THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

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Case No.: 2016-001178

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

v.

Andrew Marshall and Linda Marshall,..Appellants,

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN DENYING OWNERS' MOTIONS FOR A DIRECTED VERDICT AND JNOV.

A. There was no evidence Owners had actual knowledge of the construction defect or the wood rot on the ledger board and, therefore, Owners were entitled to judgment as a matter of law.

B. There was no evidence upon which a reasonable jury could find Owners liable for failing to warn Licensees of a change in the condition of the property which may be dangerous to them.

C. There was no evidence upon which a reasonable jury could find Owners liable for failing to warn Licensees of a change in the condition of the property which may be dangerous to them because there is no duty to search out the danger complained of.

STATEMENT OF THE CASE

This appeal involves five (5) separate cases that were consolidated for trial involving claims of negligence against the Appellants (hereinafter "Owners"). The first civil action, 2014-CP-40-4304 was filed on behalf of Respondents Linda Estrada and George Estrada on July 8, 2014. On August 20, 2014, three (3) separate civil actions were filed on behalf of Khalilah Smith (2014-CP-40-5122), Carletta Williams (2014-CP-40-5123), and Tyrone Ruff (2014-CP-40-5124). On November 14, 2014, a civil action was filed on behalf of Christian Reyes (2014-CP-40-7214). Answers were filed and timely served by Owners in all the cases.

All the civil actions relate to the collapse of a wood deck located at a home in Hopkins, South Carolina; the home was owned by Owners and rented to a non-party. Each of the above-identified plaintiffs alleged Owners were negligent in failing to warn about the condition of the deck, failing to inspect the deck, failing to maintain the deck, and failing to keep the deck in a safe condition. Each of the parties alleged they suffered personal injuries as a direct and proximate result of Owners' negligence and each sought monetary damages.

Owners denied the allegations of negligence and asserted several affirmative defenses.

On March 13, 2015, an Order was issued by the lower court consolidating all five (5) cases for the purposes of discovery and trial. The cases were consolidated under Civil Action Number 2014-CP-40-04304.

On July 27, 2015, Owners filed and served a Motion for Summary Judgment arguing there were no facts to show Owners breached a legal duty. A hearing on the summary judgment motion was set for November 3, 2015. On November 2, 2015 in

opposition to the Motion for Summary Judgment, an Affidavit from an engineer was submitted to the hearing. Owners filed and served a supplemental memorandum in support of summary judgment arguing: (1) the expert affidavit was untimely, (2) that it came from an undisclosed expert witness, and (3) that it failed to satisfy the requirements under Rule 56(e), SCRCP.

Following oral arguments, the lower court issued a Form 4 Order denying the summary judgment motion on November 23, 2015.

The case was tried in Richland County before a jury on April 5-7, 2016, which was presided over by the Honorable Brian Gibbons. Prior to the start of the case, Owners moved *in limine* to strike the plaintiffs' expert witness, Alan Abatta, P.E. The motion was denied. At the conclusion of the plaintiffs' case in chief, Owners moved for a directed verdict on the grounds that there was no evidence of a breach of a legal duty. The motion was denied. During Owners' case in chief, a witness who conducted a post-incident inspection of the premises testified during cross-examination that he was retained by State Farm. At the conclusion of the witness's testimony, Owners moved for a mistrial on the grounds that evidence of insurance was introduced. The motion was denied. At the conclusion of Owners' case in chief, Owners renewed their motion for a directed verdict, which was denied.

The jury returned verdicts finding in favor of five of the six plaintiffs and awarded the monetary damages as follows: Respondent Linda Estrada ($60,818.323), Respondent George Estrada ($47,684.39), Respondent Khalilah Smith ($9,452.02), Respondent Carletta Williams ($8,683.00), and Respondent Tyrone Ruff ($17,104.00). Respondents are hereinafter collectively referred to as "Licensees." The jury returned a verdict in

favor of Owners as to Christian Reyes. The trial judge granted the parties ten (10) days to submit post-trial motions.

On April 15, 2016, Owners filed and timely served a Motion for Judgment Notwithstanding the Verdict ("JNOV") for the grounds more fully discussed below. Licensees also filed and timely served a Motion for Costs. On or about April 19, 2016, Owners filed an objection to Licensees' motion which is the subject of Licensees' cross-appeal. On May 4, 2016, Judge Gibbons filed an Order denying both motions, which was received by Owners on May 10, 2016. On June 3, 2016, Owners filed and served their Notice of Appeal. On June 6, 2016, Licensees filed and served their Notice of Cross-Appeal. On November 2, 2016, Licensees received an Order dismissing the cross-appeal that was voluntarily withdrawn.

STATEMENT OF FACTS

On April 4, 2014, Licensees were social guests of the tenant's house which tenant rented from the Owners. Licensees were attending a birthday party. [R. p. 227, lines 20-22; p. 228, lines 1-8]. Licensees were standing and sitting on a wood deck located at the rear of the home. The deck was approximately ten (10) feet by ten (10) feet and it was attached to the house. The rear of the deck was elevated and supported by two (2) metal poles. [R. pp. 591-615]. Licensees were on the deck for approximately thirty (30) minutes to several hours before it fell. In total, there were approximately ten (10) to fifteen (15) people on the deck along with two (2) grills, chairs, and coolers. At approximately 11:30 p.m., the deck gave way at the end attached to the house causing that end to fall several feet. [R. p. 229, lines 5-13; p. 232, lines 10-19; p. 296, lines 10-12; p. 347, lines 8-11; p. 315, lines 5-8]. The end of the deck not attached to the house

was supported by the two metal poles; this end did not fall. As a result of the deck collapse, Licensees were injured.

Owners purchased the subject property in 1997 as investment property. [R. p. 172, lines 3-8]. The house was built in 1977 and Owners never personally lived in the property, but rented it to tenants from 1997 to the present. [R. p. 173, lines 11-12; p. 177, lines 16-20].

Following the collapse, Applied Building Science ("ABS") was retained to perform an inspection to determine the cause. The site was investigated and photographed. ABS's professional engineer, Luis Mariaca, opined that the collapse resulted from the improper construction of the deck; specifically, that the wood ledger board of the deck was improperly secured to the house. Mr. Mariaca testified that when the deck was constructed, holes were drilled into the house's brick veneer, plastic sleeves were inserted into the veneer, and then metal fasteners were used to attach the wood ledger board to the sleeves. Mr. Mariaca stated that the fastening system was insufficient to support the weight resulting in the fasteners failing, the deck pulling from the house, and ultimately falling. In order for the deck to have been properly constructed, a fastening system that placed bolts through the wood ledger board into the house, through the wood joist of the house frame, and then secured with bolts should have been employed. [R. p. 420, line 12-p. 422, line 11].

At trial, Licensees argued two (2) theories of liability: first, the deck was improperly constructed and Owners either failed to inspect the deck, or they failed to determine the deck was improperly constructed. Second, the ledger board itself suffered from wood rot and the rot caused the ledger board to pull away from the fasteners causing the collapse. Licensees argued that Owners failed to maintain and inspect the deck and

had an inspection been performed, the rot would have been discovered and repairs should have been made. [R. p. 448, lines 5-11; p. 451, lines 10-14; p. 462, lines 6-7]. Both theories were premised on the fact that Owner Andrew Marshall obtained a residential builders license in 1982. [R. p. 202, lines 11-13; p. 452, lines 3-20; p. 462, lines 18-20].

Until the deck gave way, neither Owners nor Licensees had any knowledge of problems with either the construction or the stability/safety of the deck.

Andrew Marshall:

Q. Okay. So are you telling this jury that you made a conscious decision, even though you knew it wasn't construction – it wasn't sound, that you could get away with it because in '97 it was properly built?

A. No, sir, the deck was sturdy when I bought it. . . . The deck was sturdy on the house when I bought it and that's the way it remained.

[R. p. 182, line 19-p. 183, line 1].

Q. The only thing you would do is walk out on the deck and turn around and say looks good to me?

A. It's sturdy.

Q. It was sturdy. How would you determine that? . . .

A. By being able to handle the weight and the elasticity of the wood.

Q. Would you jump on it?

A. Yes.

[R. p. 193, lines 5-14].

Q. Looking at these photographs, would you agree with me that there were several issues wrong with this deck?

A. At the time, like I said, I inspected it from walking on it, I didn't see any evidence of problems with it.

[R. p. 196, line 23-p. 197, line 1].

Q. In all these years that the federal housing authority would do inspections, were you ever made aware of any problems with the structural soundness of this deck?

A. Never.

Q. Were you ever informed of any need to bolster the side of the deck that's attached to the house with additional supports?

A. No, sir.

Q. Aside from walking – aside from walking on the deck, did you ever notice any problems with the structural soundness of it at any time prior to this deck collapse?

A. No, sir.

Q. Did you have knowledge that the deck was mounted with only three bolts?

A. No, I did not.

Q. Did you have any knowledge whether the bolts, actually, passed through the entire house into a frame or just drilled into the brick?

A. I didn't have any knowledge.

Q. Did you first learn about how the deck was, actually, mounted to the house after it collapsed?

A That's when I found out.

Q. Did you ever have any complaints from tenants or their guests through the 17 years that you owned this house regarding the deck?

A. No, sir.

Q. Any complaints about the soundness of the deck?

A. No, sir.

Q. Any concerns of people's safety while out there on the deck?

A. No, sir.

[R. p. 200, line 18-p. 201, line 1].

Linda Marshall:

Q. Okay. Did you have any complaints specific to this property from any of your tenants regarding the condition of the deck?

A. No.

Q. Okay. Were there ever any requests to waterproof it or paint the deck or claims that the deck may be unsafe?

A. No.

[R. p. 217, lines 13-19].

Q. Okay. Did you ever receive any documentation from the housing authority, the U.S. Government calling into question the structural soundness of this deck?

A. Never.

Q. Did you ever receive any documentation from the housing authority saying that the deck needed to be removed or was a dangerous – in a dangerous condition?

A. No, never. . . .

Q. Did you ever receive any complaints from the tenants regarding the condition of the deck?

A. Never. . . .

Q. Did you personally notice any problems during visits with the condition of the deck?

A. No.

Q. Okay. Prior to this deck following [sic], was there anything that gave you cause or concern that this deck was unsafe?

A. No.

[R. p. 219, line 20-p. 220, line 2; p. 220, lines 13-15; p. 220, line 25-p. 221, line 6].

Linda Estrada:

Q. Okay. All right. Before the deck collapsed, had you had any conversations about the condition or any dangers of the deck?

A. No. . . .

A. . . . And the next thing I know, the deck collapsed without warning. We didn't hear any sounds, any cracks, anything. It just went down.

[R. p. 231, lines 8-11, 17-20].

Q. And with all those people out there, you didn't have any concerns about the deck or it didn't appear to be any problems until finally, it just gave way?

A. Exactly, yes.
[R. p. 250, lines 3-6].

George Estrada:

Q. Any issues up until the time the deck collapsed with the deck?

A. Nope.

Q. Anybody warn you of any conditions?

A. No, sir.

[R. p. 273, lines 21-25].

Q. Just to confirm, you didn't have any knowledge about the conditions of the deck or any problems with the deck or any repairs that were or were not made to the deck prior to it falling; is that correct?

A. No, sir [indicating no prior knowledge]. . . .

Q. As far as you know, you didn't notice any problems with the deck in terms of being, I don't know the term, slimsy [sic], bounce, squishy, anything that would make you think that is was giving way until it fell?

A. No, sir.

[R. p. 283, lines 16-20; p. 283, line 25-p. 284, line 4].

Tyrone Ruff:

Q. . . . Were you surprised when the deck collapsed?

A. I surely was.

Q. Was there any warning before it collapsed?

A. No, there was no warning at all.

[R. p. 297, lines 10-14].

Q. And up until the point that the deck fell, there was no indication of it having any problems with stability or being unsound in your opinion; is this correct?

A. That is correct.

[R. p. 309, lines 6-9].

Carletta Williams:

Q. And you didn't have any knowledge about any problems with the stability or the structure or being able to hold the people on the deck prior to it falling; is that correct?

A. That's correct.

Q. And you, actually, had been out to this property beforehand; is that, also, correct?

A. That's correct.

Q. And that's because it used to be your former sister-in-law?

A. Correct.

Q. And you had been on this deck prior to this night?

A. I've been out there before, yes.

Q. And those prior occasions, did you notice anything that brought your attention to any problems that might have resulted in this fall?

A. It was brief walking on, maybe sit something down on the deck and come back in. It was never that kind of situation where it was a function or anything like that.

Q. Did you ever feel unsafe on the deck prior to it falling?

A. No.

[R. p. 324, lines 3-24].

Khalilah Smith:

Q. Was there any warning before this deck collapsed?

A. No, not at all.

Q. Is it safe to say you were surprised when it collapsed?

A. I was very surprised.

[R. p. 347, lines 12-16].

Q. My understanding is you've had the opportunity to be at this house on prior occasions; is that correct?

A. Yes.

Q. And you were on this deck prior to – on prior occasions before it fell?

A. Yes.

Q. And my understanding is on those times, you never noticed any problems with the deck; is that correct?

A. Correct.

Q. Okay. It never appeared unsafe or dangerous in your opinion prior to the fall; is that correct?

A. Correct.

Q. Okay. And no one ever reported to you problems with the deck prior to it falling?

A. No, sir.

[R. p. 358, line 13-p. 359, line 2].

Licensees retained Alan Abatta, a professional engineer who also testified at trial. Mr. Abatta opined that the ledger board was rotted at the points where it was fastened to the house and the board pulled through the fasteners allowing the deck to fall. Mr. Abatta

further opined that it was the rot and deterioration that "one hundred percent" caused the collapse. [R. p. 373, lines 17-25; p. 380, lines 2-4]. Mr. Abatta stated that the rot would have taken anywhere from two (2) to five (5) years to deteriorate to the point indicated in the photo. [R. p. 374, lines 4-12].

However, Mr. Abatta testified, "[t]he only way you could really tell if [the rot on the ledger board] wasn't visible from the outside was by doing some, you, sound testing or poking with a sharp object, which, normally *inspectors* do to determine if you have wood rot or not." (emphasis added) [R. p. 378, lines 1-11]. To determine if there was wood rot, one would have to go underneath the deck to the ledger board and hit the wood with a hammer or some kind of sharp instrument. [R. p. 378, lines 12-17].

On cross-examination, Mr. Abatta confirmed that the design of the deck was not a building code violation, but it was a violation that the deck ledger board was not positively attached to the house's joist girders. Had the proper fasteners been used to create a positive attachment, the design would have been proper. [R. p. 382, line 12-p. 383, line 5].

Mr. Abatta further confirmed that no weathering of the deck in any location, other than the ledger board, caused or contributed to the deck's collapse. [R. p. 383, line 10-p. 384, line 17].

Mr. Abatta testified that the rot was concealed from view, though he opined that rot on the ledger board was the sole cause of the collapse. [R. p. 386, lines 10-15; p. 388, lines 3-7]. Further, Mr. Abatta acknowledged that were a layperson, or a person with a builder's license, standing on the deck or merely walking by, the person would not see any rot or decay on the ledger board. [R. p. 386, lines 16-20]. Mr. Abatta confirmed that even if someone were to crawl underneath the deck to the ledger board's location at the

face of the house, the person would still not be able to see wood decay on the ledger board. [R. p. 386, line 21-p. 387, line 2; p. 388, lines 3-7]. Finally, Mr. Abatta confirmed that based on the facts in this case, if either a layperson or a licensed builder were walking on the deck and there was no lateral movement, giving, shacking, wiggling, or any other problem until the time the deck fell, there would be no basis to think that the deck was dangerous. [R. p. 393, line 22-p. 394, line 17].

Per Mr. Abatta, to discover the hidden wood rot on the ledger board, a person would have to go underneath the deck to ledger board and "tap on that board and hear a sound or you would poke it with something and see if it [sic] soft and punky." [R. p. 387, lines 3-17].

Licensees concluded their case in chief after Mr. Abatta's testimony at which time the jury was excused and Owners moved for a directed verdict.

As proposed during the directed verdict argument and adopted by the trial court for the jury charge, under South Carolina law, Licensees were social guests. Accordingly, Owners owed Licensees the following duty of care:

> [t]he 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 warn him of any concealed dangerous conditions or activities which are known to the possessor,
>
> (b) 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.
>
> However, the owner of property has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee.

[R. p. 403, line 14-p. 404, line 12].

Owners argued they had no actual knowledge of any concealed dangerous condition regarding the construction and fastening of the deck to the house—the trial court agreed. [R. p. 400, line 16-p. 401, line 6].

The only remaining issue was the change of condition of the ledger board and whether Owners, absent a duty to search out and discover defects, were reasonably expected to discover the change.

As argued to the trial court, Mr. Abatta opined that the wood rot on the ledger board was the sole contributing factor to the collapse. However, he testified that you could not see the rot when standing on the deck, standing next to the deck, or going underneath the deck. Mr. Abatta also testified a person would not be on notice of any problems if there was no movement when walking on the deck, as was the evidence in the case. [R. p. 399, lines 9-17]. The only way to have discovered the rot was to go underneath the deck and conduct sound testing or poking, despite no duty to search out and discover the danger. [R. p. 400, lines 4-15].

The trial court was concerned as to whether Owners would have reasonably been expected to discover the concealed rotting ledger board when he replaced deck boards. [R. p. 402, lines 21-23]. As presented to the trial court, the replacement of two (2) deck boards, as requested by the housing authority, was presented as evidence. However, the deck boards were not located near the ledger board. Testimony was also presented that the house was rented through the section 8 federal subsidy program for the first seven (7) to eight (8) years after its purchase in 1997. At the latest, the deck boards were replaced in 2005. Owners argued that Mr. Abatta testified that the rot on the ledger board took between two (2) and five (5) years to develop, which means the rot would not have started

until approximately 2009 at the earliest. [R. p. 401, lines 7-p. 402, line 1; p. 402, line 21-p. 403, line 12].

In opposition, Licensees argued "[o]ur own engineer says it is very obvious from looking at this deck that the rot is everywhere, it's falling apart and that it's open and obvious to anybody *that's inspecting this premises* that the conditions are changing." (emphasis added) [R. p. 406, lines 1-5]. "The testimony was from our expert that the conditions changed over time. Whether it's three years, five years or the last 15 years, there was substantial changing. And he said those combined did cause an awareness for somebody *who was inspecting the deck*." (emphasis added) [R. p. 406, line 25-p. 407, line 4].

The trial court denied the motion for directed verdict finding there were factual issues. [R. p. 409, lines 6-9].

In Owners' case in chief, Luis Mariaca was qualified as an expert in engineering. [R. p. 419, lines 12-13]. Concerning the construction of the deck, Mr. Mariaca opined that the fastening system used was improper as the deck was only secured to the brick veneer of the house rather than to the wood frame of the house. He also testified the only way to discover if fasteners were properly connected to the frame of the house would be to crawl under the house and into the crawl space to inspect where the deck was fastened to the house or to open the brick. [R. p. 420, line 12-p. 421, line 14].

Mr. Mariaca also agreed that the wood rot on the ledger board would be concealed from view from the top, sides and underneath the deck. He further agreed that if there was no evidence of lateral moving, wobbling, or sponginess while on the deck, there was no way for a person to tell there were any issues concerning the deck's structural soundness. [R. p. 425, line 23-p. 426, line 12].

In addition to Mr. Mariaca, Owners called Parker Shields as a witness. Mr. Shields is working towards his certification as a professional engineer and works with Mr. Mariaca. Mr. Shields performed the site inspection. [R. p. 411, lines 1-24]

On cross-examination by Licensees, the following exchange took place:

> Q. Okay. And you were hired by the Marshalls to go out there and investigate why this fell?
>
> A. No, that's not correct. I believe we were hired by State Farm.
>
> Q. Thank you.

[R. p. 414, lines 13-16].

After the witness's testimony, the jury was excused and Owners moved for a mistrial on the grounds that insurance was introduced. The trial court denied the motion. [R. p. 415, lines 7-13; p. 416, line 19].

At the conclusion of all the testimony, Owners renewed their motion for a directed verdict on the same grounds, which was denied. [R. p. 432, lines 20-23].

The trial court gave the following jury charge concerning liability:

> 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 [sic] 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 conditions which may be dangerous and for which the Defendants should have reasonably been excepted [sic] 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.

[R. p. 510, lines 2-22].

There were no objections to the jury charges. [R. p. 518, line 21-p. 519, line 1].

In closing arguments, Licensees focused predominately on two arguments in support of finding liability, neither of which relate to the Owners' legal duty as charged: first, that Owners failed to search out, inspect, and maintain the property; second, that because Mr. Marshall had a residential builders license, he should be held to a higher standard in being able to discover the concealed wood rot versus what a reasonable person would have been able to discover.

Search Out, Inspect and Maintain:

> That's what this case is all about. . . . It is about the difference between going I have actual knowledge and looking underneath a porch, behind a wall, to look at one single bolt to see that that bolt is about to give way and the difference between that because of wood rot and the deck fails.
>
> [R. p. 445, line 23-p. 446, line 2].
>
> Why – you may be thinking to yourself, why are we here? All those admissions by the Marshalls regarding that they owned it, that they had the duty to maintain the deck, that they were picking up checks, that they never painted, they never weathered the deck. They never did all those things that they had a duty to maintain that process.
>
> [R. p. 448, lines 5-11].
>
> The Marshall, as owners of that property, have a duty without regard to the folks who were there at that party that night in April of 2014 because they had rented that property for commercial benefit and those folks that were there are licensees under South Carolina law.
>
> [R. p. 448, lines 20-24].
>
> . . . how come after those years that they had it with the section eight housing program and those folks came in and made them make repairs, there was not one thing done to that deck after that period of time? Why? Why did [sic] the Marshalls continue to make replacements on the board on the deck? Why did the Marshalls not weather the deck? Why did the Marshalls not paint the deck? Because guess what, that took away from that $180,000 they made in renting that facility for 19 year. . . . Does that make them liable

for not having maintained that property and done what they needed to be done on that property? You darn right, it does. . . . That's the law. The law.

[R. p. 450, lines 3-20].

That witness said, They [sic] have a duty to maintain that property. Their own expert. Their own expert admitted everything that we were just trying to tell y'all throughout this trial.

[R. p. 451, lines 10-14].

Andrew and Linda Marshall closed their eyes. They never did any inspections. They didn't want to know what was wrong with that deck.

[R. p. 462, lines 6-7].

You heard a lot of testimony this week about how Mr. Marshall never crawled up under that deck. You saw Mr. Ellis get down on the floor here just a minute ago and talk about how he never got down there.

[R. p. 462, lines 10-13].

. . . he admitted he was responsible for providing a safe home to his tenants. . . He did not provide a reasonably safe home for his tenants and their guests.

[R. p. 464, lines 1-6].

There's something wrong. I haven't painted it. I haven't put any lacquer on it. I haven't done any inspections. I haven't done any repair in 12 years.

[R. p. 502, lines 13-16].

Heightened Versus Reasonable Standard:

And they want you to say there's no way, no way that Mr. Marshall with his skills as a licensed residential builder could have even walked by that deck and known, you know what, I may have problems with this thing. . . . He can't just be the landlord that's not a residential builder when he walks by that deck. He told you he has a duty to understand construction principals, to know and approve the work of subcontractors. The State of South Carolina ensures that he is licensed and responsible for the properties in which he worked on. You can't turn a blind eye.

[R. p. 452, lines 3-20].

He's an expert within the building community. He's not a layperson. He's a licensed contractor.

[R. p. 462, lines 18-20].

I don't think there's any doubt in my mind that if you're a licensed expert – he said well, we don't know about his training. I know this much. You've got to pass tests. I think you've got to get a license by the State of South Carolina to build.

[R. p. 503, lines 3-7].

I'm not asking him to crawl under there and search around. I'm asking for a person of his ability, of his training to walk by a deck and say look at this, it's falling apart.

[R. p. 502, lines 10-13].

At the conclusion of closing arguments, the jury was given the case for deliberation and returned verdicts as set forth in the Statement of the Case. [R. p. 523, line 13-p. 524, line 10].

ARGUMENTS

I. THE TRIAL COURT ERRED IN DENYING OWNERS' MOTIONS FOR A DIRECTED VERDICT AND JNOV.

Under South Carolina jurisprudence, the duty owed to a licensee follows:

The [owner or possessor of land] 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.

Singleton v. Sherer, 377 S.C. 185, 201, 659 S.E.2d 196, 204–05 (Ct. App. 2008) citing Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (emphasis in original).

However, "the [landowner] has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee." Id. (internal citations omitted). "[S]ince a licensee is there for his own benefit, he can be said to accept the premises as they are and demand no greater safety than his host provides himself." Id. The most common example of a licensee is the social guest. Sims v. Giles, 343 S.C. 708, 721, 541 S.E.2d 857, 864 (Ct. App. 2001).

A. There was no evidence Owners had actual knowledge of the construction defect or the wood rot on the ledger board and, therefore, Owners were entitled to judgment as a matter of law.

As set forth above, there was no evidence that Owners had actual knowledge that the deck was improperly secured to the house or that the ledger board had wood rot. [R. p. 200, line 18-p. 201, line 1]. In fact, the trial court agreed that there was no evidence as to actual knowledge. [R. p. 401, lines 3-6]. A reasonable jury could not have found Owners breached their duty to Licensees for failing to warn them of the concealed dangerous condition, i.e. the improper fastening of the deck or the rot on the ledger board, which required Owners to have actual knowledge of the dangers. Therefore, Owners were entitled to have a verdict directed in their favor as to liability.

The trial court erred in failing to direct a verdict in Owners' favor as to the alleged failure to warn of the construction defect and concealed rot on the ledger board as Owners did not have actual knowledge of those problems.

B. There was no evidence upon which a reasonable jury could find Owners liable for failing to warn Licensees of a change in the condition of the property which may be dangerous to them.

Licensees' sole argument under the duty charged as to liability on this issue is that since there were other areas on the deck that showed signs of deterioration, Owners were placed on notice that there might be an unseen issue concerning the deck's structural stability. [R. p. 502, lines 7-16]. Licensees argue Owners were on constructive notice that an issue may exist that should have been sought out and discovered.

Constructive notice is notice that a reasonable person should know and carries a duty of reasonable care. Staples v. Duell, 329 S.C. 503, 508, 494 S.E.2d 639, 642 (Ct. App. 1997) (internal citation omitted). "The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions." REASONABLE PERSON, Black's Law Dictionary (10th ed. 2014).

As discussed above, it is undisputed that the wood rot on the ledger board was concealed from view. It could not be seen while standing on the deck, while standing next to the deck, or while underneath the deck. [R. p. 386, lines 10-p. 387, line 2; p. 388, lines 3-7; p. 425, line 23-p. 426, line 12]. It is undisputed that the deck felt structurally sound until the moment it collapsed. [R. p. 182, line 19-p. 183, line 1; p. 193, lines 5-14; p. 219, line 20-p. 220, line 2; p. 220, lines 13-15; p. 220, line 25-p. 221, line 6; p. 283, lines 16-20; p. 283, line 25-p. 284, line 4; p. 309, lines 6-9; p. 324, lines 3-24; p. 358, line 13-p. 359, line 2]. It is further undisputed that if either a layperson or a licensed builder were walking on the deck and there was no lateral movement, giving, shacking, wiggling, or any other problem until the time the deck fell, there would be no reason to think that the deck was dangerous or structurally unsound. [R. p. 393, line 22-p. 394, line 17; p. 425, line 23-p. 426, line 12].

Mr. Abatta testified that he noted some deterioration on the outside of each of the steps and the stringer (these hold the steps in place.) He further identified in photos some

wood that was cracked and some nails that had popped up. [R. p. 376, line 22-p. 377, line 25]. However, none of those issues caused or contributed to the collapse. [R. p. 376, lines 10-22]. Additionally, Mr. Abatta did not know the condition of the deck *before* the collapse. He confirmed that "it was definitely possible" the cracks in the wood and popped nails resulted from the collapse. [R. p. 391, lines 12-18].

Mr. Abatta opined that a person recognized as a residential builder "should have recognized" that the deck was deteriorating. [R. p. 378, lines 12-22; p. 379, lines 17-22]. However, the alleged deterioration itself would not have informed a person if there was rot on the ledger board. As Mr. Abatta stated, "[t]he only way you could really tell if it wasn't visible from the outside was by doing some, you know, sound testing or poking with a sharp object, which, normally, *inspectors* do to determine if you have wood rot or not." [R. p. 378, lines 7-11].

First, there is no evidence or argument that a reasonable person would have been able to discover a ledger board that had concealed wood rot. Second, there was no evidence that Mr. Marshall ever performed any type of water damage inspections as a residential builder or if he even knew how to perform a sounding or poking test. Finally, the only evidence elicited from Mr. Marshall is that even if he crawled under the house, looked at the boards, checked the flashing and posts, and "stared at them, . . . looked at them and inspected them[]" he would not have necessarily been able to identify a problem. [R. p. 197, lines 11-18].

No reasonable jury could find Owners breached their legal duty by failing to discover the concealed wood rot on the ledger board under a reasonable person standard because the very steps necessary to discover the condition required expert knowledge and abilities. Moreover, the steps needed to discover the condition complained of would

rise to the level of taking excessive precautions, which is beyond the scope of a reasonable person standard. As such, the trial court erred in failing to direct a verdict in Owners' favor and denying the motion for JNOV.

C. There was no evidence upon which a reasonable jury could find Owners liable for failing to warn Licensees of a change in the condition of the property which may be dangerous to them because there is no duty to search out the danger complained of.

Licensees' theory of liability rests solely on the argument that Owners had a duty to search out and inspect the deck to discovery concealed dangers in order to warn Licensees of those dangers. [R. p. 462, lines 6-7; p. 502, lines 13-16].

Contrary to Licensees' argument, "the [landowner] has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee." Singleton, 377 S.C. at 201, 659 S.E.2d at 204–05. "[S]ince a licensee is there for his own benefit, he can be said to accept the premises as they are and demand no greater safety than his host provides himself." Id. (internal citations omitted).

As discussed above, it is uncontested that the rot on the ledger board was concealed from view at any angle. [R. p. 386, lines 10-p. 387, line 2; p. 388, lines 3-7; p. 425, line 23-p. 426, line 12]. It is further uncontested that there was no movement of the deck when it was walked upon. [R. p. 182, line 19-p. 183, line 1; p. 193, lines 5-14; p. 219, line 20-p. 220, line 2; p. 220, lines 13-15; p. 220, line 25-p. 221, line 6; p. 283, lines 16-20; p. 283, line 25-p. 284, line 4; p. 309, lines 6-9; p. 324, lines 3-24; p. 358, line 13-p. 359, line 2]. Per Licensees' own expert, Mr. Abatta, to discover the hidden wood rot on the ledger board, a person would go underneath the deck to ledger board and

"tap on that board and hear a sound or you would poke it with something and see if it [sic] soft and punky." [R. p. 387, lines 3-17].

Mr. Abatta's opinion and Licensees' argument for liability required Owners to seek out and discover the concealed danger, for which there is no legal duty. Id. Therefore, the trial court erred in denying Owners' motions for a directed verdict and JNOV as a reasonable jury applying the facts of the case to the law that was correctly charged, could not have found Owners breached their legal duty to Licensees when there is no duty to maintain and no duty to search out and discovery the condition that they allege caused the deck to collapse.

To the extent the trial court was concerned that by replacing two boards, Owners were placed on constructive notice of a possible defect creating a question for the jury, the concern and argument is without merit and contrary to established law. [R. p. 401, lines 3-6; 402, line 21-p. 403, line 12].

The evidence at trial was that Owners rented the property through the federal section 8 housing subsidy for seven (7) or eight (8) years after purchasing the property in 1997. During that time, the only repairs to the deck were the replacing of a couple of weathered floor boards. [R. p. 172, lines 6-8; p. 178, lines 5-9; p. 217, line 20-p. 218, line 1]. No other repairs were made to the deck since. Mr. Abatta testified that the concealed wood rot on the ledger board would have developed over two (2) to five (5) years. [R. p. 374, lines 6-11].

Since the home was purchased in 1997, the latest the floor boards could have been replaced per a section 8 housing authority request would be eight years later, or 2005. Since the deck collapsed in 2014, per Mr. Abatta's testimony, the earliest the concealed rot could have been discovered was five (5) years before the collapse, or 2009. Therefore,

any inspection in 2005 or before when the deck boards were replaced would not have lead to the discovery of the concealed rot on the ledger board, because it did not exist at that time.

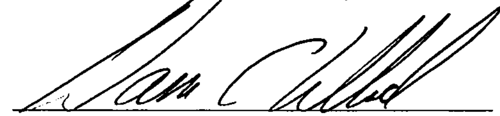
For the trial court's concern regarding constructive notice to be true, Owners would have to have performed routine inspections, including soundings and poking tests, from 2005 or before when the deck boards were replaced until they discovered the concealed rot when it developed between 2009 and 2012. Since Owners have no duty to Licensees to inspect, make safe, or search out and discover concealed dangers, it was in err to allow this matter to go to a jury for this concern. Singleton, 377 S.C. at 201, 659 S.E.2d at 204–05; cf., Staples, 329 S.C. at 508, 494 S.E.2d at 642 (stating "it is illogical to say that rural landowners have no duty to inspect and improve their property, but then to charge a rural landowner with a duty arising out of constructive notice").

Thus, the trial court erred in denying Owners' motions for a directed verdict and JNOV as a reasonable jury applying the facts of the case to the law that was correctly charged could not have found Owners breached their legal duty to Licensees when there is no duty to inspect, maintain or to search out and discover the condition that they allege caused the deck to collapse. Id.

CONCLUSION

For the reasons set forth, Appellants respectfully request a finding that the trial court erred in denying the motions for a directed verdict and JNOV as the evidence did not yield more than one reasonable inference and no reasonable jury could have reached the challenged verdict when applying the facts to the correctly charged law in this case. Appellants request an Opinion reversing the jury verdicts and entering judgments in favor of the Appellants.

RILEY POPE & LANEY, LLC



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