THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-2300

Yossi Haina,

Appellant,

v.

Beach Market, LLC, Respondent.

INITIAL BRIEF OF APPELLANT

Marshall L. Horton, Esq., SC Bar No. 73891
Lindsay Y. Goodman, Esq., SC Bar No. 100273
Post Office Box 3766
Bluffton, South Carolina 29910
(843) 757-6190
ATTORNEYS FOR APPELLANT

Other Counsel of Record:

Stafford John McQuillen, III, Esquire
John H. Tiller, Esquire
Haynesworth Sinkler Boyd, PA
Post Office Box 340
Charleston, South Carolina 29402
Attorneys for Respondent
843.722.3366
843.722.2266 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

Under South Carolina premise liability law, does Defendant Beach Market have a duty to warn Plaintiff Yossi Haina, a business invitee hired by the Defendant, of a dangerous condition that exists on a roof when Defendant Beach Market has actual knowledge of the dangerous condition and specifically instructs Plaintiff Yossi Haina to physically be on the roof?

STATEMENT OF THE CASE

This current action is a negligence action brought by Plaintiff Mr. Haina for injuries he suffered on the premises of the Defendant Beach Market, LLC. On May 26, 2011, Yossi Haina filed his summons and complaint against Beach Market, LLC in the Beaufort County Circuit Court. Plaintiff's complaint contains two causes of action, both of which are based upon the negligence theory of premise liability. Beach Market, LLC, in its timely answer, set forth a general denial as well as other related defenses.

Defendant filed a Motion for Summary Judgment on December 27, 2011 alleging "that there is no genuine issue of material fact for trial because Plaintiff cannot prove the Defendant had a duty to instruct or supervise him and any alleged dangerous condition was open and obvious."

On March 27, 2012, the Defendant's Motion for Summary Judgment was granted by The Honorable Carmen T. Mullen.

The Plaintiff filed their Motion to Alter, Amend, or Reconsider Judgment on May 3, 2012. The Plaintiff's Motion to Alter, Amend, or Reconsider was denied by the Honorable Stephanie P. McDonald and the Plaintiff's received written notice of entry of this judgment on January 10, 2013 (both parties consented to Judge McDonald hearing the Motion to Alter, Amend, or Reconsider Judgment). On January 21, 2013 the Plaintiff served the Notice of Appeal on the Defendant.

Prior summary judgment being granted, the parties had substantially completed written discovery. The parties have completed depositions of all parties with knowledge of admissible, relevant facts concerning the events that led to Mr. Haina's injuries. Although no doctors depositions have been taken, no medical testimony seems to be required for the Court to consider the issues at hand.

FACTS

This action concerns injuries that Plaintiff Mr. Haina suffered on August 17, 2010 when he slipped on the Defendant's metal roof (that was slippery due to an accumulation of foliage) and fell.

Mr. Haina makes a living as a handyman and frequently does miscellaneous work on the premises of Beach Market. *Deposition of Yossi Haina*, pg. 14, lines 17 – 25, pg. 15, lines 1-18. Mr. Jay Stever ("Mr. Stever"), an owner of Beach Market, occasionally hired Mr. Haina to do various projects. *Deposition of Jay Stever*, pg. 7, lines 20-22, pg. 8, lines 1-22.

On the morning of August 17, 2010, Mr. Haina arrived at the premises of Beach Market at or around 3:00 a.m. for the purposes of drilling holes in the concrete sidewalks of the premise of Beach Market. *Deposition of Yossi Haina*, pg. 16, lines 3-16; pg. 17-18. Mr. Stever was at the premises of Beach Market that morning. *Deposition of Jay Stever*, pg. 10, lines 4-15; pg. 11. It is conceded that Mr. Haina was a business invitee. *Defendant's Memorandum in Support of its Motion for Summary Judgment*, Pg. 3.

After Mr. Haina was finished drilling holes in the concrete, Mr. Stever asked Mr. Haina to fix a leak in the roof. *Deposition of Yossi Haina*, pg. 18, lines 6-23; pg. 19, lines 20-25; pg. 23 lines 24-25; pg. 24 lines 1-8; *Deposition of Jay Stever*, pgs. 12 – 15, pgs. 28-29.

Mr. Stever knew that the roof was in a dangerous condition that morning because of an accumulation of foliage that made the metal roof very slippery. According to Mr. Stever, when the metal roof was dry, it acted as a kind of abrasive and there was no problem walking on it; however, when it was wet, it was like walking on ice because of a film that was caused by foliage. *Deposition of Jay Stever*, pg. 18, lines 19-25; pg. 19, lines 1-5. Mr. Stever had full knowledge that the roof was

very slippery because of it being wet and because of the film left by the foliage that accumulates on the metal roof. *Id.*

Mr. Stever did not warn Mr. Haina of the condition of the roof, nor did he instruct Mr. Haina to wait until the roof was no longer wet to perform his duties.

Mr. Stever had full knowledge of the exact route that Mr. Haina was going to take to access the roof, and testified regarding the exact route that Mr. Haina must take in order to reach the location on the roof that needed to be repaired. *Deposition of Jay Stever*, pgs. 36-38, Plaintiff's Exhibit 1, Defendant's Exhibit 1.

Mr. Stever testified that Mr. Haina was on the metal roof when he slipped because there were skid marks actually on the roof and the gutter was bent. *Deposition of Jay Stever*, pg. 34, lines 10-15.

Mr. Haina fell from the roof on the Defendant's premises while he was attempting to do the work that Mr. Stever requested. *Deposition of Yossi Haina*, pgs. 20-26.

Mr. Haina suffered a head injury and was mentally dazed immediately after the fall. *Deposition of Jay Stever*, pg. 21, lines 22-25; pg. 22, lines 1-5. Other than Mr. Haina, there were no witnesses to Mr. Haina's fall. *Deposition of Yossi Haina*, pg. 23, lines 20-23.

Mr. Haina suffered tremendous injury as a result of this fall.

ARGUMENT

I. DEFENDANT BEACH MARKET HAD A DUTY TO WARN PLAINTIFF YOSSI HAINA, A BUSINESS INVITEE HIRED BY THE DEFENDANT, OF A DANGEROUS CONDITION THAT EXISTED ON THE ROOF WHEN THE DEFENDANT BEACH MARKET HAD ACTUAL KNOWLEDGE OF THE DANGEROUS CONDITION AND SPECIFICALLY INSTRUCTED THE PLAINTIFF TO PERFORM WORK ON THE ROOF.

Defendant Beach Market is liable to Plaintiff Mr. Haina on account of their negligence for failing to warn the Plaintiff of the dangerous condition of the roof. Beach Market owed Mr. Haina a duty of care by virtue of Mr. Haina's status as a business invitee. Beach Market breached this duty of care by *failing to warn* him of the slippery conditions on the roof when Beach Market instructed Mr. Haina to get onto the roof. Mr. Haina's damages were caused by Beach Market's breach of this duty.

A. Standard of Review: Summary Judgment.

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. *City of Columbia v. American Civil Liberties Union, etc., et al.*, 323 S.C. 384 (1996). *See* Rule 56, SCRCP. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non–moving party. *Id.; Manning v. Quinn*, 294 S.C. 383 (1988). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-331 (2009).

B. Duty to Warn: The Defendant Beach Market owed Mr. Haina a duty to warn him of the dangerous condition of the roof.

Beach Market owed Mr. Haina a duty of care by virtue of Mr. Haina's status as a business invitee and was required to warn him of the dangerous conditions of the slippery roof. A property

owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. *Peterson v. Porter*, 389 S.C. 148, 153 (Ct. App. 2010), *citing Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256,* (Ct.App.2004). The traditional "no duty to warn of the obvious" rule has been modified in South Carolina to hold that a property owner is liable for injuries to an invitee, despite an open and obvious defect, if the owner should anticipate that the invitee will nevertheless encounter the condition, or that the invitee is likely to be distracted. *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 125 (1991) (where a Plaintiff/ invitee was injured on a bar stool that did not have a seat, the S.C. Supreme Court found that the Defendants should have anticipated the harm despite the open and obvious condition of the danger and the Defendant was liable on account of their failure to warn), *also see Creech v. South Carolina Wildlife and Marine Resources Dept.*, 328 S.C. 24 (1997) (where a Plaintiff fell off of a public dock because railing was only located on part of the dock, the S.C. Supreme found that the lack of railing on the dock was an open and obvious condition and the Defendant should have "anticipate[d] the harm despite such knowledge or obviousness," thus the Defendants were liable on account of their failure to warn).

An example of the application of this duty to warn is found in *Meadows v. Heritage Village Church and Missionary Fellowship, Inc.*, 305 S.C. 375 (1991). In this case, the Plaintiff slipped and was injured on wet grass on the premises of a hotel. The Plaintiff had the choice of a paved driveway or a sidewalk, but chose to use the grass path. The S.C. Supreme Court decided that the wet grass was an open and obvious condition (hence triggering a duty to warn). Applying the requisite rules in reference to open and obvious conditions, the Court inquired as to whether the Defendant could anticipate the harm that the wet grass could cause to the Plaintiff. The Court found

that the Defendant could not reasonably foresee that the Plaintiff would cross the wet grass as opposed to the paved walkways, thus the Defendant was not liable for failing to warn. *Id.* at S.C. 377-378.

Another example of the S.C. Supreme Court applying the duty to warn is found in, 328 S.C. 24. In *Creech*, a Plaintiff fell off of a public dock because the railing was only located on part of the dock. The S.C. Supreme Court found that the lack of railing on the dock was an open and obvious condition. Next, the Court determines whether the Defendant should have "anticipate[d] the harm despite such knowledge or obviousness." The Court found that there was "ample evidence that the [Defendant] had been warned the lack of safety rails could present danger to people fishing from the dock...," thus found that the Plaintiff was not barred from recovering on the basis that the Defendants could anticipate that individuals would encounter the dangerous condition and hence the Defendants had a duty to warn. *Id.* at 32-33.

The case of *Peterson*, 389 S.C. 148, a case relied upon heavily by the Defendant in this case, is a case that further illustrates how this particular duty to warn operates. In *Peterson*, the Plaintiff was a business invitee workman who fell off the roof of a residential structure. The Court found that there was no evidence of any defect or dangerous condition on the Defendants' property; hence, the Defendant could not anticipate the harm that the roof could cause the Plaintiff because there was no evidence presented that that the Defendants had any reason to anticipate that anyone would fall from the roof. *Id.* at 153. Specifically, the Court finds that there "is no evidence of dangerous or defective conditions on the [Defendants' property]." *Id.* at 154. There was no dangerous condition that the Defendants could even warn the Plaintiff about, and as such the Court affirmed a ruling of summary judgment against the Plaintiff.

The facts of the case at hand are relatively simple, and they seem to establish that the Defendant had a duty to warn the Plaintiff about the dangers on the roof.

- Mr. Haina was a business invitee on the Defendant's premises. *Deposition of Yossi Haina*, pg. 16, lines 3-16; pg. 17-18; *Defendant's Memorandum in Support of its Motion for Summary Judgment*, Pg. 3.
- The Defendant asked Mr. Haina to go onto the roof that morning and knew the exact path that he would take in traversing the roof. The Plaintiff has established facts well past the required showing that the Defendants "reasonably anticipate" that the Plaintiff would encounter the dangerous condition, the facts show that the Defendant had actual knowledge of that the Plaintiff would encounter the dangerous condition. *Deposition of Yossi Haina*, pg. 18, lines 6-23; pg. 19, lines 20-25; pg. 23 lines 24-25; pg. 24 lines 1-8; *Deposition of Jay Stever*, pgs. 12 – 15, pgs. 28-29; *Deposition of Jay Stever*, pgs. 36-38, Plaintiff's Exhibit 1, Defendant's Exhibit 1.
- The Defendant was aware that a dangerous condition existed on the roof, namely that because of the accumulated foliage on the metal roof that the roof was "as slick as ice." *Deposition of Jay Stever*, pg. 18, lines 19-25; pg. 19, lines 1-5.
- The Defendant did not warn Plaintiff Haina about the dangerous condition.
- Plaintiff Haina fell off the roof because the roof was slippery. *Deposition of Jay Stever*, pg. 34, lines 10-15; *Deposition of Yossi Haina*, pgs. 20-26.

The facts as they exist in this case support Mr. Haina's claim for negligence on the basis for failure to warn.

C. The Circuit Court erred in granting summary judgment in favor of the Defendants by failing to acknowledge South Carolina law regarding a landowner's duty to warn.

The Circuit Court erred in granting summary judgment in favor of the Defendants by failing to acknowledge South Carolina law related to the duty to warn of dangerous conditions. Judge Mullen's Order Granting Summary Judgment states, "I find that the condition of the premises in question were open and obvious. After considering all material provided to me and the case law relied upon by the parties, I find that the plaintiff cannot prove that defendant Beach Market owed the plaintiff a duty to instruct or supervise him, and, therefore, the defendant is entitled to summary judgment as a matter of law." *Order Granting Summary Judgment*, Pg. 1.

This ruling ignores well established South Carolina law in which landowners have the duty to warn business invitees of any dangerous, albeit open and obvious, condition if they have reason to believe that the business invitee will encounter the dangerous condition.

In the case at hand, the facts show that the Defendant knew of a dangerous condition, they knew that the Plaintiff would encounter the dangerous condition, and the Defendant did not warn the Plaintiff of that dangerous condition. Under South Carolina law, the facts of this case support a finding of negligence against the Defendants and summary judgment against the Plaintiff was improperly granted.

D. The Circuit Court errs in granting summary judgment using an erroneous standard of a duty to "instruct or supervise."

The Court further errs in basing its finding on the fact that the Plaintiff cannot prove that he was owed a duty to "instruct or supervise." The Plaintiff was owed a duty to warn under *Callander* and subsequent case law; however, the Plaintiff does not argue that he was owed a duty to "instruct

or supervise." It appears that this language was pulled from the *Peterson v. Porter* case, and it appears to be a misreading of *Peterson* to suggest that *Peterson* creates a new premise liability standard. *Peterson*, 389 S.C. 148, 153. The Court in *Peterson* states:

> "The circuit court determined there was no evidence of any actionable negligence on the part of the Porters. The court found there was no evidence the Porters supplied Peterson with defective equipment or that the equipment caused Peterson to fall. Furthermore, the court determined there was no evidence of any defect or dangerous condition existing on the Porters' property. The court also found the roof's steep slope was an open and obvious condition, and, thus, the Porters did not have a duty to warn Peterson. The court noted there was no evidence anyone had ever fallen from the roof or that the Porters had any reason to believe a fall was likely. ***The court determined the Porters did not have a duty to instruct or supervise Porter*** in his work and there was no evidence Peterson's lack of education prevented him from safely performing his work."

Id. Emphasis added.

Plaintiff argues that this sentence does not create a new standard of "instruct or supervise" in premise liability cases; moreover, the Court in *Peterson* was merely disposing of the various meritless arguments advanced by the Plaintiff in that case. In the case at hand, Plaintiff Mr. Haina does not argue that he was owed any duty to "instruct or supervise" only that he was owed the well established duty to warn under the circumstances of this case.

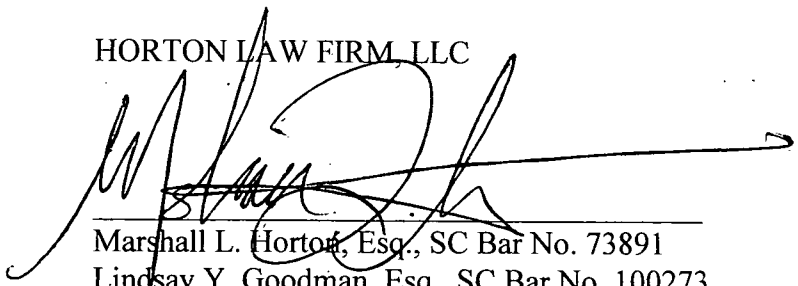
It is important to point out that the Circuit Court rested its decision solely on an "instruct or supervise" theory, which after exhaustive legal research appears to be an erroneous standard under any circumstances (i.e. there has been no know legal duty or other legal theory that would require a plaintiff to establish a duty to "instruct or supervise").

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand this case in order for Plaintiff Mr. Haina to have his case decided by a jury.

Respectfully submitted,

HORTON LAW FIRM, LLC



Marshall L. Horton, Esq., SC Bar No. 73891
Lindsay Y. Goodman, Esq., SC Bar No. 100273
Post Office Box 3766
Bluffton, South Carolina 29910
(843) 757-6190
ATTORNEYS FOR APPELLANT

Bluffton, South Carolina
This 26th day of April, 2013