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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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**ORIGINAL**

Case No.: 2014-CP-39-00613

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Opinion No. 2018-UP-011 (S.C. Ct. App. Filed January 10, 2018)

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Charles Thomas Hobbs and Mary  
Hobbs,

Petitioners,

v.

Fairway Oaks Homeowners  
Association,

Respondent.

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**BRIEF OF PETITIONERS**

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**STATEMENT OF ISSUES ON APPEAL**

- 1. DID THE COURT OF APPEALS ERR IN REFUSING TO RECOGNIZE THAT RESPONDENT HOMEOWNERS' ASSOCIATION OWED PETITIONERS A NONDELIGIBLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR**

## STATEMENT OF CASE

Petitioner Charles Thomas Hobbs (“Tommy Hobbs”) suffered debilitating injuries when he was struck in the head by a tree limb on August 21, 2012. (Summons and Complaint, A. pg. 13; Answer, A. pg. 17). The incident occurred on the common areas of the Fairway Oaks Townhome development which was owned by Respondent Fairway Oaks Homeowners Association (“Fairway Oaks”). (Summons and Complaint, A. pg. 12; Answer, A. pg. 17). Tommy Hobbs was a member of Respondent. Pursuant to the Declaration of Covenants and Restrictions for Fairway Oaks Townhouses, Easley, South Carolina, and Provisions for Fairway Oaks Homeowners’ Association (“Covenants and Restrictions”), Respondent was responsible for maintaining the common areas and maintaining liability insurance thereon. (Covenants and Restrictions, Article VI, Section 12, A. p. 194). The Covenants and Restrictions provide:

“Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas.” (Covenants and Restrictions, Article VI, Section 12, A. p. 194).

The Fairway Oaks Townhome Development was composed of eighteen units and the common areas. (Deposition of Tommy Hobbs, A. pg. 159, l. 15). Respondent Fairway Oaks did not have any employees, did not own any ladders or tools, and would hire contractors whenever maintenance needed to be performed on the common areas. (Deposition of Tommy Hobbs, A. pg. 34, Deposition pg. 27, ll. 14-15; A. pg. 35, Deposition pg. 31, ll. 3-6; A. pg. 39, Deposition pg. 24, ll. 1-25). Respondent employed the same landscaper to cut the grass on the common areas for over twenty years. (Deposition of Tommy Hobbs, A. pg. 39, Deposition pg. 24, ll. 1-7). Respondent also regularly used Lee Lambright for maintenance work around the property. (Deposition of

Tommy Hobbs, A. pg. 161, ll. 4-19; Deposition of Lee Lambright, A. pg. 174, l. 24-pg. 175, l. 12). Lambright was a local handyman who performed various jobs for Respondent and the residents of Fairway Oaks. (Deposition of Lee Lambright, A. pg. 173, ll. 11-18; A. pg. 174, l. 12 – A. pg.175, l. 12). Lambright would do any type of maintenance work that Respondent needed done. (Deposition of Tommy Hobbs, A. pg. 39, Deposition pg. 21, l. 4-pg. 22, l. 11). Lee Lambright was hired by Respondent to remove a damaged tree limb located on Respondent's common area. (Deposition of Lee Lambright, A. pg. 177 l. 18 – A. pg. 200, l. 7). It is undisputed that Lambright was an independent contractor of Respondent. Lambright asked Petitioner Tommy Hobbs to help him carry a ladder to the site where the tree limb would be cut as the ladder was too large for him to handle by himself. (Deposition of Lee Lambright, A. pg. 177, l. 18 – A. pg. 200, l. 2). Tommy agreed, and on August 21, 2012, did in fact assist Lambright in taking the ladder to the job site and setting it up. (Deposition of Lee Lambright, A. pg. 179, ll. 14-16). After getting the ladder set up, Lambright began to work on the tree limb. (Deposition of Lee Lambright, A. pg. 180, ll. 20-22).

Lambright cut a large tree limb that had previously been damaged. The limb did not fall all the way to the ground but instead was leaning against the tree. After cutting the tree limb, Lambright climbed down and spoke with Petitioner Tommy Hobbs and Daniel Lappin. Lambright then went back to the tree and pushed over the already cut limb. The limb struck Petitioner Tommy Hobbs in the head, causing grievous injuries. (Deposition of Lee Lambright, A. pg. 182, l. 4- A. pg. 202, l. 24; A. pg. 183, l. 22- A. pg. 203, l. 13). While cutting and removing the tree limb, Lambright took no safety precautions, provided no warnings, and did not look to make sure everyone was out of the way immediately prior to pushing over the tree limb. (Deposition of Lee Lambright, A. pg. 184, ll. 13-24; pg. 185, l. 23 – pg. 204 l. 3).

Petitioners filed suit against Respondent on May 19, 2014, asserting that Respondent was

liable for the negligent acts of Lambright. (Summons and Complaint, A. pp. 11-16). After taking depositions, Respondent moved for summary judgment on the ground that it was not liable for Lambright's negligence because he was an independent contractor. On August 7, 2015, the Honorable Edward W. Miller heard Fairway Oaks' Motion for Summary Judgment and issued an Order Granting Summary Judgment to Defendant Fairway Oaks, which was filed on September 23, 2015. (Order Granting Summary Judgment, A. pp. 4-8; See also Hearing Transcript, A. pp. 138-158). The trial court's order held that Fairway Oaks was not liable for the actions of Lambright because he was an independent contractor. (Order Granting Summary Judgment, A. pp. 4-8). On or about October 2, 2015, Petitioners filed a Motion to Alter or Amend Judgment Pursuant to Rule 59, *SCRCP*. (Motion for Reconsideration, A. pp. 110-125). On or about November 17, 2015, the trial court issued an Order Denying Petitioners' Motion for Reconsideration. (Order Denying Motion for Reconsideration, A. pp. 9-10).

Petitioners filed an appeal to the Court of Appeals which was heard on October 4, 2017. The Court of Appeals issued an unpublished opinion on January 10, 2018, affirming the trial court's decision. (Opinion of Court of Appeals, A. pp. 282-283). The opinion did not explain the Court's reasoning other than citing to several cases. Petitioners timely filed a Petition for Rehearing which was denied via an Order dated February 22, 2018. (Petition for Rehearing, A. pp. 284-289; Order Denying Petition for Rehearing, A. p. 190). Petitioners now ask this Court to recognize that Respondent owed Petitioners a nondelegable duty of reasonable care when performing maintenance in its commons areas, to reverse the grant of Summary Judgment to Respondent, and to remand this case to the trial court.

## ARGUMENTS

### STANDARD OF REVIEW

On appeal from the grant of summary judgment, the appellate courts apply the same standard as that required for the circuit court under Rule 56(c), SCRPC. Robinson v. Estate of Harris, 389 S.C. 360, 367-68, 698 S.E.2d 801, 805 (2010), citing Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Robinson, *supra*, citing Rule 56(c), SCRPC. “Questions of law may be decided with no particular deference to the trial court.” S. Carolina Dep’t of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008) (citations omitted). Further, when reviewing a novel question of law, the Court is “free to decide the issue with no particular deference to the lower court.” J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 372, 635 S.E.2d 97, 102-03 (2006) (internal citations omitted).

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Rule 56(c), SCRPC. On appeal, when factual matters are in dispute, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. Estate of Adair v. L-J, Inc., 372 S.C. 154, 156, 641 S.E.2d 63, 64 (Ct. App. 2007), citing Pittman v. Grand Strand Entertainment, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005).

**I. THE COURT OF APPEALS ERRED IN REFUSING TO RECOGNIZE THAT RESPONDENT OWED PETITIONERS A NONDELIGIBLE DUTY OF REASONABLE CARE WHEN MAKING REPAIRS OR IMPROVEMENTS IN ITS COMMON AREA, INCLUDING WHEN MAINTAINING TREES IN ITS COMMON AREA, SUCH THAT IT IS LIABLE FOR THE NEGLIGENT ACTIONS OF ITS INDEPENDENT CONTRACTOR**

The question of whether a homeowners' association has a nondelegable duty of reasonable care when making repairs or improvements, including when maintaining trees in the common area, is a novel question in South Carolina. The trial court's Order Granting Summary Judgment states that "there is no recognized exception in South Carolina that removes this case from the general independent contractor rule. To find otherwise would require this court to expand the existing body of case law. Because there is no recognized exception to the general independent contractor rule, Defendant is entitled to judgment as a matter of law." (Order Granting Summary Judgment, A. p. 8). At the motion for summary judgment hearing, the trial judge stated that "I am not, I think, in a position to expand the scope of exception to the rule. And so I'm going to grant their motion for summary judgment, which is not what I normally do." (Hearing Transcript, A. p. 157, ll. 2-5). As the trial judge made clear, he did not think he was in a position to recognize an exception to the general rule when it had not already been recognized by an appellate court. In its Opinion, the Court of Appeals listed the authorities on which it was affirming the trial court's order. These authorities included the general rule, as set forth in Rock Hill Tel. Co. v. Globe Commc'ns, Inc., that an employer is not vicariously liable for the negligent acts of an independent contractor. 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005) (Opinion, A. p. 283). The Court of Appeals also cited Gary v. Askew for the principle that "While it is difficult to define the exact circumstances under which a nondelegable duty will be found, a review of case law reveals that our courts' decisions regarding whether to apply the nondelegable duty doctrine are primarily grounded in public policy considerations." 417 S.C. 232, 249, 789 S.E.2d 94, 103 (Ct. App. 2016)(overturned by Gary v.

Askew, 423 S.C. 47, 813 S.E.2d 717 (2018)) (Opinion, A. p. 283). Finally, the Court of Appeals cites to Rock Hill Tel. Co. for the premise that the court had reviewed South Carolina's nondelegable duty doctrine and refused to expand it to public utilities. (Opinion, A. p. 283).

The rule of non-liability for acts of independent contractors is a common law doctrine that was adopted in this state in 1868. See Conlin v. City Council of Charleston, 15 Rich. 201 (Ct. App. 1868). Since that time, throughout the nation, "the general rule of nonliability of an employer for the torts of an independent contractor or its employees has been eroded by so many well-recognized exceptions that 'the rule is now primarily important as a preamble to the catalog of its exceptions.' This is reflected in the Restatement of Torts, Second, which states that the exceptions are so numerous, and have so far eroded the 'general rule,' that the rule can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." 41 Am. Jur. 2d Independent Contractors § 27. Since Conlin, the appellate courts of this state have followed the national trend and carved out a number of exceptions to the general rule that a master is not liable for the acts of an independent contractor. See Simmons v. Tuomey, 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318 (2000).

It is true that "[t]he 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). In Simmons, this Court codified the seemingly disparate South Carolina nondelegable duty cases when it said "[t]he cited cases clearly illustrate that a person or entity entrusted with important duties in certain

circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.” 341 S.C. 32, 44, 533 S.E.2d 312, 318. The present case falls squarely within the ambit of the already recognized exceptions, and the Court of Appeals erred in failing to recognize that Respondent owed Petitioners a nondelegable duty of reasonable care when making repairs or improvements in its common area, so that it is liable for the negligent actions of its independent contractor.

**a. Respondent’s duty to exercise reasonable care when maintaining its common areas was an important duty.**

Respondent is the homeowners’ association for the Fairway Oaks Townhome Development. The Fairway Oaks Townhome Development is a small townhome development composed of eighteen units and the common areas. (Deposition of Tommy Hobbs, A. pg. 159, l. 15). Respondent’s Covenants and Restrictions created an affirmative duty to maintain Respondent’s common area. The Covenants and Restrictions provide in pertinent part:

*“Section 12. Common Area Maintenance. Common Areas shall be the responsibility of the Association, which shall maintain the parking lots, grounds and common buildings. The Association shall make such capital improvements to common areas as the shareholders may determine to be in the best interest of Fairway Oaks Townhouses. The Association shall maintain liability insurance for the common areas.”* (Covenants and Restrictions, Article VI, Section 12, A. p. 194)(*emphasis added*).

Maintenance of the common areas was the main function of Respondent, and it was carried out through independent contractors. Respondent Fairway Oaks did not have any employees, did not own any ladders or tools, and hired contractors whenever maintenance needed to be performed on the common areas. (Deposition of Tommy Hobbs, A. pg. 34, Deposition pg. 27, ll. 14-15; A. pg. 35, Deposition pg. 31, ll. 3-6; A. pg. 39, Deposition pg. 24, ll. 1-25). Lambright was hired by Respondent to carry out its duty to maintain its common areas, and was performing this function

when he injured Petitioner Tommy Hobbs.

- i. **It has previously been held that the duty to exercise reasonable care when perform maintenance is an important duty for which a principal may not escape liability by delegating to an independent contractor.**

It has previously been held that the duty perform maintenance is an important duty for which a principal may not escape liability by delegating to an independent contractor. In Durkin v. Hansen, the Court of Appeals held 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). The Court set forth the legal premise 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 at 347, at 552-553 (internal citations omitted).<sup>1</sup> The Court then found that the landlord was responsible for maintaining the condominium premises pursuant to the rental agreement. Id at 347-48, 553. Next, the Court stated that “[t]he performance of duties assumed by Respondents by the rental agreement and those imposed by the RLTA may, of course, be delegated to others. However, liability for injury or damage resulting from the performance of these duties may not be avoided merely by the employment of an independent contractor.” Id at 348, 553. The Court found that the landlord's duty to maintain the condominium premises pursuant to its rental agreement was an absolute duty owed to the tenant so that the landlord could not escape liability by delegating the duty to an independent contractor. This is the same duty that this Court recognized thirty years before in

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<sup>1</sup> This rule was cited in Simmons v. Tuomey Regional Medical Center, 330 S.C. 115, 118, 498 S.E.2d 408, 409 (Ct. App. 1998), and Rock Hill Telephone Co. v. Globe Communications, Inc., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005).

Conner v. Farmers and Merchants Bank, wherein a landlord was held liable for injuries sustained by a tenant who fell on a negligently repaired brick floor in the common entrance to an apartment house. 243 S.C. 132, 132 S.E.2d 385 (1963).<sup>2</sup>

The facts of the present case are very similar to the facts in Durkin. Here, Respondent was obligated to maintain the common areas by the Covenants and Restrictions and hired an independent contractor to perform the necessary work. Similarly, in Durkin, the defendant undertook maintenance which it was obligated to perform pursuant to its rental agreement by hiring an independent contractor. In the present case, the independent contractor's negligence caused Petitioner's injuries, like the negligence of the independent contractor in Durkin caused the tenant's injuries. Further, the relationship of homeowners' association members such as Petitioners to the homeowners' association when on common areas is analogous to that of a tenant on rented property. Homeowners' associations such as Respondent are concomitant with planned developments wherein it is anticipated that property owner/members will utilize the common areas of the planned developments which are managed by the homeowners' association. Similarly, rental properties such as apartment complexes are often built with common features for use by tenants. Property owners in homeowners' associations are frequently required to utilize common areas maintained by the homeowners' association for access to their property, just like tenants are often required to use common areas for access to the premises they rent. The provision and maintenance of common areas is one of the core functions of homeowners' associations. Similarly, the provision and maintenance of the rented property, including any common features, is the core function of a

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<sup>2</sup> The fact pattern in Conner does not specify that the negligent repair work was performed by an independent contractor and does not mention a nondelegable duty. However, Conner is cited by the court in Simmons v. Tuomy Regional Medical Center, wherein the Court states "upholding jury verdict against landlord for elderly tenant who fell on brick floor negligently repaired by contractor". 341 S.C. 32, 533 S.E.2d 312 (S.C. 2000), Footnote 5.

landlord. The relationship between homeowners' association members and the homeowners' association is controlled by covenants and restrictions which are contractual in nature. See Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (S.C. App. 1987) (“Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.”). The relationship between a landlord and tenant is controlled by a lease agreement. In the present case, Respondent had a duty to maintain its common area which was imposed by its Covenants and Restrictions. Like the landlord’s duty to maintain the premises in Durkin and in Connor, Respondent here had a duty to maintain its common areas. Respondent owed the same important and absolute duty to Petitioner Tommy Hobbs to maintain the common area as the landlords in Durkin and in Connor owed to their tenants.<sup>3</sup> The decisions of the trial court and Court of Appeals in the present case are inconsistent with existing South Carolina precedent. The very same duty that was so important it could not be delegated in Durkin and Connor, was found to be delegable in the present case.

ii. **In previous cases where a nondelegable duty has been found, the duty in question was a core function of the principal.**

In Simmons v. Tuomey Regional Medical Center, this Court noted a number of nondelegable duties that have been recognized in South Carolina. The Court stated:

“[t]his Court and the Court of Appeals have applied the nondelegable duty doctrine in several situations. An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control. 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

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<sup>3</sup> The best argument for differentiating the landlord/tenant relationship in Durkin and Connor from the homeowners' association/member relationship at issue in this case is the right of a homeowners' association member to have some level of control in the governance of the homeowners' association. However, the lack of control is not cited as a basis for recognizing a nondelegable duty in either Durkin or Connor.

liable for injuries caused by improper repairs. A common carrier has a nondelegable duty to ensure that cargo is properly loaded and secured, and remains vicariously liable for injuries caused by an unsecured load. A bail bondsman has a nondelegable duty to supervise the work of his employees, and remains vicariously liable for injuries caused by those employees. A municipality has a nondelegable duty to provide safe streets even when maintenance is undertaken by the state Highway Department, and remains vicariously liable for injuries caused by defective repairs.” 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318 (2000).

In each of these cases, the important duty that was nondelegable was a core function of the principal. For instance, in Simmons, the Court addressed whether a hospital owed a nondelegable duty to patients in its emergency room. The provision of medical services is the core function of a hospital. Similarly, a common carrier’s core function is to transport cargo, and one of a bail bondsman’s core functions is to collect the people they have bonded out. While a municipality performs a multitude of functions, one of the core functions is providing streets for its citizens to drive on. Similarly, in the present case, Respondent was carrying out its core function when it was performing maintenance in its common area. Just like a municipality has a duty to maintain streets and sidewalks for the use of its citizenry, Respondent had a duty to maintain common areas for the use of its members.

**b. Respondent owed the duty to exercise reasonable care when maintaining its common areas to its members, including Petitioners.**

Respondent Tommy Hobbs was a member of Respondent when he was injured on Respondent’s common area.<sup>4</sup> Property owners in the Fairway Oaks Townhome Development

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<sup>4</sup> Petitioner Tommy Hobbs was the president of Respondent at the time of the subject accident, and he hired Lambright on behalf of Respondent to cut the tree limb. (Deposition of Tommy Hobbs, A. pg. 41, Deposition pg. 55, ll. 15-22). Petitioner Tommy Hobbs was at the scene of the incident because Lambright asked him to help him carry a ladder to the site of the incident. (Deposition of Lee Lambright, A. pg. 179, ll. 14-16). These facts are not germane to the issue before the court and do not affect Hobbs’ ability to recover in this case. See Hall v. Palmetto Enterprises II, Inc., of Clinton, 317 S.E.2d 140, 143 (S.C. App. 1984)(citing 57

became members of Respondent upon purchase of property. (Deposition of Tommy Hobbs, A. pg. 159, ll. 10-15). As set forth above, the Covenants and Restrictions impose upon Respondent a duty to maintain the common areas. (Covenants and Restrictions, Article VI, Section 12, A. p. 194). The common areas were intended for the use and benefit of Respondent's members, and Respondent owed those members, including Petitioners, the duty to exercise reasonable care when maintaining the common areas.

A member of a homeowners' association, such as Petitioner Tommy Hobbs, is an invitee on the common area owned by the homeowners' association. Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 204, 452 S.E.2d 619, 621 (Ct. App. 1994). "South Carolina recognizes four classes of persons present on the property of another: adult trespassers, invitees, licensees, and children. A landowner's duty toward a person to maintain his land in a certain condition depends upon the person's status." Id at 203, 621 (internal citation omitted). "In premises liability cases, the invitee is offered the utmost duty of care by the landowner and a trespasser is generally offered the least." Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001).

"The owner or occupier of premises owes to an invitee a nondelegable duty to exercise ordinary care for the safety of such persons." 41 Am. Jur. 2d Independent Contractors § 45. For instance, a customer in a store is considered an invitee<sup>5</sup> and "[a] storekeeper does not escape liability to his customer who falls through an unguarded hole in the floor of the store upon a plea that the hole had been made and left unguarded by an independent contractor, nor is the storekeeper

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Am.Jur.2d *Negligence* § 37 at 385 (1971))("A defendant who requests another person to assist the defendant in the performance of a particular task owes the person 'a duty to exercise ordinary care to avoid injuring him, including a duty to warn him of dangers not reasonably apparent to him.'").  
<sup>5</sup> See Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 65 (Ct. App. 1996).

aided in his effort to escape liability by his previous exaction of a promise by the contractor adequately to guard the hole.” S. Carolina Nat. Gas Co. v. Phillips, 289 F.2d 143, 148 (4th Cir. 1961). As already discussed, a landlord owes a nondelegable duty to its tenants when performing maintenance and repairs. See Durkin, 313 S.C. at 346-48, 437 S.E.2d at 552-553. As an invitee, Petitioner Tommy Hobbs would have at least the same status as a customer in a store or a tenant, both of whom are owed a nondelegable duty. The trial court and Court of Appeals’ decisions are inconsistent with existing precedent, as they effectively find that an invitee is owed a nondelegable duty in some cases, but not in others. This split in the duty owed to invitees is not supported by the existing case law or public policy.

**c. Respondent may not assign its duty to maintain the common areas to someone else and then expect to walk away unscathed when things go wrong.**

Respondent has relied on the rule originally set forth in Conlin that a principal is not liable for the torts of its independent contractor. 15 Rich. 201 (S.C. Ct. App. 1868). This rule was originally developed to cover the situation where an employer needed a temporary service and hired someone else to perform it. This rationale breaks down where the independent contractors are hired to perform the core functions of the employer in lieu of having any employees. The Conlin case was decided in 1868- long before restrictive covenants and homeowners’ associations became common place.<sup>6</sup> “Public policy is a dynamic not static concept, and what was valid in the past is not necessarily a valid policy today. Moreover, when the reason for a declared public policy no longer exists, we should not hesitate to abolish it and the rules which are supported by the

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<sup>6</sup> The first use of restrictive covenants to preserve common areas in the United States was Gramercy Park in New York City, which was created in 1831. *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (New Haven: Yale University Press, 1994, 1996), pg. 34. “Most uses of restrictive covenants during the nineteenth century did not involve homeowners associations[.]” Id at 35.

policy.” Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n, 277 S.C. 1, 3-4, 282 S.E.2d 230, 231 (S.C. 1981). The rule that was announced in Conlin does not apply well to modern homeowners' associations which have evolved in the more than 150 years since Conlin was decided.

Respondent's core function was to maintain the common areas of the Fairway Oaks Townhome Development, and it carried out this function through independent contractors. Respondent Fairway Oaks does not have any employees, and has employed the same landscaper to cut the grass on the common areas for over twenty years. (Deposition of Tommy Hobbs, A. pg. 34, Deposition pg. 27, ll. 14-15; A. pg. 39, Deposition pg. 24, ll. 1-7). Further, Respondent regularly used Lee Lambright for maintenance work around the property. (Deposition of Tommy Hobbs, A. pg. 161, ll. 4-19; Deposition of Lee Lambright, A. pg. 174, l. 24-pg. 175, l. 12). Lambright was the first call if there was a problem to see if it was something he could fix. (Deposition of Tommy Hobbs, A. pg. 34, Deposition pg. 25, l. 23-pg. 26, l. 9). Lambright would do any type of maintenance work that Respondent needed done. (Deposition of Tommy Hobbs, A. pg. 39, Deposition pg. 21, l. 4-pg. 22, l. 11). Instead of hiring employees to carry out its core function of maintaining its commons areas, Respondent carried out its responsibilities through the same contractors for years.

It makes practical sense that a small homeowners' association such as Respondent would use contractors instead of employees- hiring contractors can be cost effective when there is not enough work to justify hiring a full time employee. While Petitioner Hobbs was injured by a tree limb being cut, this was just one of many jobs undertaken by Respondent's contractors over the years. “[T]he general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving

them wholly to be borne by those who sustain them. . . .” Brown v. Anderson County Hosp. Ass'n, 234 S.E.2d 873, 876 (S.C. 1977) (citing President and Directors of Georgetown College v. Hughes, 76 U.S.App.D.C. 123, 130 F.2d 810 (1942)). Here, Respondent benefits from carrying out its core function through independent contractors. As the beneficiary of this arrangement, Respondent should also bear the costs when something goes wrong such as Petitioners being injured.

Despite the fact that Respondent used the same contractors for years to carry out its duties, it expects to walk away unscathed now that something has gone wrong. If Respondent is not liable for the acts of the independent contractors it uses to maintain its common areas, then it is hard to see a situation in which Respondent could be liable in tort. Short of one of respondent’s volunteer officers taking it upon themselves to start performing maintenance on behalf of Respondent, there are simply no duties carried out by officers or employees of Respondent.

It is also important to note that the Covenants and Restrictions, which govern the relationship between members and Respondent, require Respondent to maintain liability insurance for the common areas. (Covenants and Restrictions, Article VI, Section 12, A. p. 194). Respondent’s common areas are intended for the use of its members. The requirement to maintain liability insurance for the common areas was certainly meant to protect Respondent. This requirement also provides protection in case of injury for the intended users of the property- Respondent’s members. If Respondent’s position is correct, then there is little that Respondent could ever be held liable for in tort and therefore little purpose for the required liability insurance. The doctrine of charitable immunity was abolished in 1981 in the Fitzer case. In Fitzer, a child was injured while attending a camp. 277 S.C. 1, 2, 282 S.E.2d 230 (1981). The child’s mother had purchased liability insurance through the camp. Id. The Court stated that “the general

availability of liability insurance, which had been obtained in this case, underscores the unreasonableness of our continued adherence to this archaic doctrine.” *Id* at 4, 231. Similarly, in the present case, the presence of liability insurance underscores the unreasonableness of finding Respondent to be not liable for the acts of its independent contractors.

**d. Like other jurisdictions, South Carolina should recognize that a homeowners’ association owes a nondelegable duty to its members to exercise reasonable care when performing maintenance in its common areas.**

The question of whether a homeowners’ association has a nondelegable duty of reasonable care when making repairs or improvements, including when maintaining trees in the common area, is a novel question in South Carolina. “The precise point is one of first impression here, but far from new in the great network of jurisdictions with which we work in common to achieve a better balanced and more perfect jurisprudence.” Wright v. Wright, 229 N.C. 503, 509, 50 S.E.2d 540, 544 (N.C. 1948). Other jurisdictions have examined similar issues to that which we are faced with in this case, and have found that homeowners’ associations have nondelegable duties in regard to common areas and features.

In Affan v. Portofino Cove Homeowners Association, the California 4<sup>th</sup> District Court of Appeals found 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. 189 Cal. App. 4<sup>th</sup> 930, 945 (2010 Cal. App. 4<sup>th</sup>). In Affan a couple filed suit against a homeowners’ association when their condominium was damaged by sewage flooding. The plaintiffs alleged that the sewage flooding was caused by the homeowners’ association’s failure to properly maintain common area plumbing. *Id* at 484. The plaintiffs sought to hold the defendant homeowners’ association liable for the negligent acts

of the plumbing contractor it hired on the theory that it had a nondelegable duty to maintain the plumbing located in the common area. The covenants and restrictions required the defendant homeowners' association to maintain the common areas including the plumbing system. Id at Foot Note 4. The Affan court stated that “[o]n remand, the trial court must determine whether the plumber's negligence on May 3 constituted a substantial factor in causing the sewage eruption on May 14. If so, then the Association will be liable for the ensuing damage under the doctrine of nondelegable duty, assuming that Rescue Rooter's negligence is established by stipulation or competent evidence.” Id at 945.<sup>7</sup>

Florida courts dealt with a similar issue in Vasquez v. Lago Grand Homeowners Association, wherein a resident and the estate of a deceased guest of the resident brought suit against a homeowners' association after the guest's ex-husband came into the condominium complex and shot the resident and the guest. 900 So.2d 587, 589-590 (Dist. Ct. App. Fl. 2004). The condominium complex was responsible for security and hired an independent contractor security company to provide security on the premises. Id at 589. The plaintiffs alleged that the ex-husband was negligently allowed to enter the complex as the resident had told the security company not to allow him entry. Id at 591. The court found that the defendant homeowners' association had a duty to keep the premises secure, and was liable for their failure to do so as a result of its contractual obligations. Id at 594. The court further noted that the homeowners' association could not escape liability because it had hired an independent contractor. 900 So.2d 587, Foot Note 7.

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<sup>7</sup> See also Frances T. v. Vill. Green Owners Assn., wherein the court found that a homeowners' association “may properly be held to a landlord's standard of care as to the common areas under its control.” 42 Cal. 3d 490, 499-500 (1986).

Similarly, in Georgia a homeowners' association owes a nondelegable duty to invitees on its common area so that it is liable for the negligent acts of its independent contractor. In Moon v. Homeowners' Ass'n of Sibley Forest, Inc., a homeowners' association rented its pool to a company for a private party. 202 Ga. App. 821, 821, 415 S.E.2d 654, 655-656 (1992). The homeowners' association hired a private company to provide lifeguard services for the event. Id. A guest of the event named Charles Moon was seriously injured when he was either thrown or dove into the pool. Id. at 821, 656. The court found that the homeowners' association would 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. Id. at 824, 658. The court stated, "[a]s noted, Moon was, as to the Association, an invitee. Accordingly, the Association owed Moon a duty of ordinary care to keep the premises safe. OCGA § 51-3-1. Since this was a nondelegable duty, the mere fact that lifeguard services were being provided by Swimatlanta would not insulate the Association from potential liability. 'A business invitor owes a *nondelegable duty* to protect (his) invitees from injury ... [.]' Accordingly, the Association may be liable if Swimatlanta was negligent in failing to protect Moon from injury." Id. at 824, 658 (internal citations omitted) (*emphasis original*). It is notable that the Moon court bases its finding of a nondelegable duty on the fact that Moon was an invitee of the homeowners' association. As described above, Petitioner Tommy Hobbs was an invitee when on the Respondent's common area where he was injured by the negligence of Respondent's independent contractor.

Similar to Georgia, Connecticut has recognized that a property owner owes invitees a nondelegable duty when maintaining its property. In Gazo v. City of Stamford, the court stated that "[o]ne exception to this general rule, however, is that the owner or occupier of premises owes invitees a nondelegable duty to 'exercise ordinary care for the safety of such persons.'" 255 Conn.

245, 257, 765 A.2d 505, 512 (2001) (internal citations omitted). In Gazo, the plaintiff was injured when he slipped and fell on an icy sidewalk. Id. at 247, 507. The plaintiff filed suit against several defendants, including Chase Manhattan Bank, N.A. Id. Chase filed an apportionment claim against an independent contractor named Pierni that it had hired to perform ice and snow removal on the subject areas. Id. The court stated that “Pierni contracted to perform ice and snow removal services for Chase Bank, which had a nondelegable duty to keep its premises safe.” Gazo v. City of Stamford, 255 Conn. 245, 253, 765 A.2d 505, 510 (2001).

As set forth above, when presented with issues similar to the one in front of this Court, other jurisdictions have found that homeowners’ associations owe their members nondelegable duties. The decisions of the trial court and the Court of Appeals are inconsistent with the decisions of other jurisdictions that have already decided this issue. Like the courts in California, Florida, Georgia and Connecticut, this Court should find that Respondent owed Petitioner Tommy Hobbs a nondelegable duty so that it is liable for the actions of its independent contractor as if he had been an employee.

### CONCLUSION

Petitioners were injured by the actions of Respondent’s independent contractor. While it is true that a principal is not generally liable for the negligence of its independent contractor, “[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.’” Rock Hill Telephone Co., 363 S.C. at 390, 611 S.E.2d at 238. That exception should be recognized in the present case and the Court of Appeals erred in failing to do so.

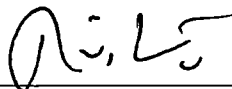
In Simmons, this Court codified the seemingly disparate South Carolina nondelegable duty

cases when it said “[t]he cited cases clearly illustrate that a person or entity entrusted with important duties in certain circumstances may not assign those duties to someone else and then expect to walk away unscathed when things go wrong.” 341 S.C. 32, 44, 533 S.E.2d 312, 318. Respondent’s Covenants and Restrictions created an affirmative duty to maintain Respondent’s common area, and maintain liability insurance. This was an important duty which was the core function of Respondent. It has previously been held that the duty perform maintenance is an important duty for which a principal may not escape liability by delegating to an independent contractor. See Durkin and Connor. Further, Respondent Tommy Hobbs was a member of Respondent when he was injured on Respondent’s common area. The common areas were intended for the use and benefit of Respondent’s members, and Respondent owed those members, including Petitioners, a duty of reasonable care when maintaining the common areas. A homeowners’ association member is an invitee on the common area. Respondent may not assign this important duty to an independent contractor and expect to walk away unscathed when its independent contractor injured Petitioner Tommy Hobbs. The decisions of the trial court and the Court of Appeals are inconsistent with existing South Carolina precedent. The duty of reasonable care when performing maintenance has already been found to be an important duty that cannot be delegated, and their rulings in this case are at odds with this existing precedent. Further, the decisions of the trial court and the Court of Appeals are at odds with the existing precedent that an invitee is owed a nondelegable duty of reasonable care.

Since this rule was announced in Conlin over 150 years ago, “the general rule of nonliability of an employer for the torts of an independent contractor or its employees has been eroded by so many well-recognized exceptions that ‘the rule is now primarily important as a preamble to the catalog of its exceptions.’ This is reflected in the Restatement of Torts, Second,

which states that the exceptions are so numerous, and have so far eroded the 'general rule,' that the rule can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." 41 Am. Jur. 2d Independent Contractors § 27. The appellate courts of this state have followed the national trend and carved out a number of exceptions to the general rule that a master is not liable for the acts of an independent contractor. See Simmons v. Tuomey, 341 S.C. 32, 42-43, 533 S.E.2d 312, 317-318. The Court should follow this trend in the present case and recognize that Respondent owed Petitioner a nondelegable duty when it performed maintenance on its common areas. Respondent has benefited from the work of its independent contractors and should not be allowed to walk away unscathed when they injure someone like Petitioner, especially when it is required to maintain liability insurance for just such an occurrence. The decisions of the trial court and the Court of Appeals are at odds with existing precedent and public policy. Therefore, the trial court's Order Granting Summary Judgment to Defendant Fairway Oaks Homeowners' Association should be reversed and the case remanded to the trial court.

RESPECTFULLY SUBMITTED,



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February 4, 2019

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

FEB 06 2019

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Edward W. Miller, Circuit Court Judge

Opinion No. 2018-UP-011 (S.C. Ct. App. Filed January 10, 2018)

Charles Thomas Hobbs and Mary Hobbs, ..... Petitioners,

vs.

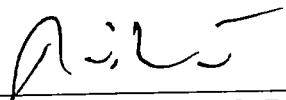
Fairway Oaks Homeowners Association, ..... Respondents,

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**PROOF OF SERVICE**

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I certify that I have served fifteen (15) copies of Petitioner's Brief and thirteen (13) copies of the Appendix on The Clerk of the South Carolina Supreme Court by mailing it, February 4, 2019, addressed to Daniel E. Shearouse, Post Office Box 11330, Columbia, SC 29211.



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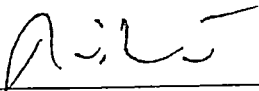
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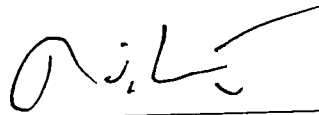
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I certify that I have served one (1) copy of the Petitioner's Brief on counsels addressed below, by depositing a copy of it in the United States Mail with postage prepaid on February 4, 2019.

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