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,

Respondent.

FINAL INITIAL BRIEF OF APPELLANT

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

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,

Respondent.

FINAL INITIAL BRIEF OF APPELLANT

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

TABLE OF CONTENTS

Table of Authorities. ii

Statement of Issues on Appeal. 1

Statement of Case. 2

Arguments:

Standard of Review 6

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS RESPONDENT HAD A NONDELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR . . 7

a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee. 8

b. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context. 10

c. Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant Tommy Hobbs had as an invitee. . . 13

d. Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case. 14

Conclusion. 18

TABLE OF AUTHORITIES

CASES

Affan v. Portofino Cove Homeowners Association 189 Cal. App. 4th 930 (2010 Cal. App. 4th).....15, 16

Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).....6

Durkin v. Hansen, 313 S.C. 343, S.E.2d 550 (Ct. App. 1993).....9, 10, 11, 12, 13, 14, 19

Estate of Adair v. L-J, Inc., 372 S.C. 154, 641 S.E.2d 63 (Ct. App. 2007).....6

Frances T. v. Vill. Green Owners Assn., 42 Cal. 3d 490, 499-500 (1986).....16

Gazo v. City of Stamford, 255 Conn. 245, 765 A.2d 505 (2001).....17, 18

Hoover v. Broome, 324 S.C. 531, 479 S.E.2d 62 (Ct. App. 1996).....14

J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 635 S.E.2d 97 (2006) (internal citations omitted).....6

Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994) (internal citation omitted).....13

Moon v. Homeowners' Ass'n of Sibley Forest, Inc., 202 Ga. App. 821, 415 S.E.2d 654, (1992).....16, 17

Parker v. Stevenson Oil Co., 245 S.C. 275,140 S.E.2d 177 (1965).....14

Pittman v. Grand Strand Entertainment, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005).....7

Robinson v. Estate of Harris, 389 S.C. 360, 698 S.E.2d 801 (2010).....6

Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 611 S.E.2d 235 (2005) (internal citations omitted).....8, 9, 10, 18

S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008) (citations omitted).....6

S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961).....14

Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 498 S.E.2d 408 (Ct. App. 1998).....9, 10, 11, 14

Sims v. Giles, 343 S.C. 708, 541 S.E.2d 857 (Ct. App. 2001).....13

Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).....6

Vasquez v. Lago Grand Homeowners Association 900 So.2d 587, Foot Note 7.....16

Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 775 S.E.2d 399,(Ct. App. 2015), reh'g denied (Aug. 20, 2015).....14

COURT RULES

Rule 56, *South Carolina Rules of Civil Procedure*.....6

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by granting Respondent Fairway Oaks Homeowners Association's motion for summary judgment, on the basis that because Lee Lambright was an independent contractor, Respondent Fairway Oaks is not liable for Lambright's negligence, and that Respondent Fairway Oaks did not owe Appellants a nondelegable duty when performing maintenance and repairs in its common area?

STATEMENT OF CASE

The pertinent facts for this appeal are not in dispute. Appellant Charles Thomas Hobbs ("Tommy Hobbs") was struck in the head by a tree limb on August 21, 2012. (R. p. 12, 16) (See Summons and Complaint, pg. 3; Answer, pg. 1). Tommy suffered memory loss as a result of the accident and does not recall the events that occurred on August 21, 2012. (R. p. 166, lines 12-14) (See Deposition of Tommy Hobbs, pg. 31, ll. 12-14). The accident occurred on the common areas of the Fairway Oaks Townhome development which was owned by Respondent Fairway Oaks Homeowners Association ("Fairway Oaks"). (R. p. 11, 16) (See Summons and Complaint, pg. 2; Answer, pg. 1). Pursuant to the Declaration of Covenants and Restrictions for Fairway Oaks Townhouses, Easley, South Carolina and Provisions for Fairway Oaks Homeowners' Association ("Covenants and Restrictions"), Respondent was responsible for maintaining the common areas. The Covenants and Restrictions provide: "Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas." (R. p. 193) (See Covenants and Restrictions, Article VI, Section 12, pg. 18). Appellant Tommy Hobbs was the President of Respondent at the time of his accident, and he had been for many years. (R. p. 158, lines 16-19) (See Deposition of Tommy Hobbs, pg. 15, ll. 16-19). Appellant Tommy Hobbs' duties as president were set forth in Respondent's By-Laws which provide that "The president shall preside at all meetings of the Board of Directors, shall see that orders and

resolutions of the Board of Directors are carried out and sign all notes, checks, leases, mortgages, deeds and all other written instruments." (R. p. 194) (Bylaws, Article XI, Section 4, pg. 6). In his role as President of Respondent, Appellant Tommy Hobbs hired Lee Lambright to remove a tree limb located on Respondent's common area that was damaged. (R. p. 176, line 18-p. 176a, line 7) (See Deposition of Lee Lambright, pg. 16, l. 18 – pg. 17, l. 7). Lambright was a local handyman who performed various jobs for Respondent and the residents of Fairway Oaks. (R. p. 172, lines 11-18; R. p. 173, line 12-p. 174, line 12) (See Deposition of Lee Lambright, pg. 12, ll. 11-18; pg. 13, l. 12 – pg.14, l. 12). It is undisputed that Lambright was an independent contractor of Respondent. Lambright asked Appellant Tommy Hobbs to help him carry a ladder to the site where the tree limb would be cut as the ladder was too large for him to handle by himself. (R. p.176, line 18-p. 176a, line 2) (See Deposition of Lee Lambright, pg. 16, l. 18 – pg. 17, l. 2). Tommy agreed, and on August 21, 2012 did in fact assist Lambright in taking the ladder to the job sight and setting it up. (R. p. 178, lines 14-16) (See Deposition of Lee Lambright, pg. 25, ll. 14-16). After getting the ladder set up, Lambright began to work on the tree limb. (R. p. 179, lines 20-22) (See Deposition of Lee Lambright, pg. 26, ll. 20-22). There were several witnesses who have provided differing accounts of what Appellant Tommy Hobbs was doing as Lambright worked on the tree.

a. Lambright testified that Appellant Tommy Hobbs was standing off to the side. (R. p. 180, line 25-p. 180a, line 6) (See Deposition of Lee Lambright, pg. 28, l. 25- pg. 29, l. 6)

b. Benny Roper testified that Appellant Tommy Hobbs was talking to David Lappin. (R. p. 191, lines 9-11) (See Deposition of Benny Roper, pg. 38, ll. 9-11).

c. David Lappin, Respondent's landscaper at the time, testified that Appellant Tommy Hobbs was pulling branches out from underneath the tree. (R. p. 186, lines 14-19) (See Deposition of David Lappin, pg. 28, ll. 14-19)

Lambright cut a large tree limb, however the limb did not fall all the way to the ground, and was leaning against the tree. After cutting the tree limb, Lambright climbed down and spoke with Appellant Tommy Hobbs and Daniel Lappin. Lambright then went back to the tree and pushed the already cut limb over. The limb struck Appellant Tommy Hobbs in the head. (R. p. 181, line 4-p. 181a, line 24; R. p. 182, line 22-p.182a, line 13) (See Deposition of Lee Lambright, pg. 31, l. 4- pg. 32, l. 24; pg. 33, l. 22- pg. 34, l. 13). Lambright took no safety precautions, provided no warnings and did not look to make sure everyone was out of the way immediately prior to pushing over the tree limb while cutting and removing the tree limb. (R. p. 183, lines 13-24; R. p. 184, line 23-p. 184a, line 3) (See Deposition of Lee Lambright, pg. 57, ll. 13-24; pg. 58, l. 23 – pg. 59, l. 3).

Appellants filed suit against Respondent on May 19, 2014 asserting that Respondent, acting through Lambright, was negligent. (R. pp. 10-15) (See Summons and Complaint). Appellant Mary Hobbs also asserted a claim for loss of consortium. (R. pp. 10-15) (See Summons and Complaint). On August 7, 2015, the Honorable Edward W. Miller, heard Fairway Oaks' Motion for Summary Judgment, and issued an Order Granting Summary Judgment to Defendant Fairway Oaks which was filed on September

23, 2015. (R. pp. 3-7; R. pp. 137-157) (See Order Granting Summary Judgment; See also Hearing Transcript). The trial court's order held that Fairway Oaks was not liable for the actions of Lambright because he was an independent contractor. (R. pp. 3-7) (See Order Granting Summary Judgment). On or about October 2, 2015, Appellants filed a Motion to Alter or Amend Judgment Pursuant to Rule 59, *SCRCP*. (R. pp. 109-124) (See Motion for Reconsideration). On or about November 17, 2015, the trial court issued an Order Denying Appellants' Motion for Reconsideration. (R. pp. 8-9) (See Order Denying Motion for Reconsideration).

Appellants therefore respectfully appeal the trial court's grant of summary judgment, and/or its denial of Appellants' motion for reconsideration of same.

ARGUMENTS

STANDARD OF REVIEW

On appeal from the grant of summary judgment, the appellate courts apply the same standard as that required for the circuit court under Rule 56(c), SCRCP. Robinson v. Estate of Harris, 389 S.C. 360, 367-68, 698 S.E.2d 801, 805 (2010), citing Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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." Robinson, *supra,* citing Rule 56(c), SCRCP. "Questions of law may be decided with no particular deference to the trial court." S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) (citations omitted). Further, when reviewing a novel question of law, the Court is "free to decide the issue with no particular deference to the lower court." J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 372, 635 S.E.2d 97, 102-03 (2006) (internal citations omitted).

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Rule 56(c), SCRCP. On appeal, when factual matters are in dispute, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. Estate of Adair v. L-J, Inc., 372 S.C. 154, 156, 641 S.E.2d 63, 64 (Ct. App. 2007), citing

Pittman v. Grand Strand Entertainment, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS RESPONDENT HAD A NONDELEGABLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR

In its Order Granting Summary Judgment to Defendant Fairway Oaks Homeowners Association, the trial court held that "Defendant is not liable for the negligence of an independent contractor that Plaintiff, as the president of the HOA, hired, and no recognized exception to the general independent contractor rule applies. Accordingly, Defendant is entitled to judgment as a matter of law." (R. p. 5) (See Order Granting Summary Judgment, p. 2). The trial court's Order Granting Summary Judgment further states "[n]onetheless, the general rule applies: Defendant is not liable for the negligence of Lambright because Lambright was an independent contractor...The general independent contractor rule applies here: 'an employer is not liable for the torts of an independent contractor...Because Lambright is an independent contractor, Defendant is not liable for Lambright's negligence." (R. p. 6) (See Order Granting Summary Judgment, p. 3). The trial court's Order Granting Summary Judgment also states that "there is no recognized exception in South Carolina that removes this case from the general independent contractor rule. To find otherwise would require this court to expand the existing body of case law. Because there is no recognized exception to the general independent contractor rule, Defendant is entitled to judgment as a matter of law." (R. p. 7) (See Order Granting Summary Judgment, p. 4). At the motion for summary judgment hearing, the trial judge stated that "I am not, I think, in a position to

expand the scope of exception to the rule. And so I'm going to grant their motion for summary judgment, which is not what I normally do." (R. p. 156, lines 2-5) (Hearing Transcript, p. 20, ll. 2-5).

Respectfully, Appellants submit that the trial court erred in ruling that Respondent did not have a nondelegable duty for the actions of its independent contractor when maintaining its common areas, because this nondelegable duty was not already recognized. The matter before the trial court was a novel issue of law. Because this was a novel issue of law, the trial court was expanding the existing body of case law whether it found that a nondelegable duty existed or found that a nondelegable duty did not exist. Appellants submit that the general rule that a principal is not liable for the torts of its independent contractor is not applicable as Respondent had a nondelegable duty of reasonable care when making repairs or improvements, including when maintaining trees in its common area, so that it is liable for the negligent actions of its independent contractor.

a. Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee.

It is true that "[t]he general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (internal citations omitted). However, "[a]n exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an

employee.'" Id. (internal citations omitted). Here, Respondent's Covenants and Restrictions created an affirmative duty to maintain Respondent's common area. The Covenants and Restrictions provide in pertinent part:

> "Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas." (R. p. 193) (Covenants and Restrictions, Article VI, Section 12, pg. 18)

Lambright was hired by Respondent to carry out its duty to maintain its common areas, and was performing this function when he injured Appellant Tommy Hobbs.

In an analogous situation, this Court has previously determined that performing maintenance pursuant to contractual requirements is an absolute duty for which a principal could not escape liability by delegating to an independent contractor. In Durkin v. Hansen, the Court considered whether a landlord's duty to maintain a premises pursuant to a rental agreement was an absolute duty owed to another person so that the landlord would be liable for the negligence of its independent contractor. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). The Court set forth the legal premise that "[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent

contractor were an employee." Id at 347, at 552-553 (internal citations omitted).[2] The Court then found that the landlord was responsible for maintaining the condominium premises pursuant to the rental agreement. Id at 347-48, 553. Next, the Court stated that "[t]he performance of duties assumed by Respondents by the rental agreement and those imposed by the RLTA may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor." Id at 348, 553. Therefore, the Court found that the landlord's duty to maintain the condominium premises pursuant to its rental agreement was an absolute duty owed to the tenant so that the landlord could not escape liability by delegating the duty to an independent contractor. Similarly, in the present case, Respondent had a duty to maintain its common area which was imposed by its Covenants and Restrictions. Like the landlord's duty to maintain the premises in Durkin, Respondent here had a duty to maintain its common areas. Respondent owed the same absolute duty to Appellant Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant, and cannot escape liability by delegating the duty to an independent contractor.

b. A nondelegable duty exists in other similar circumstances such as the landlord-tenant context.

"An exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an

[2] This rule was cited in Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 118, 498 S.E.2d 408, 409 (Ct. App. 1998), and Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005).

employee.'" Rock Hill Telephone Co., 363 S.C. at 390, 611 S.E.2d at 238 (internal citations omitted). In Simmons v. Tuomey Regional Medical Center, our Supreme Court noted a number of nondelegable duties that have been recognized in South Carolina. The Court stated, "[t]his Court and the Court of Appeals have applied the nondelegable duty doctrine in several situations. An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control. A landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs. A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load. A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees. A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs." 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318 (2000). In Simmons, the Court found that a hospital had a nondelegable duty with regard to physicians who practice in their emergency rooms, despite the fact that this nondelegable duty exception had not previously been recognized. Id at 53, 323.

One such circumstance in which a nondelegable duty was found, as set forth above, is "[a] landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs." Id at 42-43, 317-318. This nondelegable duty

was considered in Durkin v. Hansen, wherein the Court stated that "where the landlord undertakes to repair or improve the demised premises, whether he is under an obligation imposed by a covenant on his part to repair or improve or not, he is required to exercise reasonable care in making such repairs or improvements, and is liable for injuries caused by his negligence or unskillfulness or that of his servants and employees in making them or in leaving the premises in an unsafe condition." 313 S.C. at 346-47, 437 S.E.2d at 552. Further, the Court stated that "[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. This is especially true where the work to be done is attended with danger to the tenant. Moreover, a landlord owes his tenants a nondelegable duty not to create unsafe conditions on premises and is thus vicariously liable for torts of his independent contractor." Id at 348, 553. (internal citations omitted). In Durkin a tenant was injured by the negligence of an independent contractor carpet cleaner. The landlord was obligated to maintain the condominium premises by virtue of its lease agreement with the tenant.[3] Id at 347-348, 553. Like the rental agreement in Durkin, the Covenants and Restrictions in the present case created an obligation on the part of Defendant to maintain the common area. (R. p. 193) (See Covenants and Restrictions, Article VI, Section 12, pg. 18).

In the present case, the facts are very similar to the already recognized nondelegable duty owed by a landlord to a tenant. Here, Respondent was obligated to maintain the common areas by the Covenants and Restrictions and hired an independent

[3] In Durkin, the Court states that in addition to the duties set forth in the rental agreement, Defendants also had duties imposed by the South Carolina Residential Landlord Tenant Act. 313 S.C. at 348-349, 437 S.E.2d at 553.

contractor to perform the necessary tree work. Similarly, in Durkin, the defendant undertook maintenance which it was obligated to perform pursuant to its rental agreement by hiring an independent contractor. In the present case, the independent contractor's negligence caused Appellants' injuries, like the negligence of the independent contractor in Durkin caused the tenant's injuries. Therefore, the Court should find that Respondent owed Appellant Tommy Hobbs a nondelegable duty when performing maintenance and repairs so that it is liable for its independent contractor's negligent actions as if he had been a employee.

c. Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks's common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party had the same or a lesser status than Appellant Tommy Hobbs had as an invitee

Appellant Tommy Hobbs was a member of Respondent, and was injured on Respondent's common area. "South Carolina recognizes four classes of persons present on the property of another: adult trespassers, invitees, licensees, and children. A landowner's duty toward a person to maintain his land in a certain condition depends upon the person's status." Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 203, 452 S.E.2d 619, 620 (Ct. App. 1994) (internal citation omitted). A member of a homeowners association, such as Appellant Tommy Hobbs, is considered an invitee on the common area owned by the homeowners association. Id at 204, 621. "In premises liability cases, the invitee is offered the utmost duty of care by the landowner and a trespasser is generally offered the least." Sims v. Giles, 343 S.C. 708, 715, 541

S.E.2d 857, 861 (Ct. App. 2001). In other premises liability cases wherein a nondelegable duty is owed, the person to whom the duty was owed was also an invitee. For instance, a customer in a store is considered an invitee[4] and "[a] storekeeper does not escape liability to his customer who falls through an unguarded hole in the floor of the store upon a plea that the hole had been made and left unguarded by an independent contractor, nor is the storekeeper aided in his effort to escape liability by his previous exaction of a promise by the contractor adequately to guard the hole." S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961). Here, Appellant Tommy Hobbs, as an invitee, had the same status as a customer at a store. Further, as already discussed, a landlord owes a nondelegable duty to its tenants when performing maintenance and repairs. See Durkin 313 S.C. at 346-48, 437 S.E.2d at 552-553. As an invitee, Appellant Tommy Hobbs would have at least the same status as a tenant, who also is owed a nondelegable duty by his/her landlord.[5]

d. Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case

The question of whether a homeowners association ("HOA") has a nondelegable duty of reasonable care when making repairs or improvements, including when

[4] See Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 65 (Ct. App. 1996).

[5] I believe that a tenant would be considered an invitee in a common area based on the common area exception "under which a landlord has 'a duty to maintain the common areas of a leased property in a safe condition.'" Wright v. PRG Real Estate Mgmt., Inc., 413 S.C. 276, 286, 775 S.E.2d 399, 404 (Ct. App. 2015), reh'g denied (Aug. 20, 2015). This is the same duty owed to an invitee. See Parker v. Stevenson Oil Co., 245 S.C. 275, 280-81, 140 S.E.2d 177, 179 (1965).

maintaining trees in the common area, is a novel question in South Carolina. In Simmons v. Tuomey Regional Medical Center, the Supreme Court was similarly presented with the novel issue of "whether a hospital owes a common law nondelegable duty to render competent service to its emergency room patients, such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." 341 S.C. at 35, 533 S.E.2d at 314. In answering this question, our Supreme Court looked to other jurisdictions who had previously decided the issue. Id at 44-48, 318-321 (discussion of decisions in other jurisdictions). The Supreme Court stated "[i]n sum, our decision is amply supported by law in other jurisdictions. Courts throughout the nation have struggled with this issue, and nearly all have held hospitals liable under one or more theories." Id at 47, 320.

Other jurisdictions have examined similar issues to that which we are faced with in this case, and have found that homeowners associations have nondelegable duties in regard to common areas and features. In Affan v. Portofino Cove Homeowners Association, the California 4th District Court of Appeals found that a homeowners association had a nondelegable duty to property owners to maintain common area plumbing, and that the homeowners association could be liable for damage caused by an independent contractors' negligent actions. 189 Cal. App. 4th 930, 945 (2010 Cal. App. 4th). In Affan a couple filed suit against a homeowners association when their condominium was damaged by sewage flooding. The plaintiffs alleged that the sewage flooding was caused by the homeowners' association's failure to properly maintain common area plumbing. Id at 484. The plaintiffs sought to hold the defendant homeowners' association liable for the negligent acts of the plumbing contractor it hired

on the theory that it had a nondelegable duty to maintain the plumbing located in the common area. The covenants and restrictions required the defendant homeowners association to maintain the common areas including the plumbing system. Id at Foot Note 4. The Affan court stated that "[o]n remand, the trial court must determine whether the plumber's negligence on May 3 constituted a substantial factor in causing the sewage eruption on May 14. If so, then the Association will be liable for the ensuing damage under the doctrine of nondelegable duty, assuming that Rescue Rooter's negligence is established by stipulation or competent evidence." Id at 945.[6]

Florida courts dealt with a similar issue in Vasquez v. Lago Grand Homeowners Association, wherein a resident and the estate of a deceased guest of the resident brought suit against a homeowners association after the guest's ex-husband came into the condominium complex and shot the resident and the guest. 900 So.2d 587, 589-590. The condominium complex was responsible for security and hired an independent contractor security company to provide security on the premises. Id at 589. The plaintiffs alleged that the ex-husband was negligently allowed to enter the complex as the resident had told the security company not to allow him entry. Id at 591. The court found that the defendant homeowners association had a duty to keep the premises secure, and was liable for their failure to do so as a result of its contractual obligations. Id at 594. The court further noted that the homeowners association could not escape liability because it had hired an independent contractor. 900 So.2d 587, Foot Note 7.

Georgia has found that a homeowners association owes a nondelegable duty to

[6] See also Frances T. v. Vill. Green Owners Assn., wherein the court found that a homeowners' association "may properly be held to a landlord's standard of care as to the common areas under its control." 42 Cal. 3d 490, 499-500 (1986).

invitees on its common area so that it is liable for the negligent acts of its independent contractor. In Moon v. Homeowners' Ass'n of Sibley Forest, Inc., a homeowners association rented its pool to a company for a private party. 202 Ga. App. 821, 821, 415 S.E.2d 654, 655-656 (1992). The homeowners association hired a private company to provide lifeguard services for the event. Id. A guest of the event named Charles Moon was seriously injured when he was either thrown or dove into the pool. Id at 821, 656. The court found that the homeowners association could be liable for the negligence of the lifeguard despite the fact that the company who was hired to provide the lifeguard was an independent contractor of the homeowners association. Id at 824, 658. The court stated, "[a]s noted, Moon was, as to the Association, an invitee. Accordingly, the Association owed Moon a duty of ordinary care to keep the premises safe. OCGA § 51–3–1. Since this was a nondelegable duty, the mere fact that lifeguard services were being provided by Swimatlanta would not insulate the Association from potential liability. 'A business invitor owes a *nondelegable duty* to protect (his) invitees from injury ... [.]' Accordingly, the Association may be liable if Swimatlanta was negligent in failing to protect Moon from injury." Id at 824, 658 (internal citations omitted) (*emphasis* original). It is notable that the Moon court bases its finding of a nondelegable duty on the fact that Moon was an invitee of the homeowners association. As described above, Appellant Tommy Hobbs was considered an invitee when on the Respondent's common area where he was injured by the negligence of Respondent's independent contractor.

Similar to Georgia, Connecticut has recognized that a property owner owes invitees a nondelegable duty when maintaining its property. In Gazo v. City of Stamford, the court stated that "[o]ne exception to this general rule, however, is that the owner or

occupier of premises owes invitees a nondelegable duty to 'exercise ordinary care for the safety of such persons.'" 255 Conn. 245, 257, 765 A.2d 505, 512 (2001) (internal citations omitted). In Gazo, the plaintiff was injured when he slipped and fell on an icy sidewalk. Id at 247, 507. The plaintiff filed suit against several defendants, including Chase Manhattan Bank, N.A. Id. Chase filed an apportionment claim against an independent contractor named Pierni that it had hired to perform ice and snow removal on the subject areas. Id. The court stated that "Pierni contracted to perform ice and snow removal services for Chase Bank, which had a nondelegable duty to keep its premises safe." Gazo v. City of Stamford, 255 Conn. 245, 253, 765 A.2d 505, 510 (2001).

As set forth above, other jurisdictions that have found that homeowners associations owe their members nondelegable duties when dealing with issues similar to those set forth in the present case. Further, Connecticut has held that a property owner owes a nondelegable duty to invitees to exercise ordinary care. Like the courts in California, Florida, Georgia and Connecticut, this Court should find that Respondent owed Appellant Tommy Hobbs a nondelegable duty so that it is liable for the actions of its independent contractor as if he had been an employee.

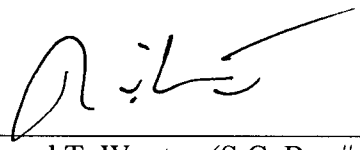
CONCLUSION

Appellants were injured by the actions of Respondent's independent contractor. While it is true that a principal is not generally liable for the negligence of its independent contractor, "[a]n exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'" Rock Hill Telephone Co., 363 S.C. at 390, 611 S.E.2d at 238. That

exception should exist in the present case and the trial court erred in ruling that no exception existed. This Court has previously held that a landlord's duty to maintain property pursuant to a rental agreement is an absolute duty so that it cannot escape liability by hiring an independent contractor. See Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Similarly, in the present case, Respondent owed an absolute duty to Appellant Tommy Hobbs when performing maintenance such as tree cutting in its common area, and is liable for the negligent actions of its independent contractor.

Further, as described above, the present case is analogous to other situations in which a principal has a nondelegable duty so that it is liable for the actions of its independent contractors. Specifically, the present situation involving a member of a homeowners association suffering an injury in Respondent's common area is comparable to the already recognized landlord tenant exception wherein a landlord is liable for the negligent acts of its independent contractors when performing maintenance and repairs just as if he/she were an employee of the landlord. Further, other jurisdictions that have decided this novel issue of law have determined that a homeowners association owes a nondelegable duty to its members in regard to its common areas. For these reasons, the Court should find that Respondent owed Appellant Tommy Hobbs a nondelegable duty and is liable for the negligent actions of its independent contractor. Therefore, the trial court's Order Granting Summary Judgment to Defendant Fairway Oaks Homeowners Association should be reversed and the case remanded.

RESPECTFULLY SUBMITTED,



Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, P.A.
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
wooten@smithjordan.com
Attorney for Appellants

Easley, South Carolina
July 20, 2016

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,

Respondent.

CERTIFICATE OF COUNSEL

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

Raymond T. Wooten (S.C. Bar # 81483)
SMITH, JORDAN & LAVERY, PA
1810 East Main Street
Post Office Box 1207
Easley, South Carolina 29641-1207
(864) 855-1661 office
(864) 855-1685 fax
Wooten@SmithJordan.com
Attorney for Appellants

Easley, South Carolina
Date: July 20, 2016