THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Opinion No. 2018-UP-242 (S.C. Ct. App. filed June 13, 2018)

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

v.

Andrew Marshall and Linda Marshall, ... Petitioners,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Tyrone Ruff ("Respondent Ruff"), Khalilah Smith, ("Respondent Smith") and Carletta Williams ("Respondent Williams") (collectively "Respondents") commenced this action against Petitioners Andrew Marshall and Linda Marshall ("Petitioners") on or about August 19, 2014. (R. pp. 25-33). Respondents' Complaints alleged causes of action for Negligence and Gross Negligence. (R. pp. 25-33). Respondents' Complaints sought recovery of damages against Petitioners for injuries they received when a deck attached to a home owned by Petitioners collapsed. (R. pp. 25-33). Petitioners timely answered. On March 13, 2015, an Order was entered consolidating the Respondents' cases with four (4) other cases brought against Petitioners arising out of the same facts and circumstances. These cases were assigned Civil Action Number 2014-CP-40-04304 (R. pp. 1-7).

The parties then engaged in written and oral discovery. The case was also unsuccessfully mediated. This case was tried before the Honorable Brian Gibbons and a jury on April 5-7, 2015. At the close of the Respondents' case, Petitioners moved for a directed verdict on the grounds that there was no evidence of any breach of a legal duty to Respondents. (R. p. 398, l. 24 – p. 409, l. 5). This motion was denied by the Court. (R. p. 409, ll. 6-9). Petitioners renewed their motion for a directed verdict at the close of the evidence. (R. p. 432, ll. 20-21). Again this motion was denied. (R. p. 432, ll. 22-23).

The jury subsequently returned verdicts on behalf of all Respondents. (R. pp. 19-20). Specifically, the jury awarded Respondent Ruff $17,104.00, Respondent Williams $8,683.00 and Respondent Smith $9,452.02. (R. pp. 19-20). The Petitioners timely filed a Motion for JNOV. (R. pp. 94-98). Judge Gibbons issued his Order denying Petitioners' Motion on May 10, 2016. (R. p. 8). Petitioners' appeal followed.

On or about June 13, 2018 the Court of Appeals issued an unpublished per curium opinion affirming the Lower Court's Order. The Petitioners filed a Petition for Rehearing which was denied on August 16, 2018. (App. ___). This Petition for Certiorari followed.

STATEMENT OF THE FACTS

On April 4. 2014, Respondents Tyrone Ruff, Carletta Williams, and Khalilah Williams and other family members gathered at a residence located at 108 Casbel Court, owned by Petitioners and rented to Latasha White (R. p. 172, ll. 3-5; p. 173, ll. 13-16). Latasha White is Respondent Tyrone Ruff's sister (R. p. 295, ll. 7-12). Respondents were there for a family birthday celebration for Respondent Tyrone Ruff's mother in law. (R. p. 295, ll. 15-18; Pl. Exh. 4).

At the time, Tyrone Ruff and Carletta Williams were married. (R. p. 294, ll. 10-11). Mr. Ruff was working two jobs at McDonald's as a cook at night from 4 p.m. to midnight, and as a painter from 7 a.m. to 3 p.m. (R. p. 294, ll. 18-21). Respondent Carletta Williams was employed as a Certified Nursing Assistant (CNA) with Community Long Term Care providing home health care. (R. p. 313, ll. 14-15). Respondent Khalilah Smith is Latasha White's sister. (R. p. 346, ll. 10-11). She was self-employed. She testified that at the time of the deck collapse she operated a cleaning service. (R. p. 346, ll. 1-3).

Respondents Ruff and Williams arrived around 9 p.m. and after greeting his mother walked out onto an attached deck and sat down. (R. p. 295, l. 19 – p. 296, l. 3; Pl. Exh. 5, 6; p. 315, ll. 3-16). Other friends and family members, including children, were sitting on the deck, cooking and playing games. (R. p. 296, ll. 1-9; p. 228, l. 23 – p. 229, l. 8; Pl. Exh. 4; p. 346, l. 22 – p. 347, l. 7; p. 347, l. 17 – p. 348, l. 2). No one was doing anything on the deck to make it collapse. (R. p. 349, ll. 1-3). No one was jumping on the deck. No

one was dancing on the deck. No one was wrestling or "horse playing" on the deck. (R. p. 297, l. 18 – p. 298, l. 1).

Suddenly, and without any warning whatsoever, the deck collapsed. (R. p. 231, l. 12 – p. 232, l. 1; p. 274, ll. 1-10; p. 297, ll. 10-17). No one knew what was happening. Witnesses described the ensuing scene as chaotic, as guests were thrown to the ground under other guests, and under two charcoal grills and their contents, which were being used at the party. (R. p. 232, l. 10 – p. 233, l. 12; p. 306, ll. 15-25). Hot charcoal and ashes were thrown onto the guests. Many of the guests were in a panic, crying and screaming. (R. p. 274, ll. 1-10; p. 298, ll. 5-22; p. 315, l. 6 – p. 316, l. 3; p. 349, l. 4 – p. 350, l. 4). Multiple ambulances and emergency vehicles were dispatched to take the injured guests to local hospitals for treatment.

Respondents Tyrone Ruff, Carletta Williams and Khalilah Smith were all treated that night at the Emergency Room. (R. p. 299, l. 15 – p. 300, l. 10). Tyrone Ruff immediately began experiencing pain in his wrist and back. (R. p. 299, ll. 4-14). At the hospital, he was given a brace for his wrist and prescribed medications for pain. He continued to experience pain after his discharge from the emergency room. (R. p. 300, l. 18 – p. 301, l. 3). In fact, he returned to Lexington Urgent Care on the day after the deck collapse due to pain. (R. p. 301, ll. 4-12). He subsequently underwent an MRI and was prescribed physical therapy. (R. p. 302, ll. 3-24). He testified that he continues to have problems with pain in his legs and back. (R. p. 303, ll. 9-19). He missed time from work and incurred substantial medical bills for his treatments. (R. p. 304, ll. 14-20; p. 305, l. 2 – p. 306, l. 2; pp. 571-581).

Respondent Carletta Williams immediately experienced pain in her hip and lower back. She had significant bruising (R. p. 318, l. 24 – p. 319, l. 7). Respondent Williams was also transported to Palmetto Health Baptist Hospital Emergency Room. (R. p. 317, l. 19 – p. 318, l.4). She continued to have pain after her discharge. As a result, she was treated by a chiropractor. (R. p. 319, ll. 8-18). Like her then husband, Respondent Tyrone Ruff, she incurred significant medical bills. (R. pp. 565-570). She also missed time from work. (R. p. 321, ll. 2-14).

Respondent Khalilah Smith experienced pain to her neck and back. (R. p. 350, l. 23 – p. 351, l. 18). She attempted to address her pain by "over-the-counter" medications and she was treated for her injuries at the Lexington Medical Center. (R. p. 351, l. 15 – p. 352, l. 10). She was subsequently treated at Midlands Health Center. (R. p. 353, ll. 2-24). Like Respondents Ruff and Williams, she also incurred bills for medical treatment. (R. pp. 584-589).

The house located at 108 Casbel Court in Richland County is owned by Petitioners. It is located in the Hopkins area off of Leesburg Road. (R. p. 172, ll. 3-5, 20-24). Petitioners purchased this property in 1997 as an investment. (R. p. 172, ll. 6-8). In addition to the property at issue in this lawsuit, Petitioners own six other rental properties in the Columbia area. (R. p. 173, ll. 4-10).

Petitioner Andrew Marshall testified that he takes personal responsibility for the maintenance and upkeep of Petitioners' rental homes. (R. p. 176, ll. 19-23). He testified that it is his responsibility as owner/landlord to ensure that the houses he rents out are soundly constructed and safe for the tenants who live there. (R. p. 183, ll. 9-13).

In addition to being a long time landlord, Petitioner Andrew Marshall is also a licensed residential home builder. (R. p. 174, ll. 1-5). He has been licensed for 28 years. He builds and remodels homes. (R. p. 174, ll. 16-19). He testified at trial that while much of the work on his houses is performed by contractors, he is responsible for all of their work. He testified that every aspect of the homes he builds or remodels is his responsibility. (R. p. 175, l. 24 – p. 176, l. 1).

In the course of doing business he supervises the work of roofers, electricians, HVAC installers, plumbers, and framers as well as a variety of other specialty licenses. (R. p. 175, ll. 1-23). He is responsible for structural integrity. (R. p. 176, ll. 8-13). He is responsible for inspecting their work and making sure that all of these subcontractors do their work correctly, that there are no defects in their work, that their work is structurally sound, and that it complies with the applicable building codes and regulations. (R. p. 176, ll. 2-18).

Petitioner Andrew Marshall testified that he has subbed out the construction of attached decks such as the one at issue here. (R. p. 189, ll. 3-24). Like the other work that he subs out, he testified that it is his responsibility to make sure that these decks are constructed properly. (R. p. 180, ll. 20-25). He testified that he is required to know the structural principals for decks such as the one at Casbel Court. (R. p. 179, l. 25 – p. 180, l. 3). This includes knowing how much weight a particular deck can handle. (R. p. 180, ll. 4-10). He testified that it is his responsibility to make sure that decks are built in accordance to applicable code provisions. He testified that he would not have approved construction of a deck like the one involved in this lawsuit because it was not built using good

construction principles. (R. p. 181, ll. 12-14). Specifically, he testified that the deck did not have supports. (R. p. 189, l. 25 – p. 190, l. 6).

As set forth above, the Petitioners purchased the house in question in 1997. (R. p. 172, ll. 6-8; Pl. Exh. 4). The deck that failed leading to Respondents' injuries was already attached to the house. (R. p. 186, ll. 12-13). Each time that Petitioners had a change in tenants, Mr. Marshall does a walk-through of the property. (R. p. 177, ll. 10-20). He testified that in the course of owning the house he would have walked around it on multiple occasions. (R. p. 186, ll. 17-23). At the time he purchased the property it was being rented out through the Housing Authority. (R. p. 188, ll. 3-10). Shortly after purchase, the Housing Authority or someone acting on its behalf requested that he replace boards that were, according to Mr. Marshall, in a "weathered condition." (R. p. 187, l. 24 – p. 188, l. 2; p. 188, ll. 7-23). Mr. Marshall replaced these boards. Photographs taken of the deck after the collapse revealed the presence of additional "weathered" boards. (R. p. 193, ll. 19-25; Pl. Exh. 5). The jury saw photographs from which they could have determined that the boards in question were not "weathered" but actually appeared to be "rotted." (Pl. Exh. 5).

The jury heard testimony from Petitioner Andrew Marshall that at the time of the collapse the deck was only being held up (on the "front" end located away from the house) by two, two-inch support poles. (R. p. 190, ll. 11-16). The jury heard evidence that the two inch supports were splitting. (R. p. 190, l. 17 – p. 191, l. 6). The jury heard testimony that the two poles (or supports) were held to the deck with two screws each and that prior to the fall the deck was being held up with only four screws. (R. p. 191, ll. 17-24; p. 192, ll. 5-12).

Petitioner Andrew Marshall acknowledged that the less he spends on upkeep on maintenance, the more money he makes off of his rental properties. (R. p. 173, ll. 23-25). The more rent he receives, the more income he gets. (R. p. 173, ll. 20-22). The fewer costs that he has, the more he makes. (R. p. 173, pp. 23-25). R. p. 184, ll. 19-22). He estimated that during the time he owned this particular property, he cleared approximately Ninety-One Thousand ($91,000.00) dollars from it. (R. p. 184, ll. 19-22).

The Respondents called Alan Abbatta as their expert. (R. p. 364, ll. 6-7). He is employed as an engineer by the Warren Group, a forensic engineering firm. (R. p. 364, ll. 12-18). Mr. Abbatta is a Professional Engineer (PE) with an undergraduate degree in Civil Engineering. (R. p. 364, ll. 19-21). He has been practicing engineering for forty-five (45) years. (R. p. 364, ll. 22-25). He is licensed in South Carolina. The Court qualified Mr. Abbatta as an expert in engineering. (R. p. 366, l. 25 – p. 367, l. 1).

Mr. Abbatta based his opinion solely on his observations taken off of photographs of the deck. (R. p. 366, ll. 6-11). Mr. Abbatta testified that the deck was supported on the side away from the house by the "front" two posts, which were attached to the deck by "maybe one," screw fastener. (R. p. 369, ll. 16-21). He testified that according to sound engineering practice and principals, there should have been at least four fasteners per post. (R. p. 369, l. 22 – p. 370, l. 3). He further testified that the connection should have been bolted in order to prevent lateral movement of the deck. (R. p. 370, ll. 13-20). According to Mr. Abbatta, the method in which the posts were attached did not meet the applicable building code in place for at least thirty (30) years. (R. p. 370, ll. 4-20).

There was no flashing on the deck. Mr. Abbatta testified that the deck's lack of flashing, to protect it from rot, also did not meet code. (R. p. 370, ll. 21-24). He testified

that the necessity of flashing should have been "obvious" to a licensed residential home builder such as Petitioner Andrew Marshall. (R. p. 371, ll. 18-23). He testified that the lack of flashing should have been obvious to anyone simply walking on the deck. (R. p. 372, ll. 2-10).

Mr. Abbatta testified that in his opinion the deck collapsed due to wood rot. (R. p. 373, ll. 4-25). Over time, the wood on the deck deteriorated and rotted, resulting in it separating from the house on the night of the collapse. (R. p. 374, l. 1- p. 376, l. 21).

Mr. Abbatta testified that in his opinion there were a number of factors which should have put Petitioner Andrew Marshall on notice that the condition of the deck was changing and that the deck was rotting and/or deteriorating. (R. p. 376, l. 22 – p. 378, l. 22). These factors included the deterioration of the stairs. (R. p. 377, ll. 1-5; Pl. Exh. 5). Despite Petitioner Andrew Marshall's characterization of the photographs as depicting "weathering," Mr. Abbatta testified that the wood was in fact rotting. (R. p. 377, ll. 6-18; Pl. Exh. 6, 11). Mr. Abbatta testified that in his opinion, visual inspection of the deck and the railing should have given Petitioners the opportunity to realize that the deck was deteriorating. (R. p. 378, ll. 16-22).

Further, the open and obvious deficiencies in the deck support should have also put Petitioners on notice that the deck was at a greater risk for falling. (R. p. 380, ll. 17-25). He agreed that, "almost anyone walking by there (the deck) without inspection, knowing that no two back poles existed, should know that that could lead to a greater danger to that deck." (R. p. 381, ll. 1-10). He agreed that at no time was the deck and the manner in which it was attached to the house code compliant. (R. p. 381, ll. 6-22)

ARGUMENTS

I. THE DECISION OF THE COURT OF APPEALS DOES NOT WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI.

Rule 242(b) of the South Carolina Appellate Court Rules sets forth factors to be considered in determining whether or not a Grant of Certiorari is warranted or appropriate. These factors include (1) whether or not there are novel questions of law; (2) whether or not there was any dissent in the Court of Appeals; (3) whether the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) whether substantial constitutional questions are directly involve; and finally (5) whether a federal question is included and the decision of the Court of Appeals conflicts with a prior decision of the United States Supreme Court. None of these factors are present in this case.

There were no novel questions of law involved in the unpublished opinion of the Court of Appeals. The decision of the Court of Appeals was unanimous. The decision is not in conflict with any prior decisions of the South Carolina Supreme Court. There are no constitutional questions involved, substantial or otherwise. Finally, there are no federal questions involved and the opinion of the Court of Appeals is not in conflict with any prior decisions of the United States Supreme Court. Therefore, based on Rule 242(b) there is no need for this Court to grant Certiorari to review the opinion of the South Carolina Court of Appeals in this case.

II. THERE WAS EVIDENCE UPON WHICH THE JURY COULD HAVE DETERMINED THAT PETITIONERS BREACHED A DUTY TO RESPONDENTS

Further, there was substantial evidence presented at trial upon which the jury could have determined that Petitioners breached a duty to Respondents. As social guests of Petitioners' tenants, the Respondents in this case were licensees. The Court correctly

charged the jury as to the law regarding a property owner's duty to a licensee. No one raised any objections to these instructions.

Under South Carolina law, a licensee is defined as one who enters the premises of another with the owner's consent. The Respondents, as social guests of the Petitioners' tenants, were licensees. Petitioners owed Respondents as licensees a duty to use reasonable care to warn them of any concealed or dangerous conditions which were known to Petitioners or of any change in the condition of the premises which Petitioners should have been expected to discover. *Goode v. St. Stephens United Methodist Church,* 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct.App.1997); *Landry v. Hilton Head Plantation Prop. Owners Ass'n,* 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct.App.1994); *Neil v. Byrum,* 288 S.C.472, 343 S.E.2d. 615 (1986). (R. p. 510, ll. 10-22). No exception was taken to the Judge's charge/instruction to the jury. (R. p. 518, l. 18 – p. 519, l. 12).

The jury heard ample evidence that the deficiencies in the deck were such that the Petitioners should have reasonably been expected to discover them. Respondents' expert, Allan Abbatta testified that there were obvious deficiencies with the deck at Casbel Court. There was no flashing. He testified that the lack of flashing on the deck led to wood rot, over time causing the deck to pull away from the house. (R. p. 368, ll. 4-17; p. 373, ll. 4-25). Mr. Abbatta testified that the lack of flashing on the deck was open and obvious and could have been discovered merely by visual inspection. (R. p. 371, ll. 18-23; p. 372, ll. 1-10).

Further, Mr. Abbatta testified that there were other signs of deterioration of the deck which should have put Petitioners on notice that the deck was deteriorating due to wood rot caused by improper construction methods. The jury heard testimony that prior to the

deck collapse, Petitioner Marshall had been asked by the Housing Authority to replace "weathered" boards. Mr. Abbatta showed the jury photographs taken of the deck after the collapse depicting decaying or deteriorating wood. (Pl. Exh. 5; pp. 584-589; p. 376, ll. 3-18; p. 376, l. 22 – p. 377, l. 18). He testified that merely looking at the condition of the steps and railing of the deck should have put Petitioners on notice that the deck was deteriorating. (Pl. Exh. 11; p. 378, ll. 16-22; p. 380, ll. 17-25).

In addition to the wood rot, Mr. Abbatta testified that the deck was being held up by an inadequate number of posts which were improperly attached to the deck. (R. p. 369, l. 2 – p. 370, l. 20). He testified that in his opinion the insufficient number of fasteners was an obvious building code violation. (R. p. 370, ll. 4-12). This also should have put Petitioners on notice that the deck was in a deteriorating condition. (R. p. 380, l. 17- p. 381, l. 10).

Contrary to the argument of Petitioners, Respondents presented ample evidence both through the photographs admitted into evidence and in the testimony of their expert, Alan Abbatta that Petitioners should have been on notice that the deck was in a deteriorating condition. Petitioners chose to ignore these obvious signs of deterioration. It is uncontested that Petitioners gave Respondents no warnings regarding the deteriorated and dangerous condition of the deck. Contrary to Petitioners' arguments, the jury heard more than ample evidence upon which it could have based an award of negligence against Petitioners. The Court's Order affirming the jury verdict in this case was correctly affirmed by this Court. The decision of the Court of Appeals affirming that award was correct and Certiorari should be denied by this Honorable Court.

CONCLUSION

Based on the foregoing discussion, as well as the arguments of the Co-respondents (which are incorporated herein by reference), the Respondents respectfully request that the Court deny the Petitioners' Andrew Marshall and Linda Marshall's Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Respondents Tyrone Ruff, Khalilah Smith and Carletta Williams' Return to Petition for a Writ of Certiorari by U. S. Mail on October 17, 2018, to the following counsel of record addressed as follows:

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