

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-000419
Trial Court Case No. 2013-CP-10-03251

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DEC 01 2016

SC Court of Appeals

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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Winsor makes the following points in reply to Mrs. Connelly's brief.

ARGUMENT IN REPLY

1. **Winsor does not, as Mrs. Connelly asserts, “suggest[] that the law of premises liability is distinct from the law of negligence . . . ;”¹ rather, Winsor contends that there is a distinction between a claim of negligence under a premises-liability theory and a claim of negligence under a theory of ordinary negligence.**

Winsor is distinguishing between theories of negligence liability: one, premises liability, which Mrs. Connelly discarded, the other, ordinary negligence, on which she staked her case. Given that, as Mrs. Connelly acknowledges, “[a]n essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff[,]”² Winsor argues that this distinction is material with respect to analyzing whether Mrs. Connelly had a viable claim for ordinary negligence, i.e., the only theory of negligence she ultimately pursued, based on Winsor's supposed duty to *maintain the silt fence*, i.e., the “particular”³ duty on which Mrs. Connelly rested her ordinary-negligence claim.

¹ (Respondent's Br. p. 8.)

² (Respondent's Br. p. 7 (quoting Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).))

³ Moore v. Weinberg, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007) (“The issue of negligence is a mixed question of law and fact.’ *First, the court must determine, as a matter of law, whether the law recognizes a particular*

“Premises liability *is a negligence action* in which the owner or occupier of land is held liable for violating a duty to protect the [plaintiff] *from a defect in the premises.*” Michael G. Sullivan & Douglas S. MacGregor, Elements of Civil Causes of Action 314 (3d ed. 2006) (emphasis added).⁴ As explained in Winsor’s principal brief, Winsor acknowledges that it owed Mrs. Connelly a duty, as it would any other member of the public making use of the sidewalk, not to create a hazardous condition on the sidewalk. In her responsive brief, Mrs. Connelly has agreed with the expression of Winsor’s duty in these terms. (*See* Respondent’s Br. p. 9 (“[T]he general rule appears to be that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk unless such a duty is imposed by legislation, *the abutter created an unsafe condition on the sidewalk*, or the abutter has a special property interest in the sidewalk.”) (emphasis in original) (citing Epps v. United States, 862 F. Supp. 2d 1460, 1464 (D.S.C. 1994).)

As explained in Winsor’s principal brief, Winsor contends that a duty to maintain the silt fence is not the same as a duty not to create a hazardous condition on the sidewalk; that the latter duty (i.e., the duty not to create a hazardous

duty. If there is no duty, the defendant is entitled to a judgment as a matter of law.”) (emphasis added) (citations omitted).

condition on the sidewalk), which Winsor owed to Mrs. Connelly, derives from and is cognizable under the theory of premises liability, not ordinary negligence; that the trial court erred in determining Mrs. Connelly had a viable claim against Winsor for ordinary negligence premised on Winsor's supposed duty to Mrs. Connelly to maintain the silt fence; and that, because Winsor did not owe Mrs. Connelly a duty to maintain the silt fence, her ordinary-negligence claim, i.e., her only claim, necessarily fails, and Winsor was—and is—entitled to judgment as a matter of law.

2. Mrs. Connelly is incorrect in contending that § 343A does not apply because she was not on the Premises, nor was the dangerous condition on the Premises, when she encountered it.

As noted above, the “general rule,” with which Mrs. Connelly agreed in her brief, is “that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk” (Respondent's Br. p. 9 (quoting Epps, 862 F. Supp. 2d at 1464).) In other words, the abutting occupier's (in this case Winsor's) duty stops at the property line; however, the exception to this rule, applicable here, providing that the abutting occupier (Winsor) has a duty not to create a hazardous condition on the sidewalk, extends the abutting

⁴ With regard to the bracketed word in this quotation (i.e., “[plaintiff]”), the original source text reads “defendant,” but the context shows this to have been a scrivener's error.

occupier's (Winsor's) duty to the sidewalk and, naturally, the applicability of § 343A follows suit—it would make no sense for the rule to be otherwise.

Elsewhere in Restatement (Second) of Torts, at § 496C, a rule of implied assumption of risk is stated. There, the Restatement explains as follows, by way of official commentary:

b. This Section deals with what may properly be called implied assumption of risk. The plaintiff does not . . . expressly consent to accept the risk of harm arising from the defendant's conduct; *but by voluntarily electing to proceed, with knowledge of the risk, in a manner which will expose him to it, he manifests his willingness to accept it, and to take his chances as to harm which may result from it. He is therefore barred from recovery as if he had expressly consented.* As in the case of express consent, the basis of the rule is the policy of the law which refuses to permit one who manifests willingness that another shall continue in a course of conduct to complain of it later if he is hurt as a result of it.

c. Such implied acceptance of the risk is commonly found in three types of situations. . . .

d. In the second type of situation the plaintiff enters the land or uses the chattels of the defendant, or enters into some other relation with him, without any right or privilege to do so other than that derived from the defendant's consent to the relation itself. . . . *[I]n the case of invitees, the defendant is under an initial duty of reasonable care in all respects to make the land or chattel safe, or otherwise to protect the plaintiff, but is relieved of this responsibility when the plaintiff, knowing of the danger, enters and accepts the risk (see § 343A).* . . .

(emphasis added).

As Mrs. Connelly acknowledges, South Carolina has adopted § 343A. (Respondent's Br. p. 8.) In view of the clear aim of § 343A in eliminating liability—not just of a duty to warn, as Mrs. Connelly seems to suggest—for known or obvious dangers and further informed of the Restatement's view via its reference to § 343A in the commentary on implied assumption of risk, it would be absurd—and in furtherance of no conceivable policy objective—to conclude that the rule in § 343A does not apply to the circumstances of the Subject Accident, which occurred on the sidewalk abutting the Premises, the Claimed Accident Condition indeed overlapping the boundary line.

3. Mrs. Connelly's view of the evidence—in arguing in support of the partial directed verdict granted to her by the trial court—is at best strongly slanted in her favor, i.e., self-serving, and, in any event, at odds with the proper directed verdict standard, which required the trial court to view the evidence and all reasonable inferences in the light most favorable to Winsor.

For instance, Mrs. Connelly represents to the Court that “Winsor testified that its workers would improperly climb over the similar fences as a shortcut to enter the site, instead of using the construction entrance, and that it had encountered that problem before” and that “Winsor had received a written warning less than three (3) months prior to the [Subject] [A]ccident from the [ARB] regarding the state of disrepair of this particular Fence and Winsor's failure to provide a proper construction entrance onto the site.” (Appellant's Br. p. 11.)

While it is true that, when asked about subcontractors sometimes damaging a silt fence, Thomas agreed “[t]hat is *one* of the ways that the fences can come down,” Mrs. Connelly ignores his testimony that subcontractors do not do this when he is onsite, which is almost daily; that he himself carries a staple gun in his truck for silt fence repair; that he had never seen the silt fence in the Claimed Accident Condition; and, indeed, despite her insinuation that there was not a proper construction entrance *at the time of the Subject Accident*,⁵ the Claimed Accident Condition phot, and even her counsel’s questioning of Thomas, shows there was a construction entrance (driveway) at the time of the Subject Accident. (Tr. p. 366:10-21, p. 368:13-24, p. 378:17-25, pp. 380:11-381:13 (emphasis added), pp. 404:11-410:4; Pl.’s Ex. 8; Def’s Ex. 2.) Likewise, Mrs. Connelly ignores the fact

⁵ In this regard, it must be remembered that the ARB *warning*—it should also be remembered that there is no record of that warning ripening into a ARB fine or other penalty—that Mrs. Connelly uses to make this insinuation pre-dates the Subject Accident by some *three months*. (Tr. pp. 377:25-378:9 (regarding the sequence of ARB action; first comes a warning, then a fine, “if you do not correct the situation”).) Indeed, with particular regard to the March 17, 2011, ARB warning, about which Mrs. Connelly makes much, Thomas testified as follows—without objection:

[F]or me to try to remember whether or not, if I have three or four jobs going on, that I’ve fixed the silt fence at 1376 Smythe Street between March 17, 2011, and June 6, 2011. I’m not going to remember that. ***I will tell you this though, once I got this notification on March 17th, we repaired the silt fence, or would have been fined.***

(Tr. pp. 436:21-437:2 (emphasis added).)

of Smith's impeachment with respect to her testimony about whether she had seen the silt fence down the week before the Subject Accident as well as the fact that the Subject Accident happened early on a Monday morning.

Lastly, on this point, Mrs. Connelly's own phrasing is rather telling. "There *was evidence* supporting the [trial] court's ruling . . . [,]" she says. (Respondent's Br. p. 12 (emphasis added).) This, of course, is not the standard. The question is not whether there "was evidence" supporting the trial court's ruling but whether, when viewing the evidence and all reasonable inferences capable of being drawn therefrom in the light most favorable to Winsor, the evidence was susceptible of more than one reasonable inference as to whether Winsor had breached the duty that the trial court had ascribed to it—and, clearly, it was.

4. Mrs. Connelly misapprehends *res ipsa loquitur*.

According to Mrs. Connelly, "[r]es ipsa goes to the issue of *causation*" (Respondent's Br. p. 12 n. 2 (emphasis added).) This is simply incorrect. Though, again, the doctrine does not apply in South Carolina, where it does apply, *res ipsa loquitur* (meaning "the thing speaks for itself") allows for an inference of negligence, i.e., negligent conduct, in certain circumstances where "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care" O'Leary-Payne v. R.R. Hilton Head, II, Inc.,

371 S.C. 340, 348, 638 S.E.2d 96, 100 (Ct. App. 2007). It does not “go[] to causation,” as Mrs. Connelly asserts.

5. **Mrs. Connelly did not merely testify that she “had seen the Fence on occasion prior to the [Subject Accident],” as she represents in her brief;⁶ rather, as explained in Winsor’s principal brief, she expressly testified that, as she approached the Claimed Accident Condition at the time of the Subject Accident, she, in fact, saw the Claimed Accident Condition, knew it was not supposed to be like it was, and, recognizing the hazard, “ran to avoid it.”**
6. **Respectfully, Mrs. Connelly’s argument that she “was not familiar with silt fences” and “lacked the necessary knowledge to understand just how serious a hazard the Fence posed to pedestrians on the sidewalk,” including her contention regarding Winsor’s supposedly superior knowledge, cannot be given any credence.**

As evidenced by the Claimed Accident Condition photo itself, not to mention Mrs. Connelly’s own counsel’s description of the silt fence material as being like a “hefty bag,” it should be plain that, in all material respects, the hazard posed by the Claimed Accident Condition was a matter of common and ordinary knowledge.

⁶ (Respondent’s Br. p. 15 (emphasis added).)

7. **Contrary to Mrs. Connelly’s contention that “[a]ny flaws in Drs. Funcik and Ghegan’s analysis go to the weight and credibility of their testimony, not its admissibility,”⁷ our Supreme Court has instructed, “The familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not admissibility’ may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.” State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).**
8. **Winsor’s counsel did not, as Mrs. Connelly asserts in her brief, ask Mrs. Connelly “about a series of communications between her husband, a lawyer, and Thomas shortly after the [Subject Accident].”⁸**

The record is clear; Winsor’s counsel asks Mrs. Connelly about her husband threatening litigation “on the day after the accident.” (Trial Tr. p. 217:4-10.) A plain reading of the question posed to Mrs. Connelly shows that it was not “about a series of communications,” as she now attempts to characterize it. Moreover, a review of Court’s Exhibit 3 shows that it was not until *two* days after the Subject Accident (i.e., June 8, 2011) that Mr. Connelly first mentioned insurance. (Court’s Ex. 3.) And she was not “pressed”⁹ for an answer in this regard; she was asked a single, proper question, calling for a “yes” or “no” answer, which did not at all call for her injection of insurance into the trial, to which she responded by knowingly injecting insurance into the proceedings. Unlike the case of Tucker v. Reynolds, 268 S.C. 330, 334 (1977), which she cites in her brief, there was no evidence of a momentary hiccup in her testimony; rather, she unequivocally responded to the

⁷ (Respondent’s Br. p. 20.)

⁸ (Respondent’s Br. p. 23.)

question, first, by wrongly denying that which is demonstrably true, i.e., that her husband threatened litigation the day after the Subject Accident, then, going into the matter of insurance—even though, as explained in Winsor’s principal brief, she would only moments later claim, outside the presence of the jury, that she really did not know what she was talking about to begin with.

9. **The mechanism of injury that Mrs. Connelly describes in her own brief—traumatic “server[ing] [of] the olfactory nerves”¹⁰—is inconsistent with the notion, which she also describes in her brief, that her awareness of her loss of the sense of smell was “gradual.”¹¹**

CONCLUSION

For the reasons set forth herein, as well as in its principal brief, Winsor asks the Court to reverse the judgment below and grant judgment in its favor as a matter of law or, as a lesser alternative, to reverse the judgment below and remand this matter for a new trial.

<SIGNED ON THE FOLLOWING PAGE>

⁹ (Respondent’s Br. p. 23.)

¹⁰ (Respondent’s Br. p. 1.)

Respectfully submitted,
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Dated: 11/28/16

¹¹ (Respondent's Br. p. 4.)

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SC Court of Appeals

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Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-000419
Trial Court Case No. 2013-CP-10-03251

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

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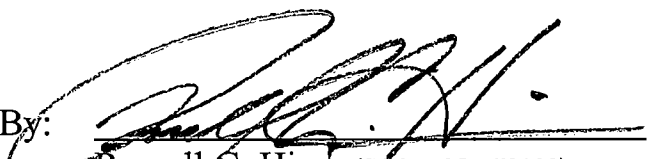
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Counsel for Appellant
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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellant Winsor Custom Homes, LLC, hereby certify that the **INITIAL REPLY BRIEF OF APPELLANT** was served on Respondent Rosemary Connelly on November 28, 2016, by depositing a copy of the same in the U.S. Mail, with sufficient postage, addressed as follows to her counsel of record:

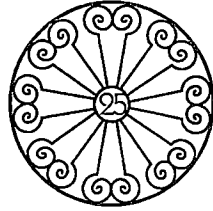
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November 28, 2016

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SC Court of Appeals

Re: Rosemary Connelly v. Winsor Custom Homes, LLC
Appellate Case No.: 2016-000419
Case No.: 2013-cp-10-03251
Claim No.: CPP001009129
YCR File: 10857-20130494

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and one copy of the **Initial Reply Brief of Appellant** and **Proof of Service** regarding the same. There are no new documents or material being designated in the Initial Reply Brief, and as such, there is not a corresponding designation of matters.

Kindly file the originals and return one court-stamped copy of each document to me using the pre-stamped envelope provided.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Partner

RGH/amj
Enclosures

cc: John A. Massalon, Esquire, Wills Massalon & Allen, LLC
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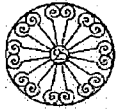
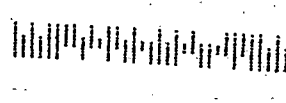
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