). Fairway Oaks filed a supporting memorandum, and the Hobbs filed an opposing memorandum.

The Honorable Judge Edward Miller held a hearing on the motion on August 7, 2015. At the hearing, Hobbs did not dispute the fact that Lambright was an independent contractor or that Hobbs himself hired Lambright, and he did not argue that any other person acting on behalf of Fairway Oaks participated in the events leading up to the incident. (Aug. 7, 2015 Transcript, 11:16-17; 12:7-8). Rather, he asked the Court to create a new exception to the independent contractor rule. After considering the arguments of both parties, Judge Miller refused to change the existing law, and granted Fairway Oaks' Motion for Summary Judgment in a written Order signed on September 15, 2015. (Sept. 15, 2015 Order, p. 4).

In its Order, the Circuit Court held that Fairway Oaks "is not liable for the negligence of an independent contractor that [Hobbs], as president of the HOA, hired, and there is no recognized exception that removes this case from the general independent contractor body of law." (Sept. 15, 2015 Order, p. 4). The Circuit Court considered Hobbs' arguments that the Court should create a new exception to the independent contractor rule, and refused to do so. (Sept. 15, 2015 Order, p. 4).

Appellants filed their Motion to Alter or Amend Judgment on November 3, 2015, which was denied by an Order dated November 17, 2015. Appellants filed their Notice of Appeal on December 10, 2015.

STATEMENT OF FACTS

On August 18, 2012, Benny Roper, a Fairway Oaks homeowner, called Hobbs to request the removal of a tree limb hanging over Roper's home. (Hobbs Dep. 28:24-29:9). Hobbs served as the president of Fairway Oaks and had done so for five years at the time of his injury. (Hobbs Dep. 15:16-19). Among other responsibilities as president of Fairway

Oaks, Hobbs arranged for the maintenance and repair of Fairway Oaks' common areas. (Hobbs Dep. 17:4-8).

Hobbs advised Roper that he would hire a professional tree service based out of Liberty, South Carolina to remove the limb on behalf of Fairway Oaks. (Roper Dep. 24:13-25:5). Although Fairway Oaks had previously hired a professional tree trimmer to perform similar services, Hobbs decided he did not want to pay a professional tree trimmer for this job. (Hobbs Dep. 22:15-23:21). Instead, Hobbs asked his personal friend Lee Lambright during a golf outing to remove the limb. (Hobbs Dep 17:20-18:2; 29:3-21; 55:15-20).

Although Hobbs had hired Lambright to perform odd jobs for Fairway Oaks over the years, Lambright explained: "I am not a contractor. I am just a neighborhood friend, and I do a lot of little projects for people." (Lambright Dep. 11:25-12:6). Lambright had no training in limb removal, and he had never been hired or performed work removing tree limbs. (Lambright Dep. 12:8-16:12). Lambright agreed to remove the limb if Hobbs would help, to which Hobbs agreed. (Hobbs Dep. 29:11-21).

On August 21, 2012, Hobbs met Lambright at Fairway Oaks, helped Lambright remove the ladder from his truck, and carried the ladder with Lambright to the tree at issue. (Lambright Dep. 25:6-26:22). Hobbs held the bottom of the ladder as Lambright climbed up and began to remove branches with a chainsaw. (Lambright Dep. 26:18-22). Then, Hobbs stood in close proximity to the tree as Lambright performed his

work. (Roper Dep. 43:1-20). Although there were safer places to stand, Hobbs stood "in the direct line of fire underneath the branch." (Roper Dep. 43:1-20).[1]

Hobbs stood in close proximity to the tree while Lambright was cutting a large limb that fell and struck Hobbs on the head. (Lappin Dep. 37:20-38:24; Roper Dep. 38:1-22). Hobbs candidly admitted that it was his own decision to attend the tree trimming and to stand where he did. (Hobbs Dep. 50:10-18). He further admitted that he was there as the president of Fairway Oaks. (Hobbs Dep. 58:4-13).

Hobbs claimed injuries and filed suit against the Respondent Fairway Oaks, of which he was the President. He did not file suit against Lambright, the independent contractor. Hobbs admits that he personally made the decision to hire Lambright instead of a professional tree trimmer in order to save money. (Hobbs Dep. 58:14-15). He also admits that he chose to stand where the limb fell, and he could have stood elsewhere. (Hobbs Dep. 58:16-23). Lastly, Hobbs presented no evidence before the Circuit Court that anyone else acted on behalf of Fairway Oaks to cause his injuries. In other words, the only negligence that Hobbs attempts to attribute to Fairway Oaks is from the acts of the independent contractor that Hobbs himself hired.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the Court of Appeals applies the same standard that governs the circuit court under Rule 56(c), SCRCP. Nelson v. Piggly Wiggly Center, Inc., 390 S.C. 382, 387-88, 701 S.E.2d 776, 779 (Ct. App. 2010).

[1] There is some factual dispute as to whether Hobbs actually assisted Lambright in the limb removal, but multiple witnesses testified that he did. (Roper Dep. 25:3-6) ("Q. And when you showed up the day the branch was being removed, it was Mr. Hobbs and Mr. Lambright removing the branch? A. Yes, sir."). (Lappin Dep. 37:17-21). For purposes of this appeal, this factual dispute is immaterial because it is undisputed that Lambright was an independent contractor.

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP.

ARGUMENT

The facts of this case present a typical independent contractor scenario, and the Circuit Court properly refused to change the existing law to create liability against Fairway Oaks when Hobbs himself selected the independent contractor without the involvement of any other officers or agents of Fairway Oaks. The trial court correctly found there is no recognized exception in South Carolina that would remove this matter from the general body of law, and the facts of this case do not justify the creation of a new exception. (Order, 6). Accordingly, Fairway Oaks was entitled to judgment as a matter of law, and the trial court's grant of summary judgement should be affirmed.

I. The Circuit Court correctly found that Fairway Oaks is not liable for the negligence of an independent contractor that Hobbs hired.

The law in South Carolina governing liability for the negligence of an independent contractor is well established and clear: "A principal that hires an independent contractor is not liable for the negligence of that independent contractor, or for harm caused by that negligence." Cherry v. Myers Timber Co., Inc., 404 S.C. 596, 745 S.E.2d 405 (Ct. App. 2013) (holding that timber company was not responsible for torts of logger hired to harvest and haul timber to mills because the logger was an independent contractor). Although Hobbs[2] argues that this case involves a novel issue of law, the issue is far from novel. Nearly 150 years ago, the Court of Appeals of South Carolina announced the rule of law that controls this case: "[T]he owner of property, fixed or movable, for whose benefit a

[2] For ease of reference, Charles and Mary Hobbs are referred to collectively herein as "Hobbs" where appropriate.

work about such property is to be accomplished, is not held answerable for the negligence of an independent contractor to whom he has committed the work, and to be done without his control in its progress." Conlin v. City Council of Charleston, 49 S.C.L. (15 Rich.) 201, 211 (1868). Lambright was an independent contractor performing work on property maintained by Fairway Oaks. Hobbs, on behalf of Fairway Oaks, committed the job to Lambright under Lambright's control. Therefore, Fairway Oaks is not responsible for Lambright's conduct.

The sole source of liability for which Hobbs seeks recovery is vicarious liability against Fairway Oaks for Lambright's conduct. This is precisely the type of liability that the independent contractor rule precludes. Indeed, in Cherry, this Court upheld summary judgment in favor of a principal, despite negligence of its hired driver, because the driver was an independent contractor. Id. This Court held in Cherry, "for the purposes of imposing vicarious liability on the employer," the test is "whether there is the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." Cherry at 601 (citing Creighton v. Coligney Plaza Ltd. Partnership, 334 S.C. 96, 116, 512 S.E.2d 510, 520 (Ct. App. 1998)).

Here, the question of the right and authority to control is a non-issue because Hobbs concedes that Lambright – whom he hired – was an independent contractor. (Aug. 7, 2015, Hearing Tr. 12:7-8). Lambright furnished his own tools, controlled the means and methods of his work, and even testified that he was acting as an independent contractor. (Lambright Dep. 22:6-8). Therefore, Lambright was not an agent of Fairway Oaks and Fairway Oaks cannot be liable for his negligence. Because the only conduct that gives rise to Hobbs'

claim is the conduct of Lambright, the independent contractor rule applies and the Circuit Court should be affirmed.

II. The trial court properly declined to change South Carolina's long-standing independent contractor rule by refusing to create a new exception to the rule out of whole cloth.

It is important to note what Hobbs is ***not*** contending and, even more importantly, **why** he is not making that contention. Hobbs is ***not*** asserting that Fairway Oaks negligently hired an independent contractor causing his injury. (Aug. 7, 2015, Hearing Tr. 17:11-14). He cannot. Hobbs himself decided to hire his friend Lambright instead of a professional tree trimmer. Therefore, Hobbs is left with only one option: asking this Court to ignore the fact that he chose the independent contractor with no applicable training or experience, and to take the unprecedented step of carving out a new exception to the independent contractor rule.

South Carolina's courts have traditionally recognized nondelegable duties only in areas where a defendant has a statutory or regulatory duty to act or when a defendant is providing a distinctly public service. However, in this case Hobbs asks this Court to create a new, nondelegable duty out of whole cloth. Hobbs would make Fairway Oaks vicariously liable for the conduct of the independent contractor that Hobbs chose. The facts of this case do not support such a drastic change in the long-standing independent contractor rule.

A. The Circuit Court properly held that the facts of this case do not fall within any recognized exception to the independent contractor rule.

The trial court correctly found that no recognized exception to the independent contractor rule applies to this case. (Order, 4). South Carolina has recognized very few exceptions to the independent contractor rule, including:

1) An employer's duty to provide a reasonably safe place to work and tools for its employees; See Belamy v. Hardee, 242 S.C. 71, 129 S.E.2d 905 (1963);

2) A commercial motor carrier's duties to properly secure cargo; See Jenkins v. E. L. Long Motor Lines, 233 S.C. 87, 103 S.E.2d 523 (1958);

3) A bail bondsman's duties with respect to actions of a hired bounty hunter; See Carson v. Vance, 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997);

4) A landlord's duties to maintain a tenant's property in a fit and habitable condition; See Nedrow v. Pruitt, 336 S.C. 668, 521 S.E.2d 755 (Ct. App. 1999);

5) A private hospital's provision of emergency room services; See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000); and

6) A municipality's maintenance of public streets; See Dolan v. City of Camden, 233 S.C. 1, 103 S.E.2d 328 (1958).

The relative dearth of exceptions to a rule that has been recognized for well over a century highlights the degree to which South Carolina's courts have protected the independent contractor rule. None of the above-listed exceptions applies in this case.[3]

B. The existing exceptions to the independent contractor rule rely on statutory or public obligations that are inapplicable to an HOA.

In modern times, South Carolina has only recognized exceptions to the independent contractor rule based on nondelegable duties in two situations: (1) the defendant attempts to delegate a statutory duty; or (2) the defendant provides a public service and attempts to delegate that distinctly public duty.[4] Because the facts of this case do not fall within either of these two classes, creation of a new exception to the independent contractor rule here would be unfitting.

Most of the modern exceptions to the independent contractor rule arise out of statutory duties. For example, the South Carolina Supreme Court relied upon the Motor

[3] As the Circuit Court found, Hobbs was not an employee, and Hobbs does not make any such contention.

[4] South Carolina has recognized a master's duty to provide a reasonably safe place and safe tools to an employee since the late nineteenth century. See Gunter v. Graniteville Mfg. Co., 15 S.C. 443 (1881). However, this duty is quite different from the more recently recognized exceptions to the independent contractor rule. From its inception, courts applying this exception require a showing that the breach of the employer's duty went beyond the mere negligence of a co-servant such that the employer was negligent in employing and supervising the co-servant. Id. at 456.

Carrier Rules and Regulations of the South Carolina Public Service Commission when it held that a commercial motor carrier's liability for improper loading of the vehicle could not be avoided when the shipper loaded the vehicle instead of the carrier. Jenkins, 233 S.C. at 95-96, 103 S.E.2d at 527-28. Likewise, this Court relied upon South Carolina statutes to hold a South Carolina bail bondsman liable for the negligence of an independent contractor hired as a bounty hunter. Carson, 326 S.C. at 550, 485 S.E.2d at 129-30 ("Bail bondsmen have a statutorily imposed responsibility for the actions of their runners [bounty hunters] when they receive their license."). As discussed in detail below, this Court also relied upon the Residential Landlord Tenant Act to recognize a nondelegable duty of a landlord while conducting business in a tenant's residence. Durkin v. Hansen, 313 S.C. 343, 348, 437 S.E.2d 550, 553 (Ct. App. 1993).

The remaining exceptions to the independent contractor rule recognized by South Carolina's courts involve government functions – such as the maintenance of public streets – or the provision of important services to the public – such as hospital services. See Dolan, 233 S.C. at 3-4, 103 S.E.2d at 329-330 (relying upon statutes and holding that municipalities may be liable for negligence with respect to roads maintained by the State Highway Department); Simmons (adopting Restatement (Second) of Torts § 429, which requires showing that the employer of the independent contractor holds itself out to the public as providing certain services, to hospital providing emergency room services to the public).

Neither of the general bases supporting an exception to the independent contractor rule applies here. No statute or regulation imposes a duty on Fairway Oaks to maintain its property in any particular manner. Moreover, Fairway Oaks is not providing a service to

the public. Its relationship to its relatively few homeowners (the properties are composed of approximately eighteen units) can easily be governed by traditional rules of contract and tort. (Hobbs Dep. 16:10-21). There is no overriding public interest or need to change the traditional tort laws with respect to the relationship between Fairway Oaks and Hobbs. Therefore, the Circuit Court properly applied the independent contractor rule and refused to create a new exception under the law.

C. Hobbs' attempt to analogize the facts of this case to a resident-landlord relationship fails because the facts and law governing the two relationships are substantially different, and without the Residential Landlord Tenant Act, even a landlord would not be liable under the facts of this case.

Hobbs places significant weight on the landlord-tenant exception, and particular emphasis on this Court's opinion in Durkin, supra. However, the exception recognized in Durkin is not analogous and has only been applied in a specific context: a landlord-tenant relationship. Because of the differences between the landlord-tenant relationship and the HOA-homeowner relationship – not the least of which is the fact that the former is governed by statute and the latter is not – the creation of a new exception based on the landlord-tenant exception would not be appropriate from a legal or factual perspective.

In Durkin, the landlord hired a contractor to enter into the plaintiff's dwelling unit to clean the carpets. The plaintiff came home and slipped on a slick substance left by the contractor in her unit. Id. at 345, 437 S.E.2d at 552. This Court looked to the contract and the Residential Landlord Tenant Act ("RLTA") to find the landlord owed a nondelegable duty: "a ***landlord*** who makes repairs and improvements on the demised premises owes a duty of reasonable care to the occupying tenants which he cannot escape by placing the work with an independent contractor." Durkin, 313 S.C. at 348, 437 S.E.2d at 553 (citations

omitted) (emphasis added). Although Hobbs' proposed exception includes similar words, the exception has never been applied to similar facts.

The landlord-tenant exception only applies in a residential rental setting, and it requires a landlord and a tenant. See Durkin, supra. Here, the landlord-tenant exception does not apply: ***Fairway Oaks is not a landlord and Hobbs is not a tenant. Fairway Oaks is an HOA and Hobbs was its president.*** This case has no nexus to a landlord-tenant relationship.

More importantly, the creation of the resident-landlord exception by this Court in Durkin came ***after*** and ***as a result of*** the General Assembly's enactment of the RLTA. See S.C. Code Ann. §§ 27-40-10, et. seq. The entire purpose of the RLTA was to "simplify, clarify, *modernize, and revise*" the law governing residential rental properties. Watson v. Sellers, 299 S.C. 426, 434, 385 S.E.2d 369, 373 (Ct. App. 1989) (quoting 1986 S.C. Acts 336) (emphasis in original). Therefore, the RLTA ***changed*** the common law as it applied to the relationship between a landlord and tenant. See S.C. Code Ann. §§ 27-40-10, et. seq. Because no similar statute governs the HOA-homeowner relationship – and certainly not the HOA-president relationship – the landlord-tenant exception is inapplicable in this case.

Pursuant to the RLTA, a landlord must "comply with the requirements of applicable building and housing codes materially affecting health and safety," "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition," and "keep all common areas of the premises in a reasonably safe condition . .

." S.C. Code Ann. § 27-40-440.[5] Unlike the landlord-tenant relationship, the South Carolina General Assembly has not adopted a similar act for common ownership of properties such as a homeowners association. Although Homeowners Association Acts have been proposed in South Carolina, the General Assembly has so far declined to adopt any such acts. See e.g., S. 0218 General Bill, 119th Session, 2011-2012, "S.C. Homeowners Association Act."

In effect, Hobbs is petitioning this Court to create a new exception to the independent contractor rule even though the General Assembly has declined to do so. The Legislature has shown its ability to create such legislation by enacting the RLTA. If the General Assembly wanted similar rules to apply to HOAs, it could have enacted a Homeowners Association Act or held that HOAs are subject to the RLTA. It has not, and it is not the function of the courts to write such an expansion of the law. See e.g., Talley v. John-Mansville Sales Corp., 285 S.C. 117, 119, 328 S.E.2d 621, 622 (1985) ("Such a change is the function of the legislature, and this Court refuses to usurp legislative authority in this matter.").

Hobbs' attempt to analogize the facts of this case to those in Durkin serves as a poor compass for this Court's analysis because that case dealt with a statutorily-governed landlord-tenant relationship; this case does not. Additionally, comparison to Durkin fails for three key reasons: (1) absent the RLTA, a landlord is not liable for the conduct of an

[5] The Covenants and Restrictions for Fairway Oaks does not go nearly as far as the language in the RLTA. The Covenants and Restrictions only state, "Common areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings." (Covenants and Restrictions, Article VI, Section 12, pg. 18). Whereas the RLTA states repairs must put the premises in a "fit and habitable condition" and keep common areas "reasonably safe," there is no representation in the Covenants and Restrictions regarding the safety of common areas or any standard to which the property must be maintained.

independent contractor; (2) the HOA is not a landlord; and (3) the danger here was not caused by any physical quality of the premises.

i. Absent the RLTA, the independent contractor rule applies to landlord-tenant relationships, and maintenance is not a nondelegable duty.

The RLTA substantially changed the common law duties and liabilities of a landlord. Before the adoption of the RLTA, a landlord was not automatically liable for the negligence of its independent contractor. See Young v. Morrisey, 285 S.C. 236, 329 S.E.2d 426 (1985). In fact, in commercial leases that are not subject to the RLTA, a landlord continues to remain shielded by the independent contractor rule when a plaintiff is injured due to that independent contractor's negligence on the landlord's premises. See Creighton, supra. Therefore, application of the nondelegable duty doctrine to Fairway Oaks is not supported in the absence of a statute obligating Fairway Oaks to maintain the property.

Prior to the enactment of the RLTA, the South Carolina Supreme Court applied the independent contractor rule to shield a residential landlord from the negligence of an independent contractor in Young. The landlord defendant hired an electrical subcontractor to wire the heating and air conditioning units of an apartment complex during its construction. The electrician – an independent contractor – negligently installed the wiring, resulting in a fire that caused the death of two minors. 285 S.C. at 238-39, 329 S.E.2d at 427-28. The landlord's lease also obligated the landlord to repair the leased premises upon notice of any defects. Id. Nonetheless, the Supreme Court held that the

landlord was not responsible for the negligence of the independent contractor. Id. at 242, 329 S.E.2d at 429-30.[6]

Furthermore, prior to the enactment of the RLTA, a contractual obligation of a landlord to repair the premises did not give rise to a negligence cause of action in tort:

> A landlord may, however, enter into a binding agreement to keep the demised premises in repair, but even then the landlord is entitled to notice of any existing defects before becoming obligated to repair. Even when a landlord so obligates himself, a failure to make repairs will give rise merely to a right of action for breach of contract under which damages are not recoverable for personal injuries sustained by reason of the defective condition of the premises.

Id. at 239-40, 329 S.E.2d at 428 (citing Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329 (1932); Conner v. Farmers and Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963); Sheppard v. Nienow, 254 S.C. 44, 173 S.E.2d 343 (1970)).

Here, at best Hobbs presented evidence that Fairway Oaks contractually agreed to "maintain" the common areas. Absent more, Hobbs cannot seek recovery for his personal injuries. See Young, supra; Timmons, supra.

Fairway Oaks' hiring of Lambright to trim the tree does not change the analysis. Although the RLTA changed the common law as it applies to the independent contractor defense in a residential lease context, the RLTA does not apply to commercial leases. See S.C. Code Ann. § 27-40-20(b)(1). In Creighton, this Court held that a landlord in a commercial lease is not liable for the conduct of an independent contractor ***even when it assumes a duty to maintain the premises***. In that case, a commercial landlord hired an

[6] South Carolina courts have recognized a limited exception to the independent contractor rule for inherently dangerous activities. Hobbs has never argued that the tree trimming in this case was inherently dangerous, and that issue is not preserved for review. Moreover, tree trimming is not an inherently dangerous activity because the risks – such as the risk at issue in this case – can be removed by taking proper precautions. See Robertson v. Morris, 209 W. Va. 288, 546 S.E.2d 770 (2001) (holding that tree trimming was not inherently dangerous because risks could be prevented with proper precautions).

independent contractor to maintain vegetation near entrance steps leading to a leased premises where a plaintiff fell and was injured. 334 S.C. at 115, 512 S.E.2d at 520. This Court recognized two rules: (1) a person who voluntarily undertakes to perform an act must use due care in the performance of that act; and (2) a landlord who attempts to make premises safe must use due care. Id. at 115-116, 512 S.E.2d at 520 (citations omitted).

This Court held that the landlord voluntarily undertook the maintenance of the steps by hiring a lawn care service – an independent contractor – to maintain the plants at the entrance steps where the plaintiff was injured. Id. However, despite the landlord's assumption of the duty to maintain the property, this Court went on to hold that the independent contractor rule applied to shield the landowner from liability for the lawn care service's negligence. Id. Therefore, the landlord could not be held liable for injuries caused by the independent contractor's negligence even after the landlord assumed the duty of maintaining the stairway.

The same legal principles apply here. Like the landlord in Creighton, Fairway Oaks had a duty to maintain the common areas of the association. Also, like the landlord in Creighton, Fairway Oaks hired an independent contractor to perform a particular task: cutting the tree limb. Hobbs' injuries did not result from a general condition of the common area. The limb did not fall on its own or because Fairway Oaks failed to properly maintain the common area. Rather, Hobbs' injuries resulted directly from Lambright's performance of the work when he cut the limb and from Hobbs' decision to stand where in close proximity to the tree when it was being cut. The limb fell and struck Hobbs because Lambright – an independent contractor – negligently performed the task and Hobbs was standing too close to the tree when the limb fell.

The nondelegable duties in the landlord-tenant context arise out of the RLTA. No similar statute has been adopted that would apply to an HOA under the facts of this case. Moreover, the duties in the landlord-tenant cases deal with physical conditions of the property, not tortious acts of third parties. Therefore, Hobbs' attempt to analogize the facts of this case – where he hired the independent contractor himself and was injured while acting as the president of Fairway Oaks – falls flat. Expansion of this Court's holding in Durkin to this case is not justified.[7]

ii. The landlord-tenant relationship is fundamentally different from the relationship between an HOA and its president, or even a homeowner and an HOA.

The relationship between a landlord and tenant is distinct from the relationship at issue in this case. Hobbs was the president of Fairway Oaks and acting as the president when he was injured. Even when compared to the relationship between an HOA and a homeowner, the comparison to a landlord-tenant relationship is strained at best.

A homeowner in an HOA is a member of the HOA with voting rights. The homeowner has the ability to influence the HOA and its conduct. In this case, Hobbs was the president of the HOA. Moreover, the homeowner owns his home. He has the right to make repairs at his will. The property under the control of the HOA is separate from the homeowner's residence.

[7] Although this Court in Durkin cited both the RLTA and the language in the lease agreement as supporting a finding of a nondelegable duty, a mere agreement in a lease to repair the premises – even with notice – does not give rise to an action in tort for recovery of personal injuries. See e.g., Timmons, supra (holding that landlord was not liable in tort for injuries to tenant's daughter when door fell on her foot despite fact that lease stated that landlord would repair premises, landlord was notified of the dangerous door hinge, and landlord failed to repair the hinge). Because the landlord in Timmons did not have a duty in tort to make the repairs, the duty arises only in contract, the breach for which does not give rise to a cause of action for personal injuries. Id. at 332.

In contrast, a tenant has no ownership in the rented property. In residential leases, the tenant rarely has the right to make any substantial changes to the rented property. In addition, aside from threatening not to renew a lease, the tenant has no say in what the landlord does with the property. In the typical residential lease, the landlord not only has control over any common areas, but also has final say in any changes that the tenant may desire to make to his residence.

As it relates to common areas, the HOA's role is more similar to that of a neighboring landowner than a landlord. While both have a duty to maintain premises under their control, the HOA's control stops at the homeowner's property line. Like a neighboring landowner, the HOA does not have a duty to maintain or any significant control over the homeowner's residence or property.

A neighboring landowner is not liable for the negligence of an independent contractor tree trimmer. See e.g., Robertson, supra at p.13 n.6 (applying independent contractor rule to homeowner who hired tree trimmer); Kinsey v. Spann, 139 N.C. App. 370, 533 S.E.2d 487 (Ct. App. 2000) (applying independent contractor rule to landowner who hired her nephew as an independent contractor to trim a tree, resulting in plaintiff neighbor's death); Dempsey v. Correct Mfg. Corp., 755 S.W.2d 798 (Tenn. Ct. App. 1988) (applying independent contractor rule to utility that hired tree trimmer). Therefore, Fairway Oaks is not responsible to a homeowner for the negligence of an independent contractor under a nondelegable duty doctrine. Moreover, Hobbs was on the premises not as a homeowner at the time of the incident, but as the Fairway Oaks president. (Hobbs Dep. 52:23-25). Therefore, the landlord-tenant analogy is even more attenuated and even less applicable.

iii. The duties arising out of the RLTA apply to the physical quality of the premises, not negligent or criminal acts of others on the premises.

Hobbs was not injured by any physical quality of the Fairway Oaks common area. The tree limb did not fall due to Fairway Oaks' failure to notice a dead limb and remedy the situation. It fell because Lambright – an independent contractor – was negligent in his work, and Hobbs was injured because he was standing too close to the tree while Lambright worked. Even under the RLTA – which does not apply to the HOA – the nondelegable duty exception to the independent contractor rule only extends to defective conditions on the premises, not injuries caused by negligent actors on the premises.

In Fair v. United States of America, 334 S.C. 321, 323, 513 S.E.2d 616, 617 (1999), the South Carolina Supreme Court limited the scope of the RLTA "fit and habitable" requirement to the "inherent physical state of the leased premises." Therefore, a landlord was not liable for injuries caused when one tenant's dog bit another tenant's daughter. Id. The Supreme Court rejected the argument that the RLTA changed the pre-existing law regarding dog bites because a dog is not part of the "inherent physical state of the leased premises."[8] Id.

Similarly, Courts have routinely held that a landlord does not owe a duty to insure the safety of residents from criminal acts of third parties. See e.g., Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1025 (D.S.C. 1990) (holding that RLTA did not impose a duty on a landlord to protect tenants from criminal activity); Cramer v. Balcor Prop. Mgmt., Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) (same). For purposes of keeping the premises safe,

[8] In a subsequent case, the Supreme Court held that a landlord who had actual knowledge of a dog's dangerous propensities could be liable for injuries caused to a tenant's invitee on common areas because the RLTA creates a statutory mandate for a landlord to keep the common areas "reasonably safe." See Clea v. Odom, 394 S.C. 175, 714 S.E.2d 542 (Ct. App. 2011). Notably, the Supreme Court expressly relied on the RLTA requirement in reaching its result. As discussed above, the RLTA does not apply to an HOA.

there is no appreciable difference from a duty to prevent criminal acts of third parties and the duty to prevent tortious acts of third parties.

For the same reasons, Hobbs' contention that he was an invitee is unavailing. Hobbs cites the "common areas" exception – which applies to landlords, not HOAs – to support his contention that he was an invitee and Fairway Oaks cannot rely upon the independent contractor rule to avoid liability for his injuries. However, the "common areas" exception also only applies to physical conditions on the common areas, not acts of third parties. See Cooke, 741 F. Supp. at 1211 ("This rule clearly has never been applied in South Carolina to anything except physical injuries resulting directly from the *condition* of the premises themselves") (emphasis in original); Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 286, 775 S.E.2d 399, 404-05 (Ct. App. 2015) (same). Therefore, even if this Court analogized the landlord-tenant relationship with the facts of this case, the independent contractor rule still applies and the HOA cannot be held liable for Lambright's actions.[9]

D. Hobbs' reliance on factually distinguishable, intermediate appellate cases from foreign jurisdictions fails to provide any compelling basis for this Court to change long-standing South Carolina law.

Hobbs looks to foreign jurisdictions to find case law "on similar issues," presumably because he cannot find support for his position in South Carolina law.

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[9] Even assuming for the moment that this claim were brought in a context where the nondelegable duty doctrine applied, our Supreme Court explained the problems it may pose for Hobbs given the facts in this case:

> "The term "nondelegable duty" is somewhat misleading. A person may delegate a *duty* to an independent contractor, but if the independent contractor breaches that duty by acting negligently or improperly, ***the delegating person remains liable for that breach***."

Simmons., 341 S.C. at 42, 533 S.E.2d at 317. Appellant admitted that it was his decision alone to delegate the tree limb removal job to the unskilled, untrained independent contractor. (Hobbs Dep. 55:15-17). Accordingly, even if the Court did extend the existing body of case law to find a new exception under the nondelegable duty doctrine, "the delegating person remains liable for that breach."

However, not only do intermediate appellate decisions from California and Florida lack any binding authority over this Court, but also the cases raised are not persuasive and do not set forth any compelling justification for changing the law of this State under the facts of this case.

Hobbs looks primarily to Affan v. Portofino Cove Homeowners Ass'n for a duty owed by a condominium association to condominium owners. 189 Cal. App. 4th 930, 117 Cal. Rptr. 3d 481 (Ct. App. 4th Dist., Div. 3, 2010). However, California's Civil Code – like the RLTA in Durkin – mandated repair, replacement or maintenance of common areas by the condominium association. Id. at 935; Calif. Civil Code § 1364(a). As discussed above, South Carolina has no such statute. Moreover, the source of the injuries in Affan was the HOA's failure to remedy a defective condition. The plaintiffs in that case were not injured by a direct act of the HOA or the HOA's independent contractor. Rather, the injuries arose out of the HOA's failure to maintain a common sewage line that serviced multiple units and the contractor's failure to remedy the situation, which eventually led to additional sewage overflow in the plaintiff's condominium unit. Id. at 936. In other words, the independent contractor's negligence left a physical condition on the common area – a sewage blockage – that eventually caused damage to the plaintiff's unit. In contrast, Hobbs injuries did not result from a condition on the land left by Lambright. Rather, they resulted directly from Lambright's actions. Therefore, Affan fails to provide guidance to the Court's analysis here.

Guidance from Affan is problematic for another reason. For some seventy years, California's courts have continually eroded the independent contractor doctrine:

> "[o]ver time, the courts have, for policy reasons, created so many exceptions to this general rule of nonliability that 'the rule is now primarily important as a preamble to the catalog of its exceptions.' "

(emphasis added) Privette v. Superior Court, 5 Cal. 4th 689, 693, 854 P.2d 721, 724 (1993), as modified on denial of reh'g (Sept. 16, 1993) (citations omitted). Unlike California, South Carolina's courts have strongly guarded the independent contractor rule and recognized very few exceptions. Although California's courts may freely carve out new exceptions to the independent contractor rule, the history of the rule in South Carolina reveals a very different approach in this State.

Appellant also references a Georgia case that is distinguishable on its face. The defendant HOA in Moon was sued for either its direct negligence or the negligence of its unqualified independent contractor lifeguard in failing to prevent party guests from throwing the plaintiff in a pool. Moon v. Homeowners' Ass'n of Sibley Forest, Inc., 202 Ga. App. 821, 824, 415 S.E.2d 654, 658 (1992). However, the Moon case dealt with an HOA that rented a pool to a business, not its homeowners. The liability in that case arose out of an HOA acting as a business in renting out its facilities, not as an HOA landowner maintaining common property. Therefore, relying upon Moon to create a non-delegable duty between an HOA and its homeowners (or president) is a poor fit.

Finally, Appellant raises various duties and obligations recognized in foreign jurisdictions where South Carolina law offers no such remedy. Each of these cases are factually distinguishable, and none is persuasive. For example, in Vasquez v. Lago Grand Homeowners Association, 900 So.2d (Fla. Dist. Ct. App. 3d Dist. 2004), a Florida court held an HOA liable for a contracted security company's failure to prevent a multiple homicide. South Carolina's courts have held that a landlord – and even more so an HOA

– are not insurers of a tenant or homeowner's safety. See Wright, supra (holding a landlord and apartment managers did not have a duty to provide security for a tenant and that the common areas exception did not apply to impose a duty to keep common areas secure from criminal activity).[10]

Put simply, no exception to the general rule of nonliability applies to the facts of this case. Although Plaintiff points to cases from foreign jurisdictions that are easily distinguishable, South Carolina has not recognized any exception – through statute or common law – that removes the present matter from the general body of case law. The Circuit Court correctly held that no recognized exception applies, and properly refused to create a new exception to the independent contractor rule out of whole cloth. Accordingly, the trial court's Order granting Summary Judgment should be affirmed.

CONCLUSION

The Circuit Court properly held that no recognized exception to the independent contractor applies in this case, and the Circuit Court correctly refused to carve out a new exception. Hobbs failed to present any actionable theory that would hold Respondent Fairway Oaks Homeowners Association liable for the negligence of an independent contractor that Hobbs personally hired. The general rule of nonliability applies, and no exception that removes this matter from that body of case law. Therefore, this Court should affirm the Circuit Court's ruling granting summary judgment in Respondent Fairway Oaks' favor.

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[10] The claim in Gazo v. City of Stamford, 255 Conn. 245, 765 A.2d 505 (2001) deals with a business-owner's duties to the general public. Those facts have no application to the situation in this case where the Fairway Oaks property was not business property open to the public.

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2014-CP-39-00613

Charles Thomas Hobbs and Mary Hobbs.....Appellants,

v.

Fairway Oaks Homeowners
Association.....Respondents.

CERTIFICATE

I, Wesley B. Sawyer, Esquire, attorney for Respondent, certify that the Respondent's Brief and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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