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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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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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# REPLY BRIEF OF PETITIONERS

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### I. RESPONDENT HOMEOWNERS' ASSOCIATION OWED PETITIONERS A NONDELEGABLE DUTY OF REASONABLE CARE WHEN PERFORMING MAINTENANCE IN ITS COMMON AREAS IN THE PRESENT CASE

In its brief, Respondent raises the new argument that, even if the Court finds that a homeowners association owes its members a nondelegable duty of reasonable care when performing maintenance in its common areas, the ruling should only apply prospectively. Respondent argues that "[b]ecause such an exception would create a new nondelegable duty where there previously was none, the new duty could only be applied to actions arising after the Court decides the current case....In other words, Fairway Oaks cannot be held liable now for a duty it did not have at the time of Hobbs' injury." (Brief of Respondent Fairway Oaks Homeowners Association, pg. 26). When addressing newly raised arguments by a respondent, this Court has stated:

> "In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (S.C. 2000).

As a new argument that has not been previously raised to either the trial court, or the Court of Appeals, Respondent's argument that this Court's ruling could only apply prospectively should be accorded appropriate weight as set forth in I'On.

Further, when considered on its merits, Respondent's new argument is not applicable to the present case. Respondent cites to the case of Marcum v. Bowden for the premise that a newly created common law duty could only be applied prospectively. 372 S.C. 452, 643 S.E.2d 85

(2007); (Brief of Respondent Fairway Oaks Homeowners Association, pg. 26). However, as the Court states in Marcum, "the abolition of an affirmative defense does not create a new duty." Id at Foot Note 2. Black's Law Dictionary defines an "affirmative defense" as "a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if the allegations in the complaint are all true." Black's Law Dictionary, Eighth Edition, pg. 451. In its Answer, Respondent asserts seven defenses- one defense responsive to the paragraphs in Petitioners' Complaint and six affirmative defenses. Respondent's Fourth Defense states that "[t]he Defendant would show, upon information and belief, that any injuries or damages sustained by the Plaintiff, which are specifically denied, were the result of the acts or omissions of others not in the employ or control of this Defendant, and therefore, the Plaintiff cannot recover from this Defendant in any sum whatsoever." (Answer, A. pg. 18). Respondent's Fifth Defense states that "[s]uch injury or loss as the Plaintiffs sustained, if any, as alleged in the Complaint, was proximately caused and occasioned by the sole negligence, gross negligence, willfulness and wantonness of a third party, in failing to exercise due care and reasonable care for their own safety, which was the direct and proximate cause of injuries or losses suffered by the Plaintiff, if any, and without which the same would not have occurred. Therefore, the Defendant pleads the sole negligence, willfulness, wantonness, carelessness, recklessness, and gross negligence of a third party as a complete bar to this action against him." (Answer, A. pgs. 18-19). Respondent moved for summary judgment on the sole ground that it was not liable for Lee Lambright's ("Lambright") negligence because he was an independent contractor, and the trial court granted summary judgment on that ground. (Order Granting Summary Judgment, A. pp. 4-8). Respondent's defense that it is not liable for Lambright's acts because he is an independent contract is an affirmative

defense, and the abolition of this defense does not create a new duty. Therefore, the Court's recognition that Petitioners were owed a nondelegable duty would not apply prospectively.

In Simmons v. Tuomy Regional Medical Center, this Court dealt with the issue of whether a hospital was responsible for the negligent acts of its independent contractor emergency room physicians. 341 S.C. 32, 533 S.E.2d 312 (2000). Like the present case, in Simmons, the defendant moved for summary judgment on the grounds that it was not liable for the acts of its independent contractors. Id at 36, 314. In finding that a hospital owed a nondelegable duty to its patients when providing emergency services so that the hospital was liable for the negligent acts of its independent contractor physicians, the Court did not make its ruling only apply prospectively. Instead, the Court remanded that case to the Circuit Court and allowed the plaintiffs to move forward with their suits. Id at 53, 323. In a footnote, Respondent asserts that the holding in Marcum is controlling because it was decided after Simmons. (Brief of Respondent Fairway Oaks Homeowners Association, pg. 27, footnote 12).[1] However, the Court in Marcum neither mentions Simmons, nor addresses nondelegable duties. Further, as described above, Marcum specifically states that the "the abolition of an affirmative defense does not create a new duty." 372 S.C. 452, 643 S.E.2d 85, Foot Note 2. Like Simmons, in the present case, the Court should hold that Respondent owed Petitioners a nondelegable duty of reasonable care when performing maintenance in its common areas, so that it is liable for the negligent acts of its independent contractor.

[1] In Marcum, the Court found that adult social hosts are liable for harm caused by persons between the ages of 18 and 21 to whom they have served alcohol. 372 S.C. 452, 462, 643 S.E.2d 85, 90. The Court in Marcum made its ruling only apply prospectively. Id.

## II. THE CONTRACTUAL DUTY TO PERFORM MAINTENANCE IS AN ABSOLUTE DUTY, AND A PRINCIPAL MAY NOT AVOID LIABILITY BY DELEGATING THIS DUTY TO AN INDEPENDENT CONTRACTOR

Respondent had a duty to maintain its common area pursuant to its covenants and restrictions. (Covenants and Restrictions, Article VI, Section 12, A. p. 194). It was established in Durkin v. Hansen that the contractual duty to perform maintenance is an absolute duty. 313 S.C. 343, 437 S.E.2d 550 (Ct. App. 1993). Respondent argues that the contractual duty to perform maintenance is not an absolute duty, and instead, that the landlord-tenant exception as set forth in Durkin is based solely on the Residential Landlord Tenant Act. Respondent also argues that in the absence of similar statutes regarding homeowners association, a nondelegable duty should not exist. Respondent has a section of its brief entitled "Absent the RLTA, the independent contractor rule applies to landlord-tenant relationships, and maintenance is not a nondelegable duty." (Brief of Respondent Fairway Oaks Homeowners Association, pg. 14). Respondent states that "[t]he nondelegable duties in the landlord-tenant context arise out of the RLTA. No similar statute has been adopted that would apply to an HOA under the facts of this case." (Brief of Respondent Fairway Oaks Homeowners Association, pg. 16). Respondent further states in a footnote that "[a]lthough the Court of Appeals in Durkin cited both the RLTA and the language in the lease agreement as supporting finding a nondelegable duty, a mere agreement in a lease to repair the premises – even with notice – does not give rise to an action in tort for recovery of personal injuries." (Respondent's Brief, pg. 17, FN 8). In making these statements, Respondent ignores the plain language in Durkin. In Durkin, the court specifically notes the existence of the rental agreement obligating the landlord to make repairs and maintenance before noting that the landlord also has duties under the RLTA. 313 S.C. at 347-348, 437 S.E.2d. at 552. The court then states 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 (***Emphasis Added***). Further, the court cites as supporting authority 49 Am.Jur.2d Landlord and Tenant § 875 which states "'[A] landlord who undertakes to make repairs or improvements for the benefit of his tenant, ***whether he is obligated by law or by agreement with the tenant to do so***, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an independent contractor to do the work....'" Id at 348, 553 (***Emphasis Added***). The court also states "we find a material issue of fact exists as to whether Respondents breached their duty of care, ***assumed in the agreement***, by undertaking the cleaning of the carpets in the condominium even though the work was actually performed by an independent contractor." Id at 349, 553 (***Emphasis Added***). Finally, the Court states "Respondents cannot insulate themselves from ***liability which has been assumed by agreement*** and, additionally, imposed by statute, by the mere employment of an independent contractor. Id at 349, 554 (***Emphasis Added***). Despite Respondent's assertion otherwise, the Durkin court makes it clear that the landlord-tenant exception is not based on the RLTA alone, and can be based on a contractual duty- the same contractual duty present in this case. In addition to ignoring the plain language of Durkin, Respondent also ignores Conner v. Farmers and Merchants Bank, which was decided in 1963- long before the RLTA was passed. In Conner, a landlord was held liable for injuries sustained by a tenant who fell on a negligently repaired brick floor. 243 S.C. 132, 132 S.E.2d 385 (1963).[2]

[2] 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 this 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.

Instead of looking to the plain language of Durkin and Conner, Respondent cites Young v. Morrisey, which involved a fire due to defective electrical wiring. 285 S.C. 236, 329 S.E.2d 426 (1985). Respondent states that "[p]rior to the enactment of the RLTA, the South Carolina Supreme Court applied the independent contractor rule to shield a residential landlord from the negligence of an independent contractor in Young. (Brief of Respondent Fairway Oaks Homeowners Association, pg. 14). While it is strictly true that the landlord in Young was not found liable for the negligent acts of an independent contractor, Young does not stand for this premise put forth by Respondent. Rather, the respondent landlord in Young was also the general contractor who built the subject premises. 285 S.C. at 238-239, 329 S.E.2d at 427. The alleged negligent act was performed by an electrical subcontractor during construction of the premises. The appellants in Young did not argue that the landlord owed a nondelegable duty to its tenant when making repairs by virtue of their relationship as landlord and tenant. Rather, the appellants in Young argued that installing electrical wiring was inherently dangerous work and "assert that the respondent general contractors remain liable for torts occurring during inherently dangerous work." Id at 242, 429. This holding has no bearing on the present case, as it deals with a contractor's liability for latent defects caused by the negligent work of its subcontractor when constructing the subject premises.

Respondent cites Creighton v. Coligny Plaza Limited Partnership for the premise that "a landlord in a commercial lease is not liable for the conduct of an independent contractor even when it assumes a duty to maintain the premises." (Brief of Respondent Fairway Oaks Homeowners Association, pg. 15); 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998). Respondent states that "despite the landlord's assumption of the duty to maintain the property, this Court went on to hold that the independent contractor rule applied to shield the landowner from liability for the lawn care service's negligence." (Brief of Respondent Fairway Oaks Homeowners Association, pg. 16).

Creighton does not stand for the premise as stated by Respondent. In Creighton, the court does state "[t]he trial court correctly ruled the Partnership was not liable for any negligence on the part of D&M in maintaining the palms and jasmine at the entrance steps to Rainbow's End because D&M was an independent contractor." Id at 118, 521. However, the Court also includes footnote 5 at the end of this passage, wherein it states "[o]ne who hires an independent contractor to perform a nondelegable duty remains liable for the negligence of the independent contractor just as if the independent contractor were an employee. *Durkin*, 313 S.C. 343, 437 S.E.2d 550. This exception to the general rule of nonliability for the torts of an independent contractor was not presented to the trial court nor presented to this court on appeal. Thus, we do not reach the issue of whether the duty to maintain the entrance steps was a nondelegable duty for which the Partnership remained liable." Id at FN 5. The Court makes it clear that it is not making a finding regarding whether the landlord in Creighton had a nondelegable duty because the issue was not raised. Therefore, Respondent's attempt to cite it for this premise ignores the court's explicit language.

Respondent also states that Young stands for the premise that "prior to the enactment of the RLTA, a contractual obligation of a landlord to repair the premises did not give rise to a negligence action in tort[.]" (Brief of Respondent Fairway Oaks Homeowners Association, pg. 15). Further, Respondent states that "[h]ere, at best Hobbs presented evidence that Fairway Oaks contractually agreed to 'maintain' the common areas. Absent more, Hobbs cannot seek recovery for his personal injuries. See Young, supra; Timmons, supra." (Respondent's Brief, pg. 14). Respondent again misinterprets the meaning of Young as it dealt with a latent defect of which the respondent landlord was not aware. Id at 239-240, 428. Instead, the applicable law is set out in Connor, wherein the Court states that:

> "The delict charged here, however, is negligence on the part of the lessor in making repairs, and not a failure to make repairs as promised. A distinction is drawn in the decisions between the two situations, and it appears to be well established that where a lessor undertakes to repair or improve the leased premises and the work is done negligently, resulting in personal injury to the lessee, the lessor is liable for the damages so sustained. Negligence on the part of the lessor in making repairs or improvements is regarded as an act of misfeasance, subjecting him to tort liability for any resulting damages." 132 S.E.2d 385, 388 (S.C. 1963).

Further, the Court states that:

> "[w]hile the question here was not involved, our cited cases of Timmons and Pendarvis recognize an exception to the general rule of nonliability of the landlord for personal injuries resulting from defective conditions in the leased premises in those instances where, as stated in Timmons, 'the lessor actually undertakes to make the needed repairs and negligently does so-where there is misfeasance as distinguished from nonfeasance.'" Id at 389.

The present case deals with negligence on the part of Respondent's contractor in making repairs, not the failure to make repairs. As made clear in Connor, a tenant may recover for personal injuries that result from the negligence of a landlord or their agent when making repairs.[3]

## III. RESPONDENT FAILS TO SUBSTANTIVELY ADDRESS THE FACT THAT PETITIONER TOMMY HOBBS WAS AN INVITEE

As a member of Respondent, Petitioner Tommy Hobbs was an invitee while in Respondent's common areas. See Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc., 317 S.C. 200, 2014, 452 S.E.2d 619, 621 (Ct. App. 1994). "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

[3] See also Durkin wherein the court states that "where the landlord undertakes to repair or improve the demised premises, whether he is under an obligation imposed by a covenant on his part to repair or improve or not, he is required to exercise reasonable care in making such repairs or improvements, and is ***liable for injuries caused by his negligence or unskillfulness or that of his servants and employees in making them*** or in leaving the premises in an unsafe condition. 313 S.C. at 346-347, 437 S.E.2d at 552. (***Emphasis Added***).

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[4] 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 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). In its brief, Respondent states that "[f]or the same reasons, Hobbs' contention that he was an invitee is unavailing. Hobbs cites the 'common areas' exception - which applies to landlords, not to HOAs - to support his contention that he was an invitee and Fairway Oaks cannot rely upon the independent contractor rule to avoid liability for his injuries." (Brief of Respondent Fairway Oaks Homeowners Association, pg. 19). Respondent does not provide any support for this contention that Petitioner was not an invitee, and does not otherwise address this issue. Respondent makes no effort to explain why the holding in Landry is inapplicable to the current case, or what status Petitioner has other than an Invitee.[5] Respondent mentions the common area exception, however, this is not discussed in Petitioner's Brief. Despite repeating that Petitioner Tommy Hobbs was president of Respondent throughout its brief, Respondent states in a footnote that Petitioner Tommy Hobbs was not an employee of Respondent. (Brief of Respondent Fairway Oaks Homeowners Association, pg. 9). Further, while Respondent makes a cursory statement that Respondent

[4] See Hoover v. Broome, 324 S.C. 531, 535, 479 S.E.2d 62, 65 (Ct. App. 1996).

[5] It is also notable that Respondent fails to cite a single case from the entire country where a court has held that a homeowners association did not owes its members a nondelegable duty when performing contractual duties owed to its members.

Tommy Hobbs is not an invitee, Respondent does not address or dispute that an invitee is owed a nondelegable duty by a homeowners association when performing maintenance.

## IV. THE FACT THAT PETITIONER WAS PRESIDENT OF RESPONDENT AT THE TIME OF THE SUBJECT INCIDENT AND THE FACT THAT PETITIONER HIRED LAMBRIGHT DO NOT HAVE ANY BEARING ON THE SOLE ISSUE IN FRONT OF THE COURT

Respondent puts a great deal of emphasis on the facts that Petitioner Tommy Hobbs held the volunteer position of president of Respondent at the time he was injured, and the fact that Petitioner Tommy Hobbs hired the independent contractor who injured him. Neither of these facts have any bearing on the narrow issue before the Court.[6] Respondent moved for and was granted summary judgment on the narrow ground that it was not liable for the negligent acts of Lambright because he was an independent contractor. (Order Granting Summary Judgment, A. pp. 4-8). The relevant facts to the question in front of this Court are not disputed by either party- Petitioner Tommy Hobbs was injured by the negligence of Respondent's independent contractor on Respondent's common area, while the independent contractor was performing maintenance on behalf of Respondent which Respondent was obligated to perform. Oliver Wendell Holmes, Jr. stated that "[g]reat cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." N. Securities Co. v. U.S., 193 U.S. 197, 364–401 (1904). The facts that Petitioner Tommy Hobbs was president of Respondent, and that, as president, Petitioner Tommy Hobbs was the person who brought the

[6] It is questionable whether these facts would even be admissible at trial pursuant to Rules 402 and 403, *SCRE*.

broken tree limb to the attention of the local handyman, are irrelevant to the issue before the Court. While Petitioner repeats these facts over and over again, it never actually explains why they are relevant to the issue before the Court. These facts are simply repeated by Respondent because they sound bad on the surface. 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). The fact that he injured Petitioner while cutting a tree limb as opposed to performing one of the multitude of other jobs that he performed for Respondents does not change the nondelegable duty analysis. Neither does the fact that Petitioner Tommy Hobbs', in his volunteer position as president, was the person who made the call to Lambright. Further, the fact that Petitioner Tommy Hobbs was present because Lambright had asked him to help him carry a ladder to the site where the tree limb would be cut does not change the analysis. (Deposition of Lee Lambright, A. pg. 177, l. 18 – A. pg. 200, l. 2); See Hall v. Palmetto Enterprises II, Inc., of Clinton, 317 S.E.2d 140, 143 (S.C. App. 1984)(citing 57 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.'"). These facts repeatedly cited by Respondent are simply not germane to the issue before the Court, and should not be allowed to make the clear seem doubtful.

## CONCLUSION

As set forth in Petitioners' Brief and above, the decisions of the trial court and the Court of Appeals are at odds with existing precedent and public policy. Respondent owed Petitioners a

nondelegable duty when performing maintenance in its common areas and cannot escape liability by placing the work with an independent contractor. 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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**PROOF OF SERVICE**

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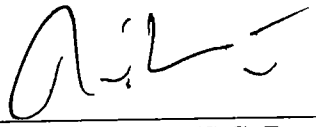
I certify that I have served fifteen (15) copies of Reply Brief of Petitioners on The Clerk of the South Carolina Supreme Court by mailing it, March 18, 2019, addressed to Daniel E. Shearouse, Post Office Box 11330, Columbia, SC 29211.



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**PROOF OF SERVICE**

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I certify that I have served one (1) copy of the Reply Brief of Petitioners on counsels addressed below, by depositing a copy of it in the United States Mail with postage prepaid on March 18, 2019.

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