

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2014-CP-24-00396

RECEIVED

MAY 18 2016

SC Court of Appeals

Tony King and Rosella King, Appellants,

v.

Christopher T. Miller, Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT PROPERLY HELD THAT MR. MILLER DID NOT BREACH ANY DUTY HE OWED MR. KING AS AN INVITEE, AND MR. MILLER DID NOT VOLUNTEER TO ASSIST OR OVERSEE THE WAY THE ROOFING JOB WAS ACCOMPLISHED?
- II. WHETHER THE CIRCUIT COURT PROPERLY FOUND THAT THERE IS NO CAUSAL LINK BETWEEN ANY ALLEGED FAILURE TO TURN ON OUTSIDE LIGHTING AND MR. KING'S FALL?
- III. WHETHER APPELLANTS' OTHER ARGUMENTS ARE WITHOUT MERIT?

STATEMENT OF THE CASE

Appellant Tony King, along with his wife, Rosella King, (jointly “Appellants”), filed a Complaint against Respondent Christopher Miller in Greenwood County Circuit Court alleging negligence and loss of consortium arising out of injuries he sustained when he fell from a ladder while doing roofing work at Mr. Miller’s house. (Complaint, filed March 26, 2014, R. pp. 11-14). In their Complaint, Appellants alleged Mr. King was an invitee of Mr. Miller, and that Mr. Miller owed him “the duty of due care to act as a reasonable person would under the same and similar circumstances when hiring someone to perform work at his house, and to warn of or eliminate any unreasonable risks on the property.” Appellants alleged that Mr. Miller breached his duty by distracting Mr. Pope and by failing to turn on the lights after offering to do so. As to causation, Appellants alleged that Mr. Miller “started a conversation with Pope that distracted Pope and caused him to walk away from the ladder,” and that “[w]hen Pope walked away from the ladder, the ladder slid and fell, which caused Mr. King to fall violently to the deck from the top of the ladder and suffer serious pain and injuries.” (Complaint, R. p. 12).

Mr. Miller filed an Answer, denying that he breached any duty he owed to Mr. King. Mr. Miller admitted that at some point he agreed to turn lights on but denied any liability and asserted that Mr. King’s injuries were caused by Mr. King’s own negligence and/or that of a third party. (Answer, filed June 12, 2014, R. pp. 15-17). After the parties exchanged discovery, Mr. Miller moved for summary judgment asserting that “there was no duty, breach of duty and proximate cause to the damages sustained by the Plaintiff.” (Defendant’s Motion for Summary Judgment, filed January 9, 2015, R. p. 18).

The Honorable R. Lawton McIntosh heard the parties on February 4, 2015. At that hearing, counsel for Appellants conceded that they were not alleging a defective premises or any latent danger, although he asserted that there was a question of fact as to whether Mr. Miller had turned on the outside lights after having offered to so. (R. p. 30, line 21 – p. 31, line 16). The only other duty identified by Appellants at the hearing was an alleged “duty not to distract Pope.” (R. p. 34, lines 11-16).

The Court issued a Form 4 Order granting Respondent’s summary judgment motion, (Form 4 Order, filed February 4, 2015, R. pp. 9-10), and filed a more detailed order on November 13, 2015. The Court held that, as an invitee, Mr. Miller owed Mr. King the duty “to exercise reasonable or ordinary care for the safety of the invitee and to warn only of latent or hidden dangers of which the land owner has knowledge or should have knowledge.” The Court held that there were no latent or hidden dangers and that Mr. Miller did not “create any hazardous condition.” (Defendant’s Order Granting Summary Judgment, filed November 13, 2015, R. p. 6 (“Order”)).

Next, the Court held that Appellants had “not produced a scintilla of evidence to establish any breach of duty ...” (Order, R. p. 6). Mr. Miller was not “responsible for holding the ladder or doing anything related to the roof repair.” In short, Mr. Miller did not have anything to do with causing Mr. King to fall. “By [Mr. Miller] talking to [Mr. King] and Mr. Pope walking away from the ladder, it does not rise to the level of any negligence on behalf of [Mr. Miller].” (Id.). Finally, the Court held that Mr. Miller did not owe a duty to Mr. King to turn on the lights and, even if he did owe such a duty, there was no breach or evidence that any lack of lighting was the proximate cause of Mr. King’s injuries. (Order, R. p. 7).

Appellants moved for reconsideration, (Plaintiffs' Motion to Alter or Amend, filed November 25, 2015, R. pp. 19-22), which the Circuit Court denied. (Form 4 Order, filed December 16, 2015, R. p. 8). Appellants timely appealed to this Court.

FACTUAL BACKGROUND

This case arises out of a fall Mr. King suffered on January 8, 2013 while he was working with Freddy Pope at Mr. Miller's residence. Mr. Miller had hired Mr. Pope to perform some roof repair work at the Miller residence. Mr. Miller had known Mr. Pope for approximately 10 years. Mr. Pope had worked for Mr. Miller's father in law and had built cabinets for Mr. Miller in 2008, an outdoor storage building in 2010, and repaired a hot water drain/steam vent in 2010 or 2011. (R. p. 139, line 25 – p. 140, line 13). When Mr. Miller arranged for Mr. Pope to do the roofing work, Mr. Pope advised that he needed "to get his roofing guy up there." (R. p. 143, lines 8-17).

Mr. Pope called Mr. King and asked if he wanted to do a roof patching job with him. (R. p. 74, lines 11-15) (R. p. 94, lines 2-4). Mr. King testified that he had been performing roofing work for "about 30-something years." (R. p. 67, lines 7-8).

Mr. King testified that he had had his right knee replaced but, due to complications in the form of infections, the artificial knee had been taken out and a rod inserted. (R. p. 68, line 4 – p. 70, line 5). As a result, Mr. King testified that he could not get on a roof unless it was flat and that he always had someone hold the ladder for him. (R. p. 81, lines 9-24).

Mr. Pope and Mr. King arrived at the Miller residence at around 9:00 a.m. on January 8, 2013. Mr. Miller was at home studying for an exam that day. (R. p. 144, lines

4-8). Mr. Pope got his ladder from his truck and the two men started working on the front of the house. (R. p. 144, line 9-21) (R. p. 96, lines 9-22).

Mr. Miller testified that he checked up on Mr. King and Mr. Pope periodically throughout the day. Mr. King testified that he told Mr. Miller that he was ok to do the work as long as he had someone to hold the ladder for him. (R. p. 97, lines 14-22). Mr. King explained that Mr. Pope was holding the ladder for him the entire day, except for when he fell. (R. p. 99, line 19 – p. 101, line 10) (R. p. 105, line 9 – p. 106, line 10).

Mr. Pope advised Mr. Miller that the work on the front of the house turned out to be more extensive than they had thought it would be. A little after 5:00 p.m., Mr. Pope and Mr. King moved around to the back of the house to replace a shingle on the back. (R. p. 145, line 14 – p. 148, line 6) (R. p. 96, line 23 – p. 97, line 9). Mr. Miller offered to turn on some lights, as it was beginning to get dark. Mr. Miller testified that his wife turned on two large floodlights, although there was another set of lights that was not turned on. (R. p. 148, line 9 – p. 149, line 23). Mr. Miller asked if they needed more light, to which Mr. Pope responded, “No.” Mr. Miller asked Mr. Pope if they needed anything further. “And at that point, Mr. King was already falling.” At the time Mr. King fell, Mr. Pope was standing about two feet away from the ladder and was not touching it. (R. p. 150, lines 17-25) (R. p. 151, line 9 – p. 152, line 8).

Mr. King testified that Mr. Miller asked, “[a]nything to do out there?” to which Mr. King responded, “[w]ell, you can cut on the light, that’ll help out.” (R. p. 107, lines 2-12). About five to ten minutes after asking Mr. Miller to turn the lights on, Mr. King went up the ladder to install the shingle. Mr. King said Mr. Miller was standing next to Mr. Pope and talking to him as Mr. King began going up the ladder. (R. p. 108, lines 6-

22). Mr. Pope was “supposed to be holding the ladder. That was his job.” (R. p. 109, lines 23-24). Mr. King explained:

So in other words, I get on the ladder, Freddie’s there, [Mr. Miller] is over here. So in my mind, the ladder is secure. This man’s holding the ladder. He held it all day long, so why he ain’t holding it on this deck? So I didn’t think about that because he held it all day long. It didn’t enter my mind. So I get up the ladder, I go to reach for that shingle. I said, Freddie, make sure you got that ladder. Next thing I know, I was coming down. And I didn’t know he was over at the side. If I had knowed that, I’d have came right back down that ladder. Like I say, he shouldn’t have been over on the side. I mean, I asked Freddie about it, and he said, Well, [Mr. Miller] called me over to discuss the price of the roof. I said, I don’t give a damn, that could have waited until I got down from the roof

(R. p. 110, line 17 – p. 111, line 10). Mr. King testified that he could not hear what Mr. Miller and Mr. Pope were talking about. (R. p. 109, lines 5-9).

Mr. Pope filed an affidavit in which he stated that, “[a]bout dark, Mr. King fell off of the top of a ladder while doing the roofing job. Mr. Miller and I were both present, and he was talking to me when Mr. King fell. No one was holding the ladder at that time. The ladder shot out from under Mr. King and he landed on his foot, which broke.” (R. p. 171). There is no evidence that Mr. Miller volunteered or was in control or in charge of the way Mr. Pope and Mr. King did their job.

Mr. King fell about 10 feet, landing on his feet and then on his back. (R. p. 153, lines 3-13). After helping Mr. King to his vehicle, Mr. Miller paid Mr. Pope for the roofing work. (R. p. 155, line 7 – p. 157, line 15) (R. p. 130, lines 23-24). Mr. King testified that, a few days later, he accused Mr. Pope of causing this to happen. (R. p. 115, lines 2-3). Neither Mr. King nor any other witness testified that any alleged lack of lighting caused Mr. King to lose his balance or contributed in any way to his fall.

STANDARD OF REVIEW

“The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” McKnight v. South Carolina Dept. of Corrections, 385 S.C. 380, 385, 684 S.E.2d 566, 568 (Ct. App. 2009). In reviewing a grant of summary judgment, an appellate court applies the same standard that governs the trial court, *i.e.*, that summary judgment is proper when “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.” Regions Bank v. Schmauch, 354 S.C. 648, 659, 582 S.E.2d 432, 438 (Ct. App. 2003). “In determining whether triable issues of fact exist, all inferences from the facts in the record must be viewed in the light most favorable to the party opposing the summary judgment motion.” Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). Nonetheless, a court cannot ignore facts unfavorable to the non-moving party and “must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” Dawkins v. Fields, 354 S.C. 58, 70, 580 S.E.2d 433, 439 (2003).

Once the moving party has met its initial burden of showing the absence of a genuine issue of material fact, “the non-moving party must come forward with specific facts showing there is a genuine issue for trial.” Carolina Alliance for Fair Empl. v. South Carolina Dept. of Labor, Lic. & Reg., 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). The disputed facts must be material. Demonstrating facts are in dispute that are not material to the determination of liability does not defeat a properly supported motion for summary judgment. *See* Smith v. Breedlove, 377 S.C. 415, 421, 661 S.E.2d 67, 71 (2008); Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 388, 701 S.E.2d 776,

779 (Ct. App. 2010) (“for purposes of summary judgment, an issue is ‘material’ if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action”). In a negligence action where the burden is the preponderance of the evidence, the non-moving party need only present a scintilla of evidence to withstand summary judgment. Nelson, 390 S.C. at 389, 701 S.E.2d at 779.

ARGUMENTS

The Circuit Court properly granted summary judgment in this case because there is no question of material fact that needs to be resolved by a fact finder. Viewing the facts in the light most favorable to Appellants, they cannot meet their burden of proof in this case. In order to recover on a negligence cause of action, it is the plaintiff’s burden to prove by a preponderance of the evidence that: (1) the defendant owed him a duty of care; (2) the defendant breached that duty by a negligent act or omission; and (3) the plaintiff suffered damage as a proximate result of that breach. *See, e.g., Nelson*, 390 S.C. at 391, 701 S.E.2d at 780. In the first instance, the court must determine as a matter of law whether a duty exists. Burnett v. Family Kingdom, Inc., 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010). Where no duty exists, “the defendant is entitled to a judgment as a matter of law.” Id.

I. The Circuit Court properly held that Mr. Miller did not breach any duty he owed Mr. King as an invitee, and Mr. Miller did not volunteer to assist or oversee the way the roofing job was accomplished.

As a property owner, Mr. Miller owed Mr. King, an invitee, the duty to exercise reasonable or ordinary care and to warn “only of latent or hidden dangers of which the property owner has or should have knowledge.” Peterson v. Porter, 389 S.C. 148, 153, 697 S.E.2d 656, 658 (Ct. App. 2010). Appellants have already conceded that they are not

alleging a defective premises or any latent danger. (R. p. 30, line 21 – p. 31, line 16). Appellants also apparently have abandoned any argument that Mr. Miller breached any general duty to an invitee to exercise reasonable or ordinary care, as they do not address this in their Brief.¹

As a result, Appellants sole argument on appeal is that Mr. Miller owed a duty to Mr. King based on a voluntary undertaking. “[O]ne who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care.” Madison v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006). As noted above, it is Appellants’ burden to prove Mr. Miller owed Mr. King a duty of care, either imposed by law or by his voluntarily undertaking such a duty. Nelson, 390 S.C. at 391, 701 S.E.2d at 780.

Although Appellants broadly characterize Mr. Miller’s offer to turn on lights as “voluntarily [undertaking] a duty to assist King in competing his job,” (App. Br. p. 5), there is no evidence whatsoever of such a broad undertaking. The only evidence in this record is that Mr. Miller offered to turn on some lights. (R. p. 148, line 9 – p. 149, line 23) (R. p. 107, lines 2-12). There is no evidence, let alone a scintilla of evidence, that Mr. Miller offered to assist or to supervise or to perform any other role in the roofing job itself. The Circuit Court properly held that Mr. Miller “had nothing to do with the work” and did not even supply the ladder. *Cf.* Peterson, 389 S.C. at 153-54, 697 S.E.2d at 658-59 (homeowners had no duty to supervise how the plaintiff pressure washed their home even though they supplied the pressure washer, the ladder and wash solution).

¹ Arguments not presented in an appellant’s opening brief are deemed abandoned on appeal. *E.g.*, Emerson Elec. Co. v. South Carolina Dept. of Rev., 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); Spivey v. Carolina Crawler, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (refusing to consider argument raised for the first time in a reply brief).

Lane v. Gilbert Constr. Co., Ltd., 383 S.C. 590, 681 S.E.2d 879 (2009), relied on by Appellants, does not dictate a different outcome. In Lane, the plaintiff, an HVAC mechanic for the hospital where Gilbert Construction was performing renovations, stepped into an open footing hole during the middle of the night when it was dark. Gilbert Construction had created the footing hole and had left it uncovered. The Court first found that the injured plaintiff was an invitee of Gilbert Construction. The Court then instructed that, “[a] landowner owes a licensee a duty to use reasonable care ... to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities.” 383 S.C. at 597, 681 S.E.2d at 882. Lane does not stand for the proposition, as is suggested by Appellants, that Mr. Miller owed Mr. King a duty “to take safety precautions to warn of or eliminate any unreasonable risks” with regard to how the roofing job was performed. (App. Br. p. 6). As noted above, Appellants do not allege that Mr. Miller created any concealed dangerous condition on his property. Neither Lane nor any other South Carolina case imposes a duty on a landowner to ensure that individuals performing work on their property perform that work in a safe manner. See Peterson, 389 S.C. at 153-54, 697 S.E.2d at 658-59.

This Court should affirm the Circuit Court’s ruling that Mr. Miller did not breach any duty he owed Mr. King as a business invitee, and did not owe Mr. King any duty to supervise the roofing job.

II. The Circuit Court properly found that there is no causal link between any alleged failure to turn on outside lighting and Mr. King’s fall.

Appellants assert that the circuit erred in finding Mr. Miller did not owe King a duty to turn on the outside lights. (App. Br. p. 7). While it is questionable whether Mr.

Miller's offer to turn on lights rose to the level of assuming a duty to do so, the answer to that question does not affect the outcome of this case in any way because the Circuit Court correctly and properly found that "the lights had nothing to do with the fall and was not the proximate cause of the Plaintiff's injuries." (Order, R. p. 7). There is no testimony by Mr. King or anyone else that even suggests that an alleged lack of lighting caused or contributed to Mr. King's fall. Thus, even if the Circuit Court was wrong that Mr. Miller did not owe Mr. King a duty to turn on the outside lights, which Respondent does not concede, any such error is harmless and does not change the outcome because, as is discussed more fully below, the lack of any causal link between the alleged lack of lights defeats Appellants' negligence claim. The pertinent question is "whether the scope of the acknowledged duty of reasonable care extends to the particular risk that led to [the] injury. A plaintiff must identify a duty that the defendant has to protect [him] from a particular harm to merit consideration of [his] claim by a jury." Nelson, 390 S.C. at 392, 701 S.E.2d at 781.

Although Appellants assert that somehow Mr. Miller's failure to turn on the lights *combined* with Mr. Pope's act of letting go of the ladder to cause the ladder to fall, Appellants do not explain how this is so and there is no evidence whatsoever to support their theory. The only so-called evidence Appellants point to is argument by their counsel at the motions hearing where he agreed that "the holding of the ladder ... was the primary cause," and simply declined "to agree that the lighting was not a proximate cause." (R. p. 36, lines 11-21). First, argument of counsel is not evidence. *See, e.g., Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). Second, even

Appellants' counsel's statement falls short of suggesting that the lack of lighting combined with Mr. Pope's actions of letting go of the ladder to cause Mr. King's injuries.

The only factual dispute Appellants can identify in the testimony is whether the outside lights were turned on. Mr. Miller testified that his wife turned them on, (R. p. 148, line 9 – p. 149, line 23), whereas Mr. King testified that no lights were turned on. (R. p. 107, lines 22-23). However, this is not a material fact, as there is no testimony or reasonable inference that the lack of lighting caused or contributed to Mr. King's fall. In order to prevail in his action, Appellants have to show that Mr. Miller either "committed a specific act that created [a] dangerous condition," or "had actual or constructive knowledge of an existing dangerous condition and failed to correct it," and that that dangerous condition caused Mr. King's injury. See Nelson, 390 S.C. at 389, 701 S.E.2d at 779-780. In this case, there simply is no evidence that the lack of lighting caused or contributed to Mr. King's fall. Instead, all of the evidence points to Mr. Pope's letting go of the ladder as the sole and proximate cause of Mr. King's fall. As a result, Appellants have failed to raise any dispute over any material facts in this case, and the Court's grant of summary judgment was proper.

"When the cause of a plaintiff's injury may be reasonably attributed to an act for which the defendant is not liable as to one for which he is liable the plaintiff has failed to carry the burden of establishing the defendant's conduct proximately cause his injuries." McKnight, 385 S.C. at 387, 684 S.E.2d at 569. And while proximate cause ordinary is a question for the jury, "when the evidence is susceptible to only one inference, it becomes a matter of law for the court." Id.

This Court should affirm the Circuit Court's finding that there is no causal link between any alleged failure to turn on outside lights and Mr. King's fall.

III. Appellants' other arguments are without merit.

A recurring theme in Appellants' Brief is that Mr. Miller was negligent in "distracting" or "interfering" with Mr. Pope by talking with him while Mr. Pope was supposed to be holding the ladder for Mr. King. (App. Br. pp. 5, 6). Appellants cite no case law establishing such a duty on the part of a property owner, as there is none. Mr. Miller had no duty to refrain from talking to either Mr. King or Mr. Pope while they were completing the roofing job. In fact, he had done so previously during the day without incident. (R. p. 144, lines 2-13) (R. p. 145, lines 14-23) (R. p. 147, lines 1-20) (R. p. 148, lines 11-20) (R. p. 97, lines 6-24). Mr. Pope's job was to hold the ladder, and his decision to let go of the ladder was his and his alone. Mr. King acknowledged as much. (R. p. 109, lines 23-24) (R. p. 110, line 17 – p. 111, line 10) (R. p. 115, lines 2-3).

Appellants misconstrue the Circuit Court's statement that, even if Mr. Miller owed Mr. King a duty to turn on lights, "he did not breach any duty. When the defendant walked outside, the Plaintiff was already on the ladder working and had been doing so without any lights prior to the Defendant walking outside, and therefore there was no negligence [on] the part of [Mr. Miller]." (Order, R. p. 7) (App. Br. p. 7). Contrary to Appellants' argument, the Circuit Court was not making a finding regarding whether Mr. King was contributorily negligent by ascending the ladder before the lights were turned on or whether Mr. King's actions excused Mr. Miller of any breach but, instead, that whether the lights were on or off had nothing to do with the conditions that caused Mr. King's injuries. Even if the Circuit Court erred in finding that Mr. Miller did not breach

any duty by not turning on outside lights, which Respondent does not concede, its grant of summary judgment is still proper as there is no evidence whatsoever that any lack of lighting caused or contributed to Mr. King's fall.

Appellants also argue that “[i]t was foreseeable to Miller that the ladder could fall with King on it if someone was not holding it” (App. Br. p. 6). However, “[f]oreseeability of injury, in and of itself, does *not* give rise to a duty.” Nelson, 390 S.C. at 391, 701 S.E.2d at 781, *quoting* Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003). In the end, Appellants have not produced any evidence, let alone a scintilla of evidence, that Mr. Miller assumed any duty that he breached which caused Mr. King's fall and subsequent injuries. As a result, the Circuit Court's grant of Respondents' summary judgment motion was entirely proper and should be upheld.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Circuit Court's grant of summary judgment and dismiss this appeal.

Respectfully submitted,

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PROOF OF COMPLIANCE

The undersigned certifies that this Respondent's Brief of Christopher T. Miller complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondent's Brief complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

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