THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2014-CP-40-04304

Linda Estrada, George Estrada, Carletta Williams,
Cristian Reyes, Khalilah Smith and Tyrone Ruff, ... Plaintiffs,

of whom
Linda Estrada, George Estrada, Carletta Williams,
Khalilah Smith and Tyrone Ruff are ..... Respondents

v.

Andrew Marshall and Linda Marshall, ... Appellants.

INITIAL BRIEF OF RESPONDENTS LINDA AND GEORGE ESTRADA

John S. Nichols, SC Bar No. 4210
Bluestein Nichols
Thompson & Delgado, LLC
PO Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Gerald E. Reardon, SC Bar No. 13739
Law Office of Jerry Reardon
PO Box 7464
Columbia, SC 29202
jerry@jerryreardonlaw.com
(803) 602-5242

Attorneys for Respondents
Linda and George Estrada

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SOUTH CAROLINA

OTHER JURISDICTIONS

RULES

COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Did the trial court correctly deny Appellants' Motions for Directed Verdict and JNOV because there was evidence in the record to support the jury's finding that Appellants' knew or should reasonably have known about the hazardous change in condition of the deck but failed to warn Respondents of the danger?

COUNTER-STATEMENT OF THE CASE

This is a premises liability case. Respondents Linda and George Estrada were among several persons who were injured when a deck collapsed at a home Latasha White rented from Appellants, Andrew and Linda Marshall. Several separate lawsuits were filed against Appellants, who timely answered each suit and denied liability. The cases were consolidated for purposes of discovery and trial. There were six total plaintiffs.

The matter was tried before a jury on April 5-7, 2016. The trial court denied motions for directed verdict Appellants made at the close of the plaintiffs' case and at the close of the evidence.

The jury brought back verdicts in favor of five of the six plaintiffs. Appellants moved for JNOV which the Court denied.

This appeal follows.

FACTS

The Respondents were at a party at a home owned by Appellants and rented to Latasha White. They were all injured when the deck next to the house collapsed without warning. The jury held Appellants liable and they have appealed only on the issue of liability. The following testimony and evidence was presented at trial.

Appellant **Andrew Marshall** testified he is a licensed residential home builder. (Tr. p. 66, ll. 1-5). For 28 years he has been licensed and working on construction and remodeling of homes. (Tr. p. 66, ll. 6-9). He owns a business separate from his rental properties through which he services, provides remodeling and construction to homeowners. (Tr. p. 66, ll. 16-19). Mr. Marshall is licensed to oversee roofers, electricians, HVAC workers, plumbers and framers along with "an abundance of other specialty licenses." (Tr. p. 67, ll. 8-23). He does subcontract some of the work out, but he is the licensed contractor who "has to get the contact to perform work to do it." (Tr. p. 66, ll. 20-25).

Mr. Marshall is responsible for every aspect of the home including the work the subcontractors provide on the homes. (Tr. p. 67, ll. 1-7; p. 67, l. 24 - p. 68, l. 10). This includes ensuring the work is cone in proper professional construction standards and that there is structural integrity on the work done by subcontractors. (Tr. p. 68, ll. 2-13). He must "spot defects that were done by [his] subcontractors" when he walks into a house. (Tr. p. 68, ll. 14-18).

Mr. Marshall purchased the home at 108 Casbel Court in Hopkins, South Carolina, in 1997 as an investment to rent to others. (Tr. p. 64, ll. 3-22; Pl. Exh. 4). He

owned the home in April 2014 when the deck collapsed. (Tr. p. 65, ll. 13-16). He never paid to have the home inspected, even after the deck collapsed. (Tr. p. 71, ll. 16-21).

He owns six other rental properties in the Columbia area. (Tr. p. 65, ll. 4-10, 17-19; p. 66, ll. 11-15). Mr. Marshall has the personal responsibility for doing maintenance on the rental homes "as needed." (Tr. p. 68, l. 19 - p. 69, l. 3). Mrs. Marshall handles the books for the properties. (Tr. p. 75, ll. 9-14).

Mr. Marshall does a "walk-through" when he changes tenants. (Tr. p. 69, 11-15; p. 78, ll. 17-23). The extent of the inspection he did on the subject home when it was rented to Ms. White "was to walk out onto the back deck" and would jump on it. (Tr. p. 69, ll. 16-22; p. 69, l. 25 - p. 70, l. 4; p. 85, ll. 5-14). He never went under the deck. (Tr. p. 84, ll. 16-24).

The only work Mr. Marshall did on the deck during the 19 years he owned the home was to replace "a couple of boards." (Tr. p. 70, ll. 5-9). Mr. Marshall never weatherproofed or painted the deck and never did anything else to maintain the deck. (Tr. p. 70, ll. 10-16). The replacement of the boards took place once Mr. Marshall rented the home through the housing authority, who saw the rotted boards during its inspection. (Tr. p. 70, ll. 17-21; p. 80, ll. 4-19; p. 93, ll. 1-3). Mr. Marshall stated the boards were "in a weathered condition." (Tr. p. 80, l. 23). He made no modifications to the deck. (Tr. p. 74, ll. 8-10.

Mr. Marshall did go under the home once but he never looked under the deck to see how it was attached to the home. (Tr. p. 70, l. 24 - p. 71, l. 9; p. 92, ll. 5-6). He stated he had no need to look to see how the deck was attached. (Tr. p. 71, ll. 10-15).

As a licensed builder Mr. Marshall is required to know structural principles for building decks like the one on the subject house. (Tr. p. 71, l. 25 - p. 72, l. 10). As a builder he has "subbed out" the construction of decks. (Tr. p. 72, ll. 15-25; p. 81, ll. 3-24). He would never permit a subcontractor to build a deck without supports at each of the deck's corners. (Tr. p. 73, ll. 1-11; p. 81, l. 25 - p. 82, l. 6; Pl. Exh. 10, 11; p. 92, ll. 7-14). Mr. Marshall agreed that would not be in accord with good practical construction principles. (Tr. p. 73, ll. 12-14). The deck on the subject home did not have supports underneath the two corners nearest to the house. (Tr. p. 74, ll. 11-14). There was only a total of four screws holding up the entire deck. (Tr. p. 84, ll. 5-12).

Mr. Marshall agreed as the homeowner he is responsible for the safety and soundness of the home's construction. (Tr. p. 75, ll. 9-13). He agreed it was his responsibility to keep the house in working order safe for the tenants. (Tr. p. 77, ll. 11-13). Mr. Marshall never gave the tenant any warning about use of the deck. (Tr. p. 77, l. 24 - p. 78, l. 2).

Mr. Marshall also agreed that after the collapse the boards demonstrated wood rot. (Tr. p. 86, ll. 22-24; Pl. Ex. 5, 8). He also agreed that there was no flashing on the deck and flashing would have prevented the wood from rotting. (Tr. p. 87, ll. 8-15). Had an inspector gone under the deck he would have seen the lack of flashing. (Tr. p. 88, ll. 4-12).

Mr. Marshall never provided any warning to any of the tenants that there were any issues with the deck that he knew of. (Tr. p. 88, ll. 19-22). He agreed that there were " a substantial amount of problems with the deck. (Tr. p. 89, ll. 2-10).

Mr. Marshall agreed that the more rent he received the more income he earned. (Tr. p. 65, ll. 20-22). He also agreed that the fewer costs he had in each rental home, the more money he earned personally. (Tr. p. 65, ll. 23-25). The home had no mortgage so other than taxes Mr. Marshall kept any money he got in rent. (Tr. p. 76, l. 23 - p. 77, l. 4).

Appellant **Linda Marshall** works with Mr. Marshall running the company that does the remodeling and repairs. (Tr. p. 99, l. 17 - p. 100, l. 20; p. 101, ll. 9-10). They own six homes that they rent. (Tr. p. 100, ll. 9-13). They purchased the home personally outside their company. (Tr. p. 101, ll. 5-13).

Mrs. Marshall visually inspected the inside of the house and would also go outside. (Tr. p. 103, ll. 8-12). She would inspect the deck to see whether any boards were weak or they had "nail pops," but she did not crawl underneath. (Tr. p. 103, ll. 13-21). Mr. Marshall was in charge of doing most of the maintenance on the rental homes. (Tr. p. 103, ll. 22-24). She had no opinion as to whether the house was properly inspected or cared for. (Tr. p. 106, ll. 5-8). Mrs. Marshall agreed that the landlord has the responsibility to maintain the property and keep the house in a working and safe condition. (Tr. p. 106, ll. 9-13; p. 107, l. 14 - p. 108, l. 3; p. 116, ll. 6-10).

Mrs. Marshall agreed that the government inspectors required that they replace a few boards on the deck. (Tr. p. 111, ll. 16-19). She was unaware of the extent of the housing authority's inspection. (Tr. p. 114, ll. 8-12). She stated they "always checked all of our houses whether [the government] mandated it or not." (Tr. p. 115, ll. 5-6). No one else inspected the home in the 19 years they owned it other than Mr. Marshall's walk-throughs. (Tr. p. 116, l. 20 - p. 117, l. 12).

Respondents testified nobody warned any of them of any conditions with the deck. (Tr. p. 123, ll. 17-18; p. 134, ll. 17-19; p.165, ll. 24-25; p. 175, ll. 21-24; p. 189, ll. 13-17; p. 200, l. 24 - p. 201, l. 5; p. 207, ll. 23-25; p. 215, l. 24 - p. 216, l. 7; p. 239, ll. 12-13; p. 250, l. 25 - p. 251, l. 6).

Alan A. Albatta testified as an engineering expert for the Respondents. (Tr. p. 256, ll. 6-25; p. 257, ll. 16-17; p. 258, l. 22 - p. 259, l. 1). Mr. Albatta reviewed photographs of the collapsed deck and concluded the "ledger board" caused the collapse. (Tr. p. 257, l. 18 - p. 260, l. 12). The board disconnected from the fastener due to a series of wood rotting, causing the deck to shift and pulling the other two fasteners out of the wall. (Tr. p. 260, ll. 13-17; Pl. Ex. 10, 11; p. 266, ll. 4-12; p. 267, ll. 6-11; p. 268, ll. 4-21; p. 272, ll. 2-4; Pl. Exh. 16). Although the posts complied with the building code, the fastening to the wall was not within code. (Tr. p. 262, ll. 1-12).

There also was no flashing. (Tr. p. 265, ll. 17-25). Flashing would be required by the building code to prevent water from getting in behind the wall of the building and the ledger board. (Tr. p. 262, l. 21 - p. 263, l. 13; p. 282, ll. 16-21). Mr. Albatta testified it should be obvious to a licensed residential builder that flashing should be included on a deck to prevent water accumulation and rotting. (Tr. p. 263, ll. 18-23). Flashing would be visible to an inspector walking out on the deck. (Tr. p. 264, ll. 1-9).

Mr. Albatta saw conditions that were changing over a period of time that would have given rise to either an inspector or home owner realizing that it was beginning to deteriorate or rot. (Tr. p. 268, l. 22 - p. 269, l. 25; p. 288, ll. 3-12). Mr. Albatta stated that, in his opinion, Mr. Marshall, being a licensed builder, should have inspected the

deteriorating circumstances of the boards, steps and railings and would have realized the deck was deteriorating. (Tr. p. 270, ll. 7-22). He opined that a person qualified to be a residential licensed builder should have recognized that there was no flashing, that water was accumulating in areas of the deck, and that the deck was deteriorating. (Tr. p. 271, l. 17 - p. 272, l. 1). Such an inspection would have revealed the defective condition of the deck. (Tr. p. 279, ll. 3-22). Furthermore, someone in the business of building homes would know from nails popping out and wood cracking that water has gotten into the deck area. (Tr. p. 288, ll. 15-22). A residential builder should understand from the conditions of the stairs, the wood, and the lack of flashing that the deck at some point was going to rot and potentially collapse. (Tr. p. 289, ll. 19-24).

Mr. Albatta also opined that Mr. Marshall, as a licensed residential builder, should have known that the lack of four posts could increase the risk that the deck could fall. (Tr. p. 272, l. 17 - p. 273, l. 5). At no time was the deck compliant with the building code. (Tr. p. 273, ll. 6-10). A residential licensed builder could walk by and see the faulty design, or "at least, go in the crawl space and look." (Tr. p. 273, ll. 19-22). Mr. Albatta stated that a person standing on the right side of the deck could see the ledger board (Tr. p. 277, ll. 5-6). He also opined that it is "always good for wood decks, to do inspections, at least, once a year." (Tr. p. 286, ll. 22-23; p. 289, ll. 12-18). Furthermore if Mr. Marshall walked by the deck "he should see all of those defects ... which led to water decay and the deck collapsing." (Tr. p. 290, ll. 3-10).

The trial court instructed the jury:

> Let's talk briefly about premises liability, okay, or landowner's

liability, whatever you want to call it. The Plaintiffs claim that an unsafe condition on the Defendants' premises injured them. In order to recover damages for their injuries, the Plaintiffs must first prove by a preponderance or greater weight of the evidence than an unsafe condition existed on the Defendants' premises.

Licensee. A licensee is a person who enters the premises of another with the owner's consent. A social guest is a licensee. The Plaintiffs in this case are considered licensees. The Defendants have the duty to use reasonable care to warn a licensee of any concealed dangerous conditions which are known to the Defendants or of any change in the condition of the premises which may be dangerous and for which the Defendants should have reasonably been [expected] to discover. However, the owner of property has no duty to search out and discover dangers or defects. The owner does have a duty to warn a licensee of hidden or concealed dangers of which the owner has actual knowledge.

(Tr. p. 402, ll. 2 - 22). Appellants took no exceptions to the court's charge. (Tr. p. 410, ll. 20-23).

The jury returned verdicts finding Respondents proved Appellants were negligent (Tr. P. 415, ll. 17-20), and the negligence proximately caused injuries to Respondents (five of the six plaintiffs). (Tr. p. 415, l. 21 - p. 416, l. 8).

Appellants made post-verdict motions which the trial court denied. This appeal follows.

ARGUMENTS

STANDARD OF APPELLATE REVIEW

The Supreme Court recently reminded the bench and bar of the appropriate standard of review from a trial court's denial of motions for directed verdict and JNOV:

> In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002) (*citing Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999)). "[T]he trial judge is concerned with the existence of evidence, not its weight." *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). Similarly, on appeal, "[t]he jury's verdict must be upheld unless no evidence reasonably supports the jury's findings." *Id.* at 320, 585 S.E.2d at 274 (*citing Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993)). Moreover, neither an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Garrett v. Locke*, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App.1992)

Bass v. SC Dept. of Social Services, 414 S.C. 558, 570, 780 S.E.2d 252, 258 (2015). Accord *Allegro, Inc. v. Scully*, 418 S.C. 24, 31, 791 S.E.2d 140, 144 (2016) ("On review from a trial court's denial of a motion for directed verdict or JNOV, [the appellate court] applies the same standard as the trial court and views the evidence and all reasonable inferences in the light most favorable to the nonmoving party...An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below.") (citations omitted); *Maybank v. BB&T Corporation*, 416 S.C. 541, 568, 787 S.E.2d 498, 512 (2016) (in deciding directed verdict or JNOV motions, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in testimony or the evidence."). In *Bass*, the Supreme Court added that the appropriate role of an

appellate court is to "examin[e] the record to discern whether there was any evidence put forward at trial to support the jury verdict" and not to "search[] the record for evidence to corroborate [appellant's] theory of the case...." *Bass*, at 574, 780 S.E.2d at 260.

THE TRIAL COURT CORRECTLY DENIED APPELLANTS' MOTIONS

There no issue before this Court regarding the amounts of each of the verdicts. There is also no challenge to the admission or exclusion of evidence or the trial court's instructions to the jury. Instead, the only issue in this case is whether there is any evidence to support the jury's finding that Appellants breached a duty of due care owed to them to use reasonable care to warn them of any concealed dangerous conditions or activities which are known to the Appellants, or of any change in the condition of the premises which may be dangerous and for which the Appellants should have reasonably been expected to discover.

Appellants present the Court with a version of the evidence in the record that favors them. This Court's standard of appellate review, however, precludes such a broad review. Instead, the issue is whether there is any evidence to support the jury's decision to find for the Respondents and award them damages. Because there is such evidence this Court should affirm.

Under South Carolina law:

> "A licensee is a person who is privileged to enter upon land by virtue of the possessor's consent." *Neil v. Byrum*, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). "When a licensee enters onto the property of another, the primary benefit is to the licensee, not the property owner." *Singleton v. Sherer*, 377 S.C. 185, 198, 659 S.E.2d 196, 203 (Ct. App. 2008).

> "A landowner owes a licensee a duty to use reasonable care to discover the licensee, 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." *Singleton*, 377 S.C. at 201, 659 S.E.2d at 204.

Lane v. Gilbert Const. Co., Ltd., 383 S.C. 590, 596-597, 681 S.E.2d 879, 882 (2009).

In this case, as in *Lane*, the evidence presented at trial raised a jury question as to whether or not Appellants met the duty of care owed to all of the Respondents as licensees. The jury found they had not. The trial court agreed the record contained some evidence to support that determination. This Court should affirm.

In *Neil v. Byrum*, the Court stated:

> The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him except:
>
> > (a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land.
> >
> > (b) To use reasonable care to warn him of any *concealed dangerous conditions* or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discover.

288 S.C. at 473, 343 S.E.2d at 616 (citing *Frankel v. Kurtz*, 239 F. Supp. 713, 717 (W.D.S.C. 1965)) (italics by the Court; underlined added). The trial court gave this instruction to the jury nearly verbatim and without objection.

The *Neil* Court noted that the injured party in that case was "clearly a licensee." *Id.* The Court added:

> If we determine that the danger posed by the steps was not hidden or concealed, then [plaintiff] had the duty to discover and avoid the danger. The [plaintiff's] fall would not have been due to any negligence on the [defendant's] part.

> Under the present facts, neither the steps themselves nor their position in relation to the door constitute a latent or concealed danger. The [plaintiff] admitted that she noticed that the steps had no railings before she started up them. The width of the steps and the position of the steps in relation to the rear door are open and obvious conditions which were readily visible at the time the accident occurred. A licensee cannot recover for an injury caused by *known dangers or risks inherent to a place*. *Smiley v. Southern R. Co.*, 184 S.C. 130, 191 S.E. 895 (1937). This Court refuses to make every landowner an insurer of the safety of their social guests. *See House v. European Health Spa*, 269 S.C. 644, 239 S.E.2d 653 (1977) (Court refused to make business owner an insurer of the safety of an invitee).
>
> Even when viewed in the light most favorable to the [plaintiff], there is no evidence which could reasonably support the conclusion that the [defendant] was negligent. Since the only conclusion which could have been reached in this case is that the steps constituted an open and obvious danger rather than a latent or concealed one, the trial judge should have granted [defendant]'s motion for a directed verdict.

288 S.C. at 473-474, 343 S.E.2d at 616 (emphasis added). Thus, the key to finding *no* liability in *Neil* was the open and obvious nature of the danger or the inherent nature of the risk (*i.e.*, steps without a railing or landing at the top).

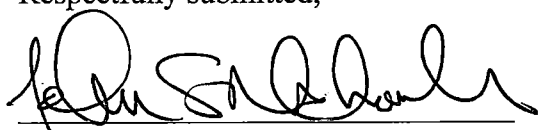
In this case, the defect in the deck (improper construction leading to rotting) was not "open and obvious" to the Respondents nor was it "inherent in the nature" of the deck. Instead, the jury found the Appellants should reasonably have been expected to discovery the deteriorating condition and to warn Respondents. Appellants did neither.

Pursuant to Rule 208(b)(6), SCACR, Respondents Linda and George Estrada adopt by reference the arguments of the brief of Respondents Tyrone Ruff, Khalilah Smith, and Carletta Williams advocating this Court affirm the trial court's decision.

CONCLUSION

For the reasons stated the Court should affirm the trial court's decision to deny Appellants' motions for directed verdict and judgment notwithstanding the verdict.

Respectfully submitted,



John S. Nichols, SC Bar No. 4210
Bluestein Nichols
Thompson & Delgado, LLC
PO Box 7965
Columbia, South Carolina 29202
(803) 779-7599

Gerald E. Reardon, SC Bar No.
Law Office of Jerry Reardon
PO Box 7464
Columbia, SC 29202
jerry@jerryreardonlaw.com
(803) 602-5242

Attorneys for Respondents
Linda and George Estrada

February 3, 2017