THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Circuit Court Case No. 2013-CP-07-1231

Appellate Case No. 2015-001988

Mark Heil and **Elizabeth Heil**, Appellants,

v.

Stewart Hines, Christina Hines, and **Sam Imler d/b/a Sam's Tree Service**, Defendants,

Of whom **Stewart Hines** and **Christina Hines** are the Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR BY FAILING TO FIND AT LEAST A SCINTILLA OF EVIDENCE FROM WHICH AN INFERENCE COULD BE DRAWN THAT RESPONDENTS BREACHED A NEGLIGENCE DUTY OWED TO APPELLANTS?

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of summary judgment to Defendants Stewart and Christina Hines (hereinafter "Respondents"). Plaintiffs Mark and Elizabeth Heil (hereinafter "Appellants") initiated this case by filing a Summons and Complaint on May 6, 2013. They filed an Amended Summons and Complaint on October 6, 2013. (R. pp. 008-013). The Amended Complaint includes causes of action against Respondents for negligence and breach of fiduciary duty. (R. pp. 008-011) It also included causes of action against a co-defendant Sam Imler d/b/a Sam's Tree Service ("Imler") for negligence and breach of implied warranty of workmanship. (R. pp. 008-009, 011-012). Imler was not a party to Respondents' Motion for Summary Judgment, nor is he a party to this appeal.

Appellants' claims against Respondents pertain to Respondents' alleged failure to prevent a tree in their yard from causing damage to Appellants' residence. (R. pp. 008-011). Respondents filed an Answer and Motion to Dismiss Plaintiffs' Amended Complaint on November 12, 2013, denying Appellants' claims against them. (R. pp. 014-018).

Respondents filed a Motion for Summary Judgment and a memorandum in support of same on December 5, 2014. (R. pp. 019-064). Respondents substituted one page of that memorandum with a filing on January 5, 2015. (Incorporated on R. p. 023) Appellants served a memorandum in opposition to Respondents' motion on February 25, 2015. (R. pp. 065-107). The Honorable Perry M. Buckner heard this motion on March 3, 2015. (R. pp. 186-200). Judge Buckner signed an order granting Respondents' Motion for Summary Judgment, filed on March 16, 2015. (R. pp. 001-004).

Appellants subsequently filed a Motion to Alter or Amend Judgment pursuant to SCRCP 59(e), including a memorandum in support of same, on March 30, 2015. (R. pp. 108-115). Respondents served a Memorandum in Opposition to (Appellants') Motion to Alter or Amend on April 13, 2015. (R. pp. 116-120). Judge Buckner heard Appellants' Motion to Alter or Amend on June 16, 2015. (R. 200-213). Judge Buckner subsequently signed an Order Denying Motion to Alter or Amend on July 21, 2015. (R. pp. 005-007). This order was filed and served to Appellants on August 13, 2015.

Both of the circuit court orders included a holding that Respondents were entitled to summary judgment on the negligence claim because Appellants failed to show evidence of breach. (R. pp. 002, 005-006). The orders also granted summary judgment on the breach of fiduciary duty claim because the circuit court found no existence of a fiduciary duty. (R. pp. 003-004, 007). Both of these orders are subject to this appeal. The basis of this appeal is that Appellants assert that the circuit court made errors of law and ignored pertinent facts in determining that Appellants did not submit evidence suggesting that Respondents breached the negligence duties they owed Appellants. The fiduciary duty claim is not at issue in this appeal. Appellants served a Notice of Appeal to Respondents on September 9, 2015.

FACTS

Appellants and Respondents owned neighboring houses in the Yacht Cove neighborhood of Hilton Head Island. Appellants resided in the Subject Property only part of the year. (R. p. 144, line 25-p. 145, line 2). Respondents do not reside in Yacht Cove and have always rented that residence to tenants. (R. p. 168, line 10-22).

Appellants visited the subject property in November 2011 and noticed that a tree based on Respondents' property was encroaching onto Appellants' property, specifically the roof. (R. p. 146, line 8-p. 147, line 4). Appellants did not observe

any damages inside their residence during that visit, but were concerned about the condition of the tree and thus notified Respondents of the condition. (Id.; R. p. 149, line 2-5).

Respondents asked Appellants to provide bids from tree contractors. (R. p. 147, line 1-4). Appellants testified that they complied by giving Respondents bids from two different licensed and insured tree contractors, one for $4,000 and the other for $2,800. (R. p. 147, line 20-p. 148, line1; R. p. 150, line 15-17).

Conflicting testimony raises many questions of fact as to the manner in which a tree service company was selected, vetted, and hired. (Compare R. p. 171, line 16-22 with R. p. 150, line 8-17). However, it is undisputed that Respondents retained Imler to prune the problematic tree for $500. (R. p. 137, line 23-p. 138, line 7). It is also undisputed that Imler was uninsured, used an undocumented worker, and charged only a fraction of the cost in comparison to the insured companies referred by Appellants. (R. p. 125, line 6-9; R. p. 128, line 17-p. 129, line 4; R. p. 129, line 22-p. 130, line 5).

After the November 2011 interaction, Appellants' next visit to the subject property, their secondary home, took place in April 2012. (R. p. 151, line 7-p. 152, line 7). Upon arrival, Appellants noticed substantial damage throughout the house deriving from a hole in the roof. (Id.) Appellants turned this matter over to their property insurance company, but the insurance company denied coverage because the inspectors for the claim determined that the tree located on Respondents' property caused the damages by rubbing against the roof. (R. p. 158, line 11-p. 159, line 6; R. p. 078).

Appellants contacted Respondents, who in turn contacted Imler, to seek help paying for the damages; however, neither Respondents nor Imler agreed to assume any of the responsibility. (R. p. 154, line 19-p. 156, line 5). Appellants already repaired the Subject Property at their own expense. (R. p. 153, line 3-24).

They subsequently filed this lawsuit against Respondents and Imler to seek reimbursement for the damages they incurred.

ARGUMENTS

It is conceivable that one could draw a first impression of this case that is sympathetic to Respondents' general thematic argument that "no good deed goes unpunished." However, a reasonable fact finder considering all of the evidence before the court would determine that Respondents' conduct should not be characterized as a good deed. Respondents had a legal obligation to protect the Appellants' residence from dangers caused by a tree located in Respondents' yard. See Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 288, 356 S.E.2d 123, 127 (Ct. App. 1986). Whether intentional or not, Respondents negligently allowed that tree to overgrow to the point where multiple limbs encroached and rubbed Appellants' residence. (R. pp. 182-185; R. p. 158, line 11-p. 159, line 6). Despite tree service professionals determining that the proper course of action should have cost $2,8000 - $4,000 (R. p. 147, line 20-p. 148, line 1), Respondents chose an inadequate measure to maintain the tree for $500, in an attempt to save money. (R. p. 154, line 15-23; R. p. 137, line 23-p. 138, line 7). Despite this reckless conduct, Respondents are attempting to paint themselves as good neighbors for performing an obligation bestowed on them by law, no matter how inadequately they performed that obligation.

The circuit court apparently was sympathetic to the impression that Respondents should not be punished for their alleged good deed, and issued orders that ignored most of the evidence presented. As discussed below, the circuit court ignored copious evidence of Respondents' breach of the duty (I) to inspect and maintain the subject tree, and (II) to use due care in vetting, hiring, and supervising a tree contractor. Accordingly, the circuit court orders should be reversed to the extent the orders grant summary judgment as to negligence on the grounds that Appellants did not present evidence of Respondents' breach.

I. The Circuit Court Ignored Copious Evidence of Respondents' Breach of the Duty to Inspect and Maintain the Subject Tree.

A. The circuit court erred by improperly disposing of key manners by which the duty to inspect and maintain the subject tree may be breached.

The first order correctly held that Appellants admitted photographs from which an inference could be drawn that the subject tree was encroaching Appellants' roof in an unsound manner, which would trigger Respondents' duty to exercise reasonable care to prevent an unreasonable risk of harm arising from the subject tree. (R. p. 002) (citing Israel, 292 S.C. at 288, 356 S.E.2d at 127) (also citing R. pp. 182-185). Although the circuit court correctly identified a source of Respondents' duty, it badly misapplied that law.

The circuit court held there was no breach of the duty to inspect and maintain the tree because Respondents acted swiftly in hiring a tree trimmer after Appellants requested such. (R. p. 006). This finding presupposes that there must be only one way to breach the duty to inspect and maintain the tree.

Generally, a breach of a duty in one respect is not negated by a lack of breach in another respect. To the extent that is even possible, it would be a question of fact for a jury, not a judge. More specifically, there is no law stating that swift action to remove a tree upon learning it is hazardous negates the duty to inspect the tree and learn that is hazardous before it causes damage.

A "landowner now has a duty to use reasonable care, **including inspection** to make sure the tree is safe." Israel, 292 S.C. at 288, 356 S.E.2d at 127 (emphasis added). Thus, merely allowing the tree become unsound could be evidence of both the existence of a duty and a breach of that duty. Appellants need not even argue that Respondents failed to act swiftly after the November 2011 notification because Respondents breached the duty to inspect and maintain the tree in other manners, as set forth below. The circuit court's misapplication of Israel was not harmless. It should be reversed.

B. The failure to acknowledge key manners of breach caused the circuit court to ignore substantial evidence of breach.

A single photograph that Appellants admitted is sufficient for this Court to reverse the grant of summary judgment on negligence to Respondents. Nonetheless, below is a list of many items of evidence in the record that were before the circuit court. Each of these items alone constitutes at least a scintilla of evidence giving rise to an inference of breach.

a) Elizabeth Heil's testimony that there were limbs lying on and over their roof in November 2011. (R. p. 146, lines 8-14).

b) Gary Garwood's opinion that the subject tree rubbed on Plaintiffs' roof for a couple of months, thereby causing the hole. (R. p. 158, line 11-p. 159, line 11).

c) Sam Imler's testimony, on multiple different occasions, that there were several dead limbs fallen on Plaintiffs' roof and on Plaintiffs' yard prior to his arrival. (R. p. 126, lines 8-10; R. p. 131, lines 11-15; R. p. 131, lines 21-22; R. p. 134, lines 15-24).

d) Sam Imler's testimony that there were three or four limbs the size of his arm hitting the roof. (R. p. 135, lines 1-6).

e) Sam Imler's testimony that there was a misplaced shingle on the roof in the area of the tree. (R. p. 131, lines 20-22).

f) Sam Imler's testimony that there was a damaged shingle on the roof that had evidence of a limb hitting it. (R. p. 136, lines 14-24).

g) Sam Imler's testimony that there was a roof cap damaged from a limb hitting it. (R. p. 139, lines 9-15).

h) The photographs from which an inference could be drawn that the subject tree was encroaching onto Plaintiffs' roof in an unsound manner. (R. pp. 182-185).

i) The insurance adjuster inspector's opinion that the subject tree rubbed on Plaintiffs' roof, thereby causing the hole. (R. p. 078).

j) Mark Heil's testimony that the subject tree rubbed on Plaintiffs' roof, thereby causing the hole. (R. p. 163, lines 7-21).

The determination of breach is a question of fact for the jury. The circuit court patently erred by finding that Appellants failed to submit any evidence suggesting that Respondents breached their duty to inspect and maintain the subject tree. That finding and the grant of summary judgment that flowed should be reversed.

II. The Circuit Court Ignored Copious Evidence of Respondents' Breach of the Duty to Use Reasonable Care in Vetting, Hiring, and Supervising a Tree Contractor.

The duty arising from Israel logically includes a duty to use reasonable care when vetting, hiring, and supervising a tree contractor. Even if Israel were not interpreted as such, those obligations still applied to Respondents in this case. In South Carolina, "one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if . . . his failure to exercise such care increased the risk of such harm." Russell v. City of Columbia, 305 S.C. 86, 89-90, 406 S.E.2d 338, 340 (1990). This is referred to as the "Good Samaritan" negligence doctrine. Here, Respondents voluntarily undertook the job of retaining a tree removal service, and should have recognized that this act was necessary for the protection of Appellants' residence. (R. p. 171, lines 16-20). Thus, even if Respondents' decision to retain a tree contractor were a "good deed" (as opposed to a legal obligation), they still had a duty to use reasonable care in carrying out the task.

The circuit court overreached by making a finding tantamount to a determination that there was not even a scintilla of evidence from which a juror could infer that Defendants did not reasonably vet, hire, or supervise Imler. In finding no breach, the first order pointed to Respondents' attorney's argument that Imler specialized in tree service and that the job occurred without incident. (R. pp. 002-003). The order provided no further elaboration on the issue. That finding is

insufficient to dispose of the facts before the court, and it ignores many questions of fact, as well as uncontroverted evidence, on the issue of Respondents' failure to properly hire, vet, and supervise the tree contractor Imler. As discussed below, (A) a reasonable jury would infer that Respondents are not credible and hired a company whose estimate was unreasonably too low compared to other qualified bidders, (B) Respondents failed to supervise or check Imler's work, and (C) the circuit court improperly determined that the hiring of an uninsured tree worker does not raise an inference of breach. Accordingly, the circuit court should be reversed.

A. A reasonable jury would infer that Respondents are not credible and hired a contractor whose estimate was unreasonably too low compared to qualified bidders.

Appellants told Respondents that the subject tree was problematic, so Respondents asked Appellants to provide bids from tree contractors. (R. p. 147, lines 1-4). Despite this promising beginning, there is copious evidence of negligent vetting and hiring from that point forward, in addition to apparently untruthful testimony by Respondents.

Appellants complied with Respondents' initial request and gave Respondents bids from two different licensed and insured tree contractors, one for $4,000 and the other for $2,800. (R. p. 147, line 20-p. 148, line 1). Both of these companies were licensed and insured. (R. p. 150, lines 15-17). Respondents apparently ignored the bids from contractors vetted by Appellants, and instead hired Imler for $500 (R. p. 138, lines 3-7), **less than one fifth** of the price of the **next lowest bid** from the other contractors. The contractor who bid $4,000 apparently determined the proper course of action should cost **eight times** the amount that Respondents paid Imler. Appellant testified that Respondent told her that he selected Imler to save money. (R. p. 154, lines 15-23). The record further shows that Respondents made no inquiry as to how Imler was able to perform the tree

services for such a substantially lower price. (R. p. 173, lines 6-15; R. p. 174, lines 7-10). A reasonable person would be curious enough to inquire.

Respondents also testified that they did nothing whatsoever to vet Imler prior to retaining them. (R. pp. 169-180). To be fair, Respondents testified that they did not vet or supervise Imler because Appellants referred and authorized Imler to do the work, and therefore Appellants had the onus to properly vet and supervise. (R. p. 169, lines 9-10; R. p. 171, lines 20-22; R. p. 172, lines 7-8; R. p. 172, line 22-p. 173, line 5). However, Appellant testified that she had never heard of Imler before, nor had she suggested using him for this job. (R. p. 150, lines 8-17). Additionally, not only does Appellant's testimony directly contradict Respondent's on the issue of who selected Imler, but Sam Imler's testimony also contradicts Respondent's testimony, on multiple occasions. (R. p. 124, lines 22-25; R. p. 131, lines 8-11; R. p. 140, lines 17-24; R. p. 141, lines 6-23).

In an apparent attempt to reconcile Respondents' story that Appellants selected and authorized Imler, Respondent testified that he had never heard of Imler or his company before this job. (R. 173, lines 16-19). However, Imler testified that he had worked for Respondents on other houses prior to working at Appellants' house. (R. p. 132, lines 6-15; R. p. 133, lines 11-13).

The question of whether Respondents breached the duty to hire and vet Imler in this case is the epitome of a "he said, she said" scenario, and the award of summary judgment in the face of such questions of fact was not appropriate. Moreover, Imler's testimony corroborates Appellants' testimony and directly contradicts Respondents'. As such, the evidence in the record gives more credence to inferences that Appellants are entitled to judgment than to inferences that Respondents are. A jury could reasonably infer that Respondents are not credible and hired a company whose estimate was unreasonably too low compared to qualified bidders. This alone establishes that the Court should reverse the circuit court.

B. Respondents failed to supervise Imler and failed to inspect whether Imler's work rectified the tree problem.

A juror could infer that Respondents should have checked Imler's work, if for no other reason to ensure that the tree no longer encroached onto Appellants' property. Alternatively, a juror could infer that Respondents should have informed Appellants that the work was complete so that Appellants could check Imler's work. Respondents do not live at their residence at issue and neither visited the property to check Imler's work, nor informed Appellants that Imler performed the work, until approximately five months after it was complete. (R. p. 181, lines 17-25; R. p. 148, lines 9-20). This failure by Respondents caused Appellants' damages to badly exasperate. Much like Respondents did nothing to vet Imler, they did nothing to supervise or ensure the adequacy of Imler's work either. That alone also establishes that the Court should reverse the circuit court.

C. The circuit court improperly determined that the hiring of an uninsured tree worker does not raise an inference of breach.

A juror could reasonably infer that when a neighbor sends a worker to another person's house, one of the first things the neighbor should check for is whether the worker is insured. This is especially true for the type of work here, tree removal. Perhaps a second juror might infer that the neighbor's failure to check for insurance was reasonable. Regardless, it is not proper for a judge to deprive the jury of making this determination. The circuit court did just that, as evidenced by Judge Buckner's statement at the first hearing:

> THE COURT: Whether (Imler) was insured has nothing to do with this matter. I understand (Appellants) argued that, but that has nothing to do with whether or not I should grant or not grant summary judgment.

(R. p. 198, lines 14-17). This was a legal error for the judge to reach into the province of the jury and vote as if serving as a juror. Many contractors advertise the fact that they are "licensed and insured." Contractors place these statements

on business cards, business trucks, yellow page advertisements, etc. If no reasonable person would check to verify whether a contractor was insured, then contractors would not so frequently advertise the fact that they are.

Both of the tree companies recommended by Appellants (and refused by Respondents) advertised that they were licensed and insured. (R. p. 150, line 15-17). The evidence before the court shows that Respondents made no attempt to inquire as to whether or not Imler was insured. (R. p. 172, lines 15-18). The record further shows that Imler was indeed uninsured to perform tree removal work, and that he used an undocumented, uninsured worker to perform the work done at Appellants' residence. (R. p. 125, lines 6-9; R. p. 128, line 17-p. 129, line 4; R. p. 129, line 22-p. 130, line 5). This evidence alone is also sufficient to reverse the finding that Appellants failed to submit evidence of breach.

CONCLUSION

The Court is presumably well aware of how rare it is to invoke the drastic remedy of summary judgment, particularly for a claim of negligence, and thus Appellants need not cite the voluminous authority prescribing the applicable standard of review. Appellants have shown copious evidence that Respondents failed to inspect and maintain the subject tree. Appellants have further shown copious evidence suggesting both unreasonable actions and untruthful testimony by Respondents in retaining and failing to supervise Imler. This evidence far exceeds the scintilla standard that applies, especially when viewed in the light most favorable to Appellants, as is appropriate. Even if the Court disagrees with any of the arguments or sub-arguments set forth above, each of them alone is independently sufficient to reverse the circuit court. The Court cannot uphold the circuit court's finding that Appellants did not submit evidence of breach without creating entirely new law, which would be unjust considering the facts of this case.

As such, this Court should reverse the two circuit court orders finding that Appellants did not submit evidence of breach of a negligence duty, thereby reversing the grant of summary judgment to Respondents on Appellants' negligence claim.

Respectfully submitted,

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February 29, 2016
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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellants complies with Rule 211(b), SCACR.

February 29, 2015

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Appellants** and **Final Reply Brief of Appellants** on Stewart Hines and Christina Hines by depositing a copy of it in the United States Mail, postage prepaid, on February 10, 2015, addressed to their attorney of record, Brian McDaniel, P.O. Box 2085, Beaufort, SC 29901.

February 29, 2015

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