

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Court of Appeals Opinion No. 2017-UP-325
(Filed August 2, 2017)

Tony King and Rosella King, Appellants,

v.

Christopher T. Miller, Respondent.

**RETURN IN OPPOSITION TO
PETITION FOR REHEARING**

Pursuant to Rules 221 and 240, SCACR, Respondent Christopher T. Miller responds in opposition to Appellants Tony and Rosella King's Petition for Rehearing ("Petition") of this Court's Opinion No. 2017-UP-325, filed August 2, 2017. Appellants have failed to identify any arguments or facts that were properly before this Court which were misapprehended. Appellants' Petition should be denied.

First, Appellants' Petition, which comprises barely two pages of text, fails to cite a single case in support of its argument regarding foreseeability. As a result, Appellants are "deemed to have abandoned this issue." First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); *see also* In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (a cursory and unsupported argument is deemed abandoned on appeal).

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Second, the Appellants' argument – that it was “foreseeable that Mr. King would be injured by Miller’s actions in calling away Freddie Pope ... from holding the ladder that Mr. King was climbing,” (Petition, p. 2) – lacks merit. As a landowner, and since it has been conceded that there were no latent or hidden dangers, Mr. Miller owed Mr. King only the duty to exercise reasonable or ordinary care. *See, e.g., Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004). Mr. Miller had no duty to refrain from talking to either Mr. King or Mr. Pope while they were completing the roofing job. In fact, he had done so previously during the day without incident. (R. p. 144, lines 2-13) (R. p. 145, lines 14-23) (R. p. 147, lines 1-20) (R. p. 148, lines 11-20) (R. p. 97, lines 6-24). Mr. Pope’s job was to hold the ladder, and his decision to let go of the ladder was his and his alone. Mr. King acknowledged as much. (R. p. 109, lines 23-24) (R. p. 110, line 17 – p. 111, line 10) (R. p. 115, lines 2-3).

Appellants argue that it was foreseeable that Mr. King would fall when Mr. Miller called “away Freddie Pope, who worked on the roofing job with Mr. King, from holding the ladder that Mr. King was climbing.” However, the evidence Appellants point to does not create an issue of material fact that would defeat summary judgment:

- R. p. 97, lines 8-22 (Mr. King testifying that Mr. Miller “made a comment, I really don’t like you being up there. I said, Well, as long as somebody hold the ladder. I said, As long as you got somebody to hold the ladder for me to get the singles up, I ain’t got no problem. He was a little nervous about me being up there. I told him, Don’t worry about it, as long as I got somebody to hold the ladder. He said, I guarantee I want somebody holding the ladder for you. I said, No problem, Freddie’s doing it”);
- R. p. 164, lines 209 (Mr. Miller testifying that, when he saw that Mr. King’s leg did not bend, he “asked Mr. Pope, I said, Is it okay for him to

be up there? And Mr. King yelled down and said, you know, that he's more than capable to get it done");

- R. p. 109, line 23 – p. 110, line 6 (Mr. King testifying, “And Freddie supposed to be holding the ladder. That was his job. And if Chris stayed away from him, the ladder never would have come down. Chris pulled Freddie away from that ladder. Like I asked Freddie, I said, Why did you leave that ladder? He said, Well, Chris called me over for a minute. I said, Well, I don't give a damn, you should have held that ladder”);
- R. p. 111, lines 5-10 (Mr. King testifying “Like I say, he shouldn't have been over on the side. I mean, I asked Freddie about it, and he said, Well, Chris called me over to discuss the price of the roof. I said, I don't give a damn, that could have waited until I got down from the roof”);
- R. p. 171, ¶ 3 (Mr. Pope's affidavit stating “About dark, Mr. King fell off of the top of a ladder while doing the roofing job. Mr. Miller and I were both present, and he was talking to me when Mr. King fell. No one was holding the ladder at that time”); and,
- R. p. 150, line 11 – p. 152, line 5 (Mr. Miller testifying that “Mr. King was going up the ladder at that point. And I came around and asked Freddie if there was anything else he needed. And at that point, Mr. King was already falling And Freddie is, approximately, three feet from me, at that point, but he was facing the ladder. So not exactly facing me, but not facing away from me, either, just turned a little bit towards the ladder It was in the middle of saying, So we're good then? And that's when the ladder kicked out.”

In fact, Mr. King testified that Mr. Pope had held the ladder all day, and that that was his job. (R. p. 110, lines 2-6 and 19-23; p. 115, lines 2-3). Further, it is undisputed that Mr. Miller had spoken with both Mr. King and Mr. Pope at least one other time during the day, without mishap. (R. p. 97, lines 14-22, p. 106, lines 4-12 (conversation

between Mr. King, Mr. Pope and Mr. Miller)) (*see also* R. p. 145, line 14 – p. 146, line 8; p. 147, lines 12-23 (Mr. Miller testifying about speaking with Mr. King and Mr. Pope during the day)). Throughout the day, Mr. Pope had held the ladder. Mr. King testified that it did not enter his mind that Mr. Pope, with whom he had worked previously, (R. p. 72, line 17 – p. 77, line 19; p. 130, lines 11-24), would walk away from the ladder. (R. p. 110, lines 20-23; p. 112, lines 1-3). If it was not foreseeable to Mr. King that Mr. Pope might walk away from the ladder, it inarguably was not foreseeable to Mr. Miller, who was not in the roofing business and who had never performed roofing work with either Mr. King or Mr. Pope.

“The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen.” Stone v. Bethea, 251 S.C. 157, 162-63, 161 S.E.2d 171, 173 (1968). Here, as was the case in Smith v. Breedlove, 377 S.C. 415, 425, 661 S.E.2d 67, 73 (2008), the possibility that Mr. Pope would let go of the ladder was only a “remote possibility,” which “was not reasonably foreseeable so as to create a duty on behalf of [Mr. Miller].” Thus, as is the case here, “when the evidence is susceptible to only one inference, [proximate cause] becomes a matter of law for the court.” McKnight v. South Carolina Dept. of Corr., 385 S.C. 380, 385, 687 S.E.2d 566, 569 (Ct. App. 2009).

Even if, and solely for the sake of argument, it could be deemed foreseeable that Mr. Miller’s speaking to Mr. Pope would cause Mr. Pope to let go of the ladder, “[f]oreseeability of injury, in and of itself, does *not* give rise to a duty.” Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010), *quoting*

Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003). As a property owner, the only duty Mr. Miller owed to Mr. King was to exercise reasonable or ordinary care and to warn “only of latent or hidden dangers of which the property owner has or should have knowledge.” Peterson v. Porter, 389 S.C. 148, 153, 697 S.E.2d 656, 658 (Ct. App. 2010). Mr. Miller simply had no duty to not speak to either Mr. Pope or Mr. King.

Furthermore, there is no evidence that Mr. Miller’s actions were the actual cause of Mr. King’s fall. As Mr. King stated, Mr. Pope caused him to fall. (R. p. 114, line 24 – p. 115, line 3) (R. p. 171 (Pope affidavit stating that he was talking to Mr. Miller when Mr. King fell and that no one was holding the ladder, but no indication of what caused him to let go of the ladder)). There simply is no evidence, other than Mr. King’s unsupported theory and hearsay evidence, that even suggests that Mr. Miller’s actions were the direct cause of his fall and resulting injuries. Supposition and conjecture about causation are insufficient to defeat summary judgment. *See, e.g.,* Baughman v. AT&T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with “specific facts showing that there is a genuine issue for trial,”” *quoting* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). The summary judgment standard “does not authorize submission of speculative, theoretical, and hypothetical views to the jury.” Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (“assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact”); *see also* McKnight, 385 S.C. at 389, 687 S.E.2d at 571

("evidence must amount to more than speculation and conjecture to submit a case to the jury").

In addition, hearsay evidence, including testimony by Mr. King about what Mr. Pope allegedly told him, (R. p. 109, line 25 – p. 110, line 4; p. 111, lines 5-10), is insufficient to withstand a summary judgment motion. Hall v. Fedor, 349 S.C. 169, 175-76, 561 S.E.2d 654, 657 (Ct. App. 2002) (evidence that is inadmissible at trial, including hearsay, is insufficient to defeat a summary judgment motion). There simply is no testimony on this issue from the person in the best position to explain what caused him to let go of the ladder – Mr. Pope. (See R. p. 171 (Pope averring that he had assisted Mr. King with the roofing job; that he and Mr. Miller were present when Mr. King fell, and Mr. Miller was talking with him, and that “[n]o one was holding the ladder at that time,” but with no explanation of what caused him to stop holding the ladder). Ultimately, “[w]hen the cause of a plaintiff’s injury may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing the defendant’s conduct proximately caused his injuries.” McKnight, 385 S.C. at 385, 687 S.E.2d at 569.

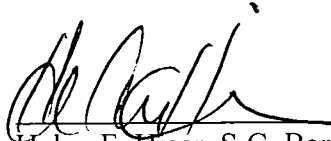
CONCLUSION

For all the reasons stated herein, this Court should deny Appellants' Petition and affirm its Opinion No. 2017-UP-325.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

August 22, 2017



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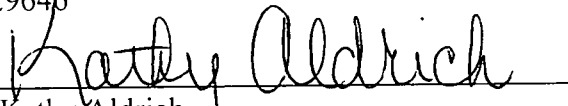
v.

Christopher T. Miller, Respondent.

PROOF OF SERVICE

I certify that on the 22nd day of August 2017, I served the Respondent's **Return in Opposition to Petition for Rehearing** on Tony King and Rosella King by depositing a copy of it in the United States Mail, postage prepaid, addressed to their attorney of record:

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August 22, 2017

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Tony King and Rosella King vs. Christopher T. Miller
Civil Action No.: 2014-CP-24-00396 (Greenwood)
Date of Incident: January 8, 2013
Carrier Claim No.: HNG4134
MGC File No.: 20527.14135
Appellate Tracking No.: 2016-000077

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Return in Opposition to Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC



Helen F. Hiser

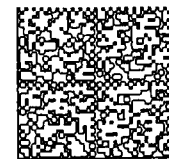
Enclosures

cc: R. Jamison Tinsley, Jr., Esquire

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