THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

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,

FINAL REPLY BRIEF

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REPLY ARGUMENT

I. The duty of care owed to licensee is based upon a reasonable person standard.

As discussed more fully in Appellants' ("Owners") Brief, it is uncontested that Owners did not have actual knowledge of any construction defect, stability issue, safety issue, or any other dangerous condition before the collapse of the deck. [Owners' Br. pp. 6-11 *citing* R. p. 182, line 19-p. 183, line 1; p. 193, lines 5-14; p. 196, line 23-p. 197, line 1; p. 200, line 18-p. 201, line 1; p. 217, lines 13-19; p. 219, line 20-p. 220, line 2; p. 220, lines 13-15; p. 220, line 25-p. 221, line 6; p. 231, lines 8-11, 17-20; p. 250, lines 3-6; p. 273, lines 21-25; p. 283, lines 16-20; p. 283, line 25-p. 284, line 4; p. 297, lines 10-14; p. 309, lines 6-9; p. 324, lines 3-24; p. 347, lines 12-16; p. 358, line 13-p. 359, line 2]. Respondents ("Licensees") do not contest that there is no evidence before the collapse to indicate Owners had actual knowledge of any construction defect, stability issue, safety issue, or any other dangerous condition related to the deck. [Estrada Br. p. 5, stating "Mr. Marshall agreed that *after the collapse* the boards demonstrated wood rot"[1]]. Accordingly, the issue before the trial court, and this Court, is whether there was evidence upon which a reasonable jury could determine that Owners should have discovered the

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[1] Estradas' Brief also argues Owners "agree that there were 'a substantial amount of problems with the deck." [Estrada Br. p. 5]. While correct, the statement is taken out of contest. The line of questioning follows:

A. At the time . . .I didn't see any evidence of problems with [the deck].
Q. That wasn't my question. My question is *looking at these photographs now*, . . .would you agree that there were [sic] a substantial amount of problems with this?
A. There possibly was.
Q. No. It's a yes or no answer. Do you agree that there were issues with this deck?
A. There was.

[R. p. 196, line 25-p. 197, line 10] (emphasis added).

concealed and dangerous condition. *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). An owner is under no duty to licensee except "to use reasonable care to warn him . . .of any change in the condition of the premises which may be dangerous to him, and which he may *reasonably* be expected to discover." *Id.* (emphasis added).

Constructive notice is that which 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).

There was no evidence at trial, and no arguments before this Court, that a reasonable person would have discovered the concealed, dangerous condition, or complained of condition. Instead, Licensees solely argue that because Mr. Marshall was a licensed residential builder, he should have been able to ascertain from casual observations of the deck that an inspection should have been performed to determine if the deck was properly secured to the house and to determine if the deck was suffering any wood decay leading to an unsafe condition. [Estrada Br. pp. 5, 7-8; Ruff Brief, pp. 6-7, 9, 10 "there were a number of facts which should have put Appellant Andrew Marshall on notice . . . [,]" p. 12-13]. Essentially, Licensees argue that Mr. Marshall should be held to a higher duty of care because he is a licensed residential builder.

The absence of argument that Ms. Marshall had an obligation, or ability, to discover the deck defects (even though she visually inspected the deck and walked upon the deck) further supports the argument that no evidence existed upon which a reasonable

jury could find a reasonable person could have discovered the concealed dangers. [Estrada Br. p. 6].

It was in err for the trial court to deny Owners' motions for a directed verdict and judgment notwithstanding the verdict because there was no evidence presented that a reasonable person, without any specialized training, would have been able to determine that an inspection of the deck was needed based upon casual, visual observations.

II. 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 complained of danger.

"A crucial element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Absent a duty, there is no actionable negligence. The question of negligence is a mixed question of law and fact." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010). "First, the court must resolve, as a matter of law, whether the law recognizes a particular duty. If the court determines there is no duty, the defendant is entitled to a judgment as a matter of law." *Id.*

Duties a landowner owes to a licensee are well established -- "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 (internal citations omitted). The law was charged to the jury without objection. [R. p. 510, lines 2-22; Estrada Br. pp. 9; Ruff Br. p. 11]. However, none of the Licensees

identify or address this issue which was raised in Owners' Brief. [Br. pp. 23-25; Estrada Br. p. 11-12[2]; Ruff Br. p. 11[3]].

Despite the fact that an owner has no duty to a licensee to search out and inspect for dangers or defects, Licensees briefs are replete with evidence and arguments that Owners breached their duty by failing to have performed inspections to identify the dangers and/or defects:

- Mr. Marshall, being a licensed builder, should have *inspected* . . . and would have realized the deck was deteriorating;
- Such an *inspection* would have revealed the defective condition of the deck;
- A residential builder could "at least, go in the crawl space and look."
- [I]t is "always good for wood decks, to do *inspections*, at least, once a year[;]"

[Estrada Br. pp. 7-8].

Also absent from the Licensees' briefs is discussion concerning the uncontested testimony that discovery of the improper construction, or the water damaged ledger board, would require searching out the conditions.

Licensees' expert, 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

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[2] While Licensees correctly cite to the controlling law, the brief strategically omits setting forth that there is no duty to search out and discover dangers or defects as charged to the jury, instead noting that "[t]he trial court gave this instruction to the jury *nearly verbatim* without objection." Licensees set forth the charge given in their counter-statement of facts stating which states ". . .the owner of property has no duty to search out and discovery dangers or defects." [Estrada Br. p. 9].

[3] While Licensees cite that no exception to the jury charge was taken, they do not cite to the jury charge itself or the law that there is no duty to search out and discovery dangers or defects.

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 and "tap on that board and hear a sound or you would poke it with something and see if it [sic] soft and punky." In other words, inspect the ledger board from underneath the deck and hit and/or poke the board with a hammer or some kind of sharp instrument. [R. p. 378, lines 12-17; p. 387, lines 3-17].

The only evidence presented at trial was that Owners would need to inspect the deck, to include going underneath the deck and conducting a sound test to determine *if* the wood rot was present. Since Owners owe no such duty to Licensees under South Carolina law, the trial court should have granted Owners' motions for a directed verdict or judgment not withstanding the verdict.

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; 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.

SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE

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