THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No.: 2014-CP-39-00613

RECEIVED
JAN 23 2018
SC Court of Appeals

Charles Thomas Hobbs and Mary Hobbs,

Appellants,

v.

Fairway Oaks Homeowners Association,

Respondent.

APPELLANTS' PETITION FOR REHEARING

Raymond T. Wooten (S.C. Bar # 81483)
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Appellants, pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, hereby petition for a rehearing or rehearing *en banc* of the decision in this appeal based on the following grounds:

1. **The Court misapprehended or overlooked the fact that Respondent owed an absolute duty to Appellant Tommy Hobbs so that it remains liable for the negligence of its independent contractor just as if the independent contractor were an employee.**

"The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor." Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (internal citations omitted). However, "[a]n exception to the general rule is that '[a] person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.'" Id. (internal citations omitted). Here, Respondent's Covenants and Restrictions created an affirmative duty for Respondent to maintain its common area. (R. p. 193) (Covenants and Restrictions, Article VI, Section 12, pg. 18). In Durkin v. Hansen, the court found that a landlord's duty to maintain a premises pursuant to a rental agreement was an absolute duty owed to another person so that the landlord would be liable for the negligence of its independent contractor. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Respondent owed the same absolute duty to Appellant Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant, and cannot escape liability by delegating the duty to an independent contractor.

2. **The Court misapprehended or overlooked the fact that a nondelegable duty exists in other similar circumstances such as the landlord-tenant context.**

There are a number of recognized exceptions to the general rule that a principal is not liable for the negligent acts of its independent contractor. See Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318 (2000). One such exception

occurs in the landlord tenant context wherein "[a] landlord who undertakes repair of his property by use of a contractor has a nondelegable duty to see that the repair is done properly, and remains vicariously liable for injuries caused by improper repairs." Id at 42-43, 317-318. This exception was examined in Durkin v. Hansen where the court found that a landlord was liable for the negligent acts of its independent contractor carpet cleaner. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). In Durkin, the landlord was obligated to maintain the leased premises by virtue of its lease agreement with the tenant.[1] Id at 347-348, 553. The court found that the landlord owed a nondelegable duty to its tenant when performing maintenance on the leased premises and could not escape liability for injuries caused by the negligence of an independent contractor. Id at 348, 553. In the present case, Respondent was obligated to maintain its common area by its Covenants and Restrictions. (R. p. 193) (Covenants and Restrictions, Article VI, Section 12, pg. 18). Like the landlord's duty to maintain the premises in Durkin, Respondent here had a duty to maintain its common areas. Respondent owed the same absolute duty to Appellant Tommy Hobbs to maintain the common area as the landlord in Durkin owed to its tenant, and cannot escape liability by delegating the duty to an independent contractor.

3. **The Court misapprehended or overlooked the fact that Appellant Tommy Hobbs, as a member of Fairway Oaks, was considered an invitee in Fairway Oaks' common area, and South Carolina has recognized a nondelegable duty in other similar cases where the injured party was an invitee.**

Appellant Tommy Hobbs was a member of Respondent and was injured on Respondent's common area. A member of a homeowners association, such as Appellant Tommy Hobbs, is considered an invitee on the common area owned by the homeowners association. Landry v.

[1] In Durkin, the Court states that in addition to the duties set forth in the rental agreement, Defendants also had duties imposed by the South Carolina Residential Landlord Tenant Act. 313 S.C. at 348-349, 437 S.E.2d at 553.

Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 204, 452 S.E.2d 619, 621 (Ct. App. 1994). As an invitee, Appellant Tommy Hobbs was owed the utmost duty of care by Respondent. See Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). In other situations, a landowner cannot escape liability for an injury to an invitee caused by the negligence of its independent contractor. See S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961)(Discussing the nondelegable duty owed by a storekeeper to its invitee customers when performing maintenance and repairs). Like a customer in a store, Appellant Tommy Hobbs was an invitee when on Respondent's common area and Respondent cannot escape liability for the negligence of its independent contractor.

4. **The Court misapprehended or overlooked the fact that Courts in other states who have ruled on similar issues have determined that homeowners associations have nondelegable duties to their members in circumstances similar to the present case.**

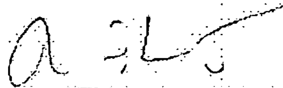
The issue of whether a homeowners association owes a nondelegable duty to a member in its common areas is a novel question in South Carolina. In Simmons v. Tuomey Regional Medical Center, the court was similarly presented with the novel issue of "whether a hospital owes a common law nondelegable duty to render competent service to its emergency room patients, such that it may not avoid liability for the negligent acts of emergency room physicians hired as independent contractors under a contract between the hospital and a separate corporation." 341 S.C. 32, 35, 533 S.E.2d 312, 314 (2000). In answering this question, the court looked to other jurisdictions who had previously addressed the issue. Id. at 44-48, 318-321 (Discussion of decisions in other jurisdictions). Other states have addressed similar issues to the one in the present case have found that a nondelegable duty is owed. See Affan v. Portofino Cove Homeowners Association, 189 Cal. App. 4th 930, 945 (2010 Cal. App. 4th)(Finding that a

homeowners association had a nondelegable duty to property owners to maintain common area plumbing, and that the homeowners association could be liable for damage caused by an independent contractors' negligent actions in repairing the plumbing); see also Vasquez v. Lago Grand Homeowners, 900 So.2d 587 (Finding that the defendant homeowners association had a duty to keep the premises secure, was liable for its failure to do so as a result of its contractual obligations, and noting that the defendant homeowners association could not escape liability even though its independent contractor had performed the negligent acts); see also Moon v. Homeowners' Ass'n of Sibley Forest, Inc., 202 Ga. App. 821, 415 S.E.2d 654 (1992)(Finding that, where a guest was injured at a common area pool, the homeowners association could be liable for the negligence of the lifeguard despite the fact that the company who was hired to provide the lifeguard was an independent contractor of the homeowners association); see also Gazo v. City of Stamford, 255 Conn. 245, 765 A.2d 505 (2001)(Where the court stated that the occupier of a premises owes a nondelegable duty to exercise ordinary care for the safety of invitees).

CONCLUSION

Appellants therefore respectfully request a rehearing or rehearing *en banc* in this case on the grounds raised above.

RESPECTFULLY SUBMITTED,



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January 23, 2018

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PROOF OF SERVICE

I certify that I have served APPELLANTS' PETITION FOR REHEARING to the Respondent, on the counsels addressed below, by depositing a copy of it in the United States Mail with postage prepaid on January 23, 2018.

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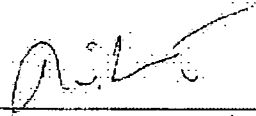

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Attorneys At Law

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The Honorable Jenny Abbott Kitchings
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GENERAL ACCOUNT

Memo: 13-0058E Hobbs

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January 23, 2018

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Via Facsimile 803-734-1839 and Fed-Ex Overnight
The Honorable Jenny Abbott Kitchings
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RE: Charles Thomas Hobbs and Mary Hobbs v. Fairway Oaks Homeowners Association
C.A. No.: 2014-CP-39-00613
Appellate Case No.: 2015-002573

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of the Appellants' Petition for Rehearing as well as the original and two (2) copies of the Proof of Service in the above captioned matter.

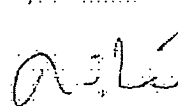
I ask that you please file the original and return the clocked copies to me in the envelope provided.

Please contact me if you have any questions.

With highest regards, I remain.

Sincerely,

SMITH, JORDAN & LAVERY, P.A.



Raymond T. Wooten

RTW/amr
Enclosures
cc: Clients
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