THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-CP-24–01236

Jennifer Scott Harmon.....Appellant,

v.

Allen L. Fortner and Jason C. Griffin,.....Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On September 10, 2010, Appellant brought this action against Fortner Builders, L.L.C. (R.pp.). On December 16, 2010, Fortner Builders, Inc., answered through attorney Thomas E. Hite, III. (R.pp.).

Following discussions between counsel, on February 25, 2011, the Court signed a consent order permitting an amendment to name Respondent Allen Lee Fortner as defendant. (R.pp.). The amended summons and complaint was filed and served on or about March 7, 2011. (R.pp.). On March 24, 2001, Respondent Allen Lee Fortner answered through attorney Jack D. Griffith. (R.pp.).

Following discovery, on December 19, 2011, the Court signed a consent order permitting an amendment to add Respondent Jason Chad Griffin as defendant. (R.pp.). The second amended summons and complaint was filed and served on or about December 13, 2011. (R.pp.). On February 15, 2012, Respondents Allen Lee Fortner and Jason Chad Griffin answered through Jack D. Griffith. (R.pp.).

After jury selection on October 1, 2012, the case proceeded to trial before The Honorable Frank R. Addy, Jr., on October 3, 2012. (R.pp.). After the close of the evidence on October 4, 2012, about 12:35 pm, Appellant moved for a directed verdict as to negligence and proximate cause as well as a directed verdict as to Respondents' comparative fault claims. The Court denied those motions. (R.pp. 219, lines 22-25) (R.pp. 220-224) (R.pp. 225, lines 1-11).

On October 4, 2012, about 3:55 pm, the jury began deliberations. At 4:00 pm, the jury sent a question and the Court recharged the jury about pre-existing conditions. At 4:30

pm, the jury sent another question asking, "If the first question is 'no', are we done?" The Court charged the jury and sent the jury back to deliberate. At 4:45 pm, the jury returned a verdict answering the first question with "no." (R.pp.). At 5:00 pm, Appellant asked for ten days to file post trial motions. The Court granted Appellant's request. (R.pp).

On October 15, 2012, Appellant filed and served post trial motions and memorandum in support of her request for judgment notwithstanding the verdict, new trial absolute and new trial under the thirteenth juror doctrine. (R.pp.). On October 23, 2012, Respondents filed and served their opposing return and memorandum. (R.pp.). On November 21, 2012, the Court executed and delivered its order denying Appellant's post trial motions. (R.pp.).

On December 7, 2012, Appellant served Notice of Appeal on all parties. (R.pp).

FACTS

At the time of the incident, Appellant was a good tenant (R.pp. 36, lines 15-16) who rented a house from Respondent Fortner. (R.pp. 26, lines 12-16) (R.pp. 34, lines 23-25) (R. pp. 35, line 1) (R.pp. 63, lines 20-25) (R.pp. 64, line 1) (R.pp. 65, line 1) (R.pp. 66, line 1). Respondent Fortner was responsible for the repair of a water heater in Appellant's rental home. (R.pp. 26, lines 17-22). Respondent Fortner contacted Respondent Griffin to help him with the repair. (R.pp. 26, lines 23-25) (R.pp. 27, lines 1-4) (R.pp. 44, lines 24-25). Respondent Griffin was acting as Respondent Fortner's agent and/or employee at the time of the incident. (R.pp. 45, lines 1-7).

Before the incident, a ladder had been in Appellant's laundry room and leaned against the wall over a circuit breaker panel for more than 2 weeks without moving. (R.pp. 64, lines 18-22) (R.pp. 68, line 1) (R.pp. 69, lines 1-4). The feet of the ladder were about sixteen

inches from the wall. (R.pp. 69, lines 5-25) (R.pp. 70, lines 1-7).

At the time Respondents came to Appellant's rental house to repair the water heater, Respondents were present no more than 50 minutes. (R.pp. 44, lines 2-3) (R.pp. 46, lines 1-3). During that time, Respondents walked through the laundry room numerous times within several feet of the ladder (R.pp. 27, lines 5-9) (R.pp. 46, lines 4-6) saw it leaning against the wall (R.pp. 27, lines 10-13) (R.pp. 45, lines 11-19) (R.pp. 46, lines 7-8), did not reposition the ladder in the belief that it was not properly set against the wall and never said anything to Appellant about the ladder being in an unsafe or unstable condition. (R.pp. 27, lines 23-25) (R.pp. 28, lines 1-4) (R.pp. 31, lines 8-12, 17-25) (R.pp. 46, lines 13-15, 24-25) (R.pp. 47, lines 1-4). Respondents were aware the ladder was leaning over the circuit breaker panel. (R.pp. 45, lines 11-19). Respondents did not observe Appellant do anything to cause the ladder to fall. (R.pp. 31, lines 3-7) (R.pp. 50, lines 6-15). Appellant testified she did not do anything to cause the ladder to fall. (R.pp. 78, lines 8-9). Respondents did not ask for nor receive any assistance from Appellant. (R.pp. 32, lines 1-3) (R.pp. 38, lines 14-16) (R.pp. 49, lines 15-20) (R.pp. 67, lines 8-9). Respondents agreed Appellant was not involved in the repair of the water heater and did not assist in any way. (R.pp. 49, lines15-20). Most important, Respondent Griffin testified Appellant could not anticipate he would be reaching for the circuit breaker in the manner that he did. (R.pp. 49, lines 21-24).

At Respondent Fortner's direction, Respondent Griffin reached for the circuit breaker panel by putting his right arm between the wall and ladder to reach for the circuit breaker panel. (R.pp. 28, lines 5-10) (R.pp. 45, lines 8-10) (R.pp. 45, lines 20-24). At the same time, Appellant was standing in front of her laundry machines tending to some clothes and with

her back to the ladder and Respondent Griffin. (R.pp. 66, lines 11-24) (Plaintiff's #7) (R.pp. 70, lines 8-19). When reaching for the circuit breaker, Respondent Griffin recognized ladder was more upright than he would expect, but he reached for the circuit breaker anyway. (R.pp. 49, line 1) (R.pp. 50, lines 1-5). Respondent Griffin admittedly caused the ladder to fall when he reached between the wall and ladder to turn on the circuit breaker. (R.pp. 28, lines 22-24) (R.pp. 47, lines 23-25) (R.pp. 48, line 1) (R.pp. 50, lines 16-18) (R.pp. 55, lines 3-6) (R.pp. 78, lines 1-7). Appellant turned and was struck in the arm and face by the ladder. (R.pp. 56, lines 15-21) (R.pp. 70, lines 17-25) (R.pp. 71, lines 1-2). After Respondent Griffin knocked the ladder over, Respondent Griffin saw the ladder strike Appellant on the arm and face. (R.pp. 48, lines 1-9) (R.pp. 49, lines 6-8) (R.pp. 59, lines 14-20).

Both Respondents witnessed a contemporaneous scream, wound to Appellant's nose, blood collected on a tissue Appellant held to the wound on her nose and a scab two weeks later. (R.pp. 28, line 25) (R.pp. 29, lines 1-6) (R.pp. 30, lines 11-22) (R.pp. 41, lines 9-14) (R.pp. 43, lines 3-7, 12-15) (R.pp. 49, lines 12-14) (R.pp. 57, lines 16-20) (R.pp. 60, lines 1-13) (R.pp. 71, lines 3-25). Appellant testified that blood was running down her face. (R.pp. 99, lines 4-8). Appellant eventually got the bleeding to stop. (R.pp. 72, lines 1-7). Appellant also has a small scar. (Plaintiff's 10).

After the incident, there was additional testimony of the existence of cut, blood, bruises, black eyes, laceration and contusion to her nose and face from Respondents, lay witnesses and medical experts. (R.pp. 117, lines 21-25) (R.pp. 118, lines 1-23) (R.pp. 121, lines 6-16) (R.pp. 196, lines 12-19).

According to Appellant's expert, the ladder, just when falling from a pure vertical

position, could cause up to 28 lbs of force. (R.pp. 178, lines 11-15). More important, this force would actually be more because Respondent Griffin caused additional force when his armed pushed the ladder over. (R.pp. 176, lines 3-6).

Most important, there was *absolutely no testimony by the Respondents* that the placement and the position of the ladder caused or contributed to the accident or that the ladder was leaning in a precarious or dangerous position.

ARGUMENTS

I. DID THE COURT ERR BY RULING APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT REGARDING LIABILITY WHERE RESPONDENTS ADMITTED NEGLIGENCE, ADMITTED TO PROXIMATELY CAUSING THE LADDER TO FALL AND TESTIFIED, ALONG WITH LAY PERSONS AND AN EXPERT, TO OBJECTIVE SIGNS OF INJURY AFTER THE INCIDENT.

A. LAW.

To succeed in a negligence cause of action, the plaintiff must establish (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. Moore v. Weinberg, 373 S.C. 209, 220-21, 644 S.E.2d 740, 746 (Ct. App. 2007).

"Proximate cause requires proof of both causation in fact and legal cause." Small v. Pioneer Mack, Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App.1997).

Proximate cause does not mean the sole cause. Wallace v. Owens-Illinois, Inc., 300 S.C. 518, 389 S.E.2d 155 (Ct. App. 1989). The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury. Id.

"Legal cause is proved by establishing foreseeability." Id. The test of foreseeability is whether the injury is the natural and probable consequence of the alleged negligent act. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

Ordinarily, legal cause is a question of fact for the jury. Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992).

"Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). "The particular facts and circumstances of each case determine whether the question of proximate cause is for the court or for the jury." Id.

B. DISCUSSION:

1. Negligence (Duty and Breach).

The evidence is only susceptible of one inference. Respondents owed Appellant a duty and breached that duty and, therefore, were negligent.

Regarding duty, Respondent Fortner as a landlord and Respondent Griffin as his admitted agent/employee, had a duty not to harm Appellant, the tenant, while they were repairing the water heater. See e.g., McQuillien v. Dobbs, 262 S.C.386, 204 S.E.2d 732 (1974) (landlord must use due care if he undertakes to do work on leased premises). Accordingly, the Court found Respondents owed a duty. (R.pp. 219, lines 13-18).

The question then turns to breach of duty. No doubt, Respondents breached that duty by knocking over the ladder. There was no testimony that the ladder, as it was positioned against the wall, was dangerously placed or was able to fall on its own. In fact, Respondent Griffin testified that the ladder was not "precariously perched" or "unsafe" (R.pp. 46, lines

9-15) and Respondent Fortner was completely silent on the issue. Even though Respondent Griffin testified that the ladder only appeared "a little more straight up than it should have been", he still "reached for the circuit breaker anyway." (R.pp. 50, lines 1-4). It required a force and that force admittedly was exerted by Respondent Griffin. (R.pp. 50, lines 16-18).

Even the Court acknowledged Respondents' breach by saying, "I do find however that the plaintiff has demonstrated competent evidence in which a jury, sufficient competent evidence from which a jury may reasonably conclude that the defendants in this case acted *negligently*." (R.pp. 219, lines 5-9).

Given Respondent Griffin's observations of the condition of the ladder at the time, and given he could have reached from the front of the ladder and avoid knocking it over and given he chose to reach as he did and unreasonably exposed Appellant to a foreseeable risk, because he knew Appellant was in harm's way, Respondents were negligent.

2. Liability (Proximate Cause).

Based on Respondents' own testimony, Respondent Griffin's right arm was the but for and legal cause for the ladder to fall. Given Respondents' were aware Appellant was in the same room across from the ladder, knocking over the ladder created a foreseeable risk of injury to Appellant. See e.g., Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753 (1977) (negligence may be deemed a proximate cause when without such negligence an injury would not have occurred or could have been avoided).

Most important, there was no evidence presented Appellant did anything to put the ladder in motion. Respondents testified that the ladder, as it rested against the wall, was not precarious, unsafe or presented a danger.

3. Damages.

The only reasonable inference to be drawn from the evidence was that the ladder cause some injury to Appellant. See e.g., Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998) (S.C. Court of Appeals affirmed trial court's grant of directed verdict of liability and damages where there was contemporaneous lay testimony and expert medical testimony to causation of injuries).

In Collins, the S.C. Court of Appeals found that the evidence at least show some injury and a strain on credulity to say the plaintiff did not sustain any injury. Id. at 301, ___.

In this case, even Respondents testified to observation of some injury, the emergency room doctor testified to objective signs of injury and several lay witnesses testified to contemporaneous observations of some injury. No other reasonable inference can be drawn – the ladder caused Appellant to suffer some injury (even if not all injuries she claimed).

II. BECAUSE THERE IS NO EVIDENCE IN THE RECORD FROM WHICH EVEN AN INFERENCE OF NEGLIGENCE BY APPELLANT CAN BE DRAWN, THE COURT ERRED BY FAILING TO GRANT APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO RESPONDENTS' COMPARATIVE FAULT DEFENSE.

A. LAW:

Defendant bears the burden of proving comparative fault. Simmons v. Atlantic Coast Line R. Co., 250 S.C. 199, 157 S.E.2d 172 (1967).

Defendant must show a plaintiff had a duty, breached that duty and proximately caused her own damages. Taylor v. Bryant, 274 S.C. 509, 265 S.E.2d 514 (1980).

B. DISCUSSION:

On the issue of alleged comparative fault, there is no evidence of it. During cross examination, Appellant admitted to placing the ladder against the wall in the laundry room, and it

sat there for a couple weeks during domestic activity without incident. That does not create a duty and does not give reason to strain breach of duty and proximate cause beyond legal limits.

Placement of the ladder as a source of Appellant's duty and breach of duty is remote, conjectural and unfair. Under the circumstances of this case, Appellant could not expect that Respondent Griffin would reach of the circuit breaker panel in the manner in which he did or even use the circuit breaker panel given that she was not involved in the repair work, was not aware of how Respondents would repair the water heater or was expected by Respondents to know what it would take to repair the water heater. See e.g., Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003) (One does not always owe a duty of care to others); Snipes v. Piggily Wiggily St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977) (When assessing risk to determine if a duty exists, if a risk is remote or conjectural, it is unfair and inefficient to expect that risk to be considered); Carter v. Anderson Mem'l Hosp., 284 S.C.229, 233, 325 S.E.2d 78, ___ (Ct. App. 1985) (When weighing evidence by a preponderance, a mere possibility in the sense of a greater than zero percent likelihood of an event is inadequate because such a showing does not rise above "mere speculation and conjecture."). Assuming Respondents' assert that Appellant's placement of the ladder was a *possible* cause of the ladder to fall does not satisfy Respondents' burden of proof and the issue of comparative fault should not be submitted to the jury for consideration. See e.g., Messier v. Adicks, 251 S.C. 268, 161 S.E.2d 845 (1968).

Actually, Respondents testified the ladder was not precariously perched, did not present a danger and Appellant did nothing to cause or contribute to the ladder to fall. Further, Respondents admitted that Respondent Griffin bumped the ladder causing it to fall and was aware of the ladder's position against the wall before he reached to turn on the circuit breaker. Respondents presented NO evidence that the manner in which Appellant placed the ladder against the wall was improper nor that the manner in which Scott placed the ladder against the wall caused it to fall.

Also, Appellant was not engaged in the repair of the water heater nor advised as to what

steps would be taken to repair the water heater. There was no evidence she had an expectation or could reasonably foresee that she knew Defendants would access the circuit breaker panel.

Allowing the jury to entertain a comparative fault defense improperly permitted the jury to considered what was only "possible" and speculate. "Reasonable probability" is the standard and Respondents did not present any evidence, to a reasonable probability, that Appellant's placement of the ladder caused it to fall. Again, as Dr. Slimmer testified, in order for the ladder to fall, it would require an external force, and that force would be about the same regardless of which side of the ladder was placed against the wall.

III. BECAUSE THE JURY, BY ITS VERDICT, FOUND APPELLANT DID NOT MEET HER BURDEN OF PROVING RESPONDENTS WERE NEGLIGENT AND THAT RESPONDENTS' NEGLIGENCE DID NOT PROXIMATE CAUSE APPELLANT TO SUFFER SOME INJURY, THE TRIAL COURT ERRED BY FAILING TO GRANT APPELLANT'S POST TRIAL MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL ABSOLUTE AND NEW TRIAL PURSUANT TO THE THIRTEENTH JUROR DOCTRINE.

A. LAW:

Regarding a motion for JNOV, in determining whether a motion for judgment notwithstanding the verdict should be granted, the evidence and all reasonable inferences that can be drawn therefrom must be considered in the light most favorable to the party opposing the motion and against the party making it. Ellison v. Pope, 290 S.C. 100, 348 S.E.2d 367 (Ct. App. 1986). The motion should be refused if more than one reasonable inference can be drawn from the evidence. Id.

Regarding a motion for new trial absolute, a trial judge in his discretion may order a new trial when it appears necessary to prevent injustice. S.C. State Hwy. Dept. v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976).

Regarding a new trial under the thirteenth juror doctrine, the trial court may grant a

new trial based on its view of the facts. Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. Id. The court may weigh the evidence even though it is not permitted to do so in considering a directed verdict motion. See Buxton v. Thompson Dental Co., 307 S.C. 523, 528, 415 S.E.2d 844, 848 (Ct. App. 1992)

B. DISCUSSION:

1. JNOV.

The trial court erred by failing to grant JNOV as to Respondents' liability as well as Respondents' comparative fault claim. Given all the facts and circumstances in this case, the only reasonable inference is that Respondents had a duty, breached that duty and proximately caused Appellant to experience some (even if not all) damages. The trial court found Respondents owed Appellant a duty as a matter of law. Respondents' bump of the ladder created a foreseeable risk which led to the ladder hitting Appellant in the arm and face as she turned around. At the same time, there was nothing beyond conjecture and unfairness when permitting the jury to consider comparative fault simply for the placement of a ladder against the wall and without any actual evidence of negligence or proximate cause on the part of Appellant.

2. New Trial Absolute.

The trial court erred by failing to grant a new trial absolute. Given all the facts and circumstances, how can anyone say that the trial court permitted justice to be served? Given Respondents' apparent liability for at least some damages, the trial court should not have

permitted the jury to consider whether Respondents' were liable.

3. New Trial Under the Thirteenth Juror Doctrine.

The trial court erred by failing to grant a new trial under the thirteenth juror doctrine. The trial court should have considered the facts as presented, realized Respondents were liable to some degree and granted a new trial based on the jury's answer to the first question on the verdict form. Appellant believes the trial court permitted the issues of Respondents' negligence and Appellant's purported comparative fault to go to the jury in hopes that the jury would find shared responsibility with most responsibility falling upon Respondents. When that did not happen, Appellant should have been granted a new trial.

4. Errors in Trial Court's Order.

In denying Appellant's post trial motions and on the question of Respondents' liability, the trial court held that "both Plaintiff and Defendants submitted conflicting evidence on the issues of breach and proximate cause." (R.pp.). This statement is not supported by the record. There was absolutely no evidence presented that Appellant had a duty, breach a duty and proximately caused the ladder to fall.

Further, the trial court held that "Defendants presented evidence that Respondent Griffin acted reasonably and with due care in reaching for the circuit breaker." (R.pp). This statement is not supported by the record. Respondent Fortner did not even comment on this topic. As for Respondent Griffin, he only testified that he reached between the ladder and the wall. He did not offer any testimony that this method was a reasonable method given the circumstances before him at that time. In fact, he admitted that he could have reached between the steps of the ladder and avoiding knocking the ladder over. To the contrary, the

only evidence is that Respondent Griffin did not act reasonably and caused the ladder to fall.

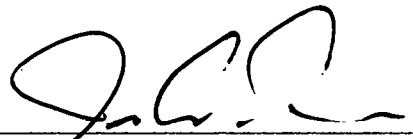
Further, the trial court found that the jury "may not have attributed Plaintiff's headaches, facial pain, neuralgia, and post concussive syndrome to that negligence." (R.pp.). The trial court justifies its ruling by saying Appellant was not entitled to a finding of damages because the jury may not have believed *all her damages* proximately flowed from Respondents negligence. This is a misstatement of the law. Appellant only has to prove that she experienced some injury. Appellant provided uncontroverted and contemporaneous testimony through Respondents' own mouths, from two lay witnesses and from the emergency room physician who observer clinically objective signs of injury to her face and, therefore, some injury. See e.g., Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). Even the trial court acknowledged, despite its contrary ruling, that Respondents did suffer some injury. (R.pp).

Last, the trial court held that "[d]efendants presented evidence that Plaintiff placed the ladder against the wall, and that her positioning of the ladder contributed to its falling and striking her." (R.pp). This statement is not supported by the record. Respondent Fortner never testified to any subject matter even remotely close to this statement. Respondent Griffin never testified to any subject matter even remotely close to this statement. The only testimony regarding the placement of the ladder came from Appellant when she admitted to placing the ladder against the wall. The only testimony regarding the positioning of the ladder came from Respondent Griffin when he testified that it appeared more upright than normal but, at the same time, was not precariously placed or presented any danger.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court.

Respectfully submitted,



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