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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

RECEIVED
JUN 27 2018
SC Court of Appeals

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' PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellants (hereinafter "Owners") hereby submit their Petition for Rehearing following this Court's Unpublished Opinion filed June 13, 2018.

STATEMENT OF THE CASE

This appeal involves five (5) separate cases that were consolidated for trial involving claims of negligence against Owners.

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.

The case was tried in Richland County before a jury on April 5-7, 2016, which was presided over by the Honorable Brian Gibbons. 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. 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. Respondents are hereinafter collectively referred to as "Licensees." 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. On May 4, 2016, Judge Gibbons filed an Order denying the motion, which was received by Owners on May 10, 2016. On June 3, 2016, Owners filed and served their Notice of Appeal.

Following a complete briefing on the issues, the case was submitted for consideration without oral arguments for the May 2018 term. On June 13, 2018, a per curiam Unpublished Opinion affirming the trial court decisions was filed. Owners now file their Petition for Rehearing within fifteen (15) days from the date of the filed Opinion as provided by Rule 221(a), SCACR.

POINTS OVERLOOKED OR MISAPPREHENDED

At the end of Plaintiffs' case, Owners moved for a directed verdict, which was denied. At the conclusion of the case, Owners again moved for a directed verdict on the same grounds, which was denied. [R. p. 398, line 24-p. 409, line 9; p. 432, lines 20-23]. In evaluating both directed verdict motions as well as in charging the jury, the trial court set forth the following law in this case:

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) (emphasis added). [R. p. 403, line 14-p. 404, line 12; p. 510, lines 2-22].

While this Court cited to both *Singleton* and *Neil* as to the legal duties owed by an owner to a licensee, the Opinion completely omitted any reference to the provision set forth in both cases that a 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.

It is undisputed that there were no issues or concerns with the stability of the deck at any time prior to its collapse. [R. p. 182, line 19-p. 183, 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].

It is undisputed that the condition Licensees allege resulted in the deck collapse was not visible from the top, sides, front, or underneath the deck, and it would not be discoverable by walking on the deck in light of the undisputed evidence discussed above. Specifically, Licensees' expert testified that (1) the rot was concealed from view, (2) 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, (3) 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, and (4) 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. 386, lines 10-15; p. 388, lines 3-7; p. 386, lines 16-20; p. 386, line 21-p. 387, line 2; p. 388, lines 3-7; p. 393, line 22-p. 394, line 17]. The facts were confirmed by Owners' expert. [R. p. 425, line 23-p. 426, line 12].

It is undisputed that the only way to discover the condition complained of ". . . was by doing some, you, [sic] 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].

Finally, Licensees arguments to both the trial court and jury was 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. 406, line 25-p. 407, line 4; p. 448, lines 5-11; p. 451, lines 10-14; p. 462, lines 6-7].

ARGUMENTS

I. THE OPINION FAILED TO SET FORTH THE COMPLETE LAW.

The Court correctly set forth that an owner owes a licensee a duty to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land, and 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. *See Singleton*, 377 S.C. at 201, 659 S.E.2d at 204–05; *Neil*, 288 S.C. at 473, 343 S.E.2d at 616.

However, the Court overlooked the additional law set forth in the cases cited in the Opinion that “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) (emphasis added). Accordingly, the law cited is incomplete.

II. THE OPINION OVERLOOKED THE UNCONTESTED TESTIMONY THAT THE CONDITION COMPLAINED OF COULD NOT BE DISCOVERED ABSENT SEARCHING IT OUT AND DISCOVERING IT THROUGH AN INSPECTION FOR WHICH THERE IS NO LEGAL DUTY.

As discussed above, Licensees’ theory of liability rests solely on the argument that Owners had a duty to search out and inspect the deck to discover concealed dangers and to repair those dangers. It is uncontested that the condition complained of was concealed from view, there were no indicators or warnings that the deck was dangerous,

and the only way to have discovered the condition was to go underneath the deck and not only inspect the deck but perform tests on the deck.

This Court has previously determined that a 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, notwithstanding an owner's duty to warn of a change in condition which may be dangerous and which the owner may reasonably be expected to discover. *Singleton*, 377 S.C. at 201, 659 S.E.2d at 204–05; *Neil*, 288 S.C. at 473, 343 S.E.2d at 616. This has been the law for the past thirty-seven years.

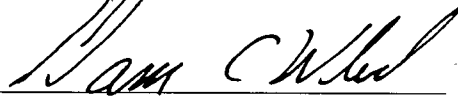
The Court has overlooked or misapprehended the undisputed facts that Owners would need to seek out and discovery the condition complained of. It was therefore clear error to submit the matter to the jury for consideration. Therefore, the Court erred in affirming the denial of the motions for a directed verdict and judgment notwithstanding the verdict.

CONCLUSION

For the reasons set forth, Appellants respectfully request the Court grant the Petition for Rehearing, withdraw the current Opinion, and issue a new Opinion finding the trial court erred in not granting the Motions for Directed and Judgment Not Withstanding the Verdict, and entering judgments in favor of the Appellants.

SIGNATURE BLOCK APPEARS ON FOLLOWING PAGE

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served upon the persons named below copies of **Appellants' Petition for Rehearing** via United States mail, first-class postage prepaid, to the following:

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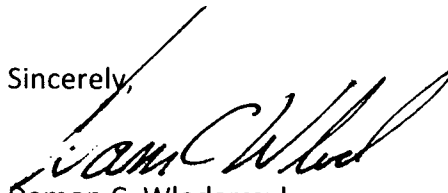
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Linda Estrada, George Estrada, Tyrone Ruff, Khalilah Smith, Carletta Williams, and Cristian Reyes, Respondents, v. Andrew Marshall and Linda Marshall, Appellants
Case No.: 2016-001178
Our File No.: 5167.00614

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of Appellants' Petition for Rehearing along with an original and one (1) copy of proof of service. Please return one (1) filed copy of each to me with my courier. Also enclosed is my firm's check in the amount of \$25.00 to cover the filing fee. Please do not hesitate to contact me with questions.

Sincerely,


Damon C. Wlodarczyk

DCW/
Enclosures

cc: Blake A. Hewitt, Esquire (w/enclosures)
Gerald E. Reardon, Esquire (w/enclosures)
R. Nichols Riley, Jr., Esquire (w/enclosures)
Todd Ellis, Esquire (w/enclosures)

