

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge
Case No. 2014-CP-26-07790

Opinion No. 2022-UP-085 (filed March 2, 2022)

Appellate Case No. 2022-000693

Richard CiampanellaRespondent

vs.

City of Myrtle Beach Petitioner

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Gene M. Connell, Jr. (S.C. Bar No. 1358)
KELAHER, CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Julian Z. Hanna (S.C. Bar No. 2667)
Julian Z. Hanna and Associates, P.A.
14323 Ocean Highway, Suite 4105
Pawleys Island, S.C. 29585
(843) 237-3431 (phone)
(843) 237-4659 (facsimile)

Attorneys for Respondent

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COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Does this case meet the requirements of Rule 242, SCACR?
- II. If this case is appropriate for review, then did the Court of Appeals correctly affirm the grant of a new trial by the circuit court?

COUNTER STATEMENT OF CASE

Richard Ciampanella filed this lawsuit against the City of Myrtle Beach on November 20, 2014, after he fell from a beach access walkover when the railing collapsed.¹ (Compl.) (R. p. 9) He suffered a transverse process fracture to his spine and accumulated \$16,508.90 in medical expenses. (R. p. 70, lines 3-25.) Respondent's Complaint asserted that the City of Myrtle Beach, through its officers, agents, or employees, was negligent, reckless, and willful in one or more of the following:

- (a) failing to properly construct the walkover;
- (b) failing to properly maintain the walkover;
- (c) failing to make sure the walkover railing would not fail;
- (d) using improper nailing techniques on the walkover;
- (e) failing to properly affix the railing to the walkover;
- (f) nailing the railing to the outside of the post in violation of generally accepted construction practices;
- (g) failing to inspect the boardwalk and railing on a regular basis to ensure that it was properly affixed;
- (h) failing to warn the Respondent of the dangers of the railing on the boardwalk; and
- (i) failing to take that degree of skill and care which a reasonable or prudent person would have done under the same or similar circumstances.

¹ A "beach access walkover," or "walkover" is a bridge over a sand dune that allows access to the beach. *S.C. Dep't. of Health and Env't. Control, Ocean and Coastal Res. Mgmt.*

Ciampanella also asserted that his injuries were the direct and proximate result of the City's negligence. (Compl.) (R. p. 9).

The City filed an Answer denying any wrongdoing and asserting that Ciampanella's claims were subject to the South Carolina Tort Claims Act and the South Carolina Recreational Use Statute. S.C. Code Ann. § 15-78-60(15); S.C. Code Ann. §§ 27-3-10, 27-3-70. (Answer) (R. p. 12).

The case proceeded to a jury trial before the circuit court. At the close of Ciampanella's case, the City moved for a directed verdict. (R. p. 396, line 7). The trial court granted the City's motion as to liability under the South Carolina Tort Claims Act and the South Carolina Recreational Use Statute. S.C. Code Ann. § 15-78-60(15); S.C. Code Ann. §§ 27-3-10, 27-3-70. (Order Granting Directed Verdict) (R. p. 1).

On February 3, 2017, Ciampanella timely moved for a new trial pursuant to South Carolina Rule of Civil Procedure 59(a). (Respondent's Motion for New Trial and to Alter or Amend Judgment) (R. p. 19). After reviewing the transcript, briefs, and hearing oral arguments from counsel, the trial court granted Ciampanella's motion for a new trial on all causes of action related to the negligent design and construction of the walkover. (Order Granting New Trial) (R. p. 3). The trial court did not grant Ciampanella's motion for new trial on claims related to the maintenance, security, or supervision of the walkover, finding that the South Carolina Tort Claims Act precluded such claims. *Id.* The trial court also referenced its previous ruling, in which it granted partial summary judgment as to simple negligence under the South Carolina Recreational Use Statute. *Id.* However, the trial court did not grant summary judgment as to the City's gross negligence under the South Carolina Recreational Use Statute. (Order Granting New Trial) (R. p. 3).

The City moved for reconsideration on October 5, 2018. (Appellant's Motion for Reconsideration) (R. p. 28). The trial court denied the City's motion by Order entered on November 21, 2018. (Order Denying Reconsideration) (R. p. 6).

The City then served a Notice of Appeal on December 17, 2018, appealing the September 25, 2018 Order granting Respondent's motion for a new trial on negligent design and construction as well as the November 21, 2018, Order denying Appellant's motion for reconsideration.

The Court of Appeals, in an unpublished opinion dated March 2, 2022, affirmed the trial court in granting Ciampanella's motion for a new trial. In its opinion, the Court of Appeals noted:

Our standard of review dictates that we must only look to see if there is evidence in the record to support the circuit court's decision to grant a new trial, and, only in the complete absence of such evidence, is it within our province to find the circuit court abused its discretion.

(Opinion No. 2022-UP-085 March 2, 2022).

STANDARD OF REVIEW

The City has filed a Petition for a Writ of Certiorari. Certiorari to the Court of Appeals is governed by Rule 242(b), SCACR. It provides:

(b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Further, the standard of review in this case concerns the decision to grant a new trial which is a well settled area of the law in South Carolina. The grant or denial of a new trial motion rests within

the sound discretion of the trial court, and its decision should not be disturbed on appeal unless the findings are wholly unsupported by the evidence, or the conclusions reached are controlled by an error of law. *Brinkley v. S.C. Dep't. of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). The reviewing Court should determine “whether evidence exists to support the trial court’s order.” *Folkens v. Hunt*, 300 S.C. 251, 255, 387 S.E.2d 265, 267 (1990). In doing so, the Court should consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Brinkley*, 386 S.C. at 186, 687 S.E.2d at 56. The party challenging the trial court’s ruling has the burden of showing abuse of discretion. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

ARGUMENT

I. A WRIT OF CERTIORARI IS UNWARRANTED.

The Respondent asserts that this case is not appropriate for certiorari. Rule 242, SCACR provides lawyers and litigants the general reasons why this Court should grant certiorari. Those reasons are applicable here. First, there are no novel questions of law in that the Court of Appeals simply had to decide whether the trial court properly granted a new trial. Second, there was no dissent in the Court of Appeals decision in this case as it was *per curiam*. Third, the decision in this case is not in conflict with any decision of this Court. Fourth, there are no constitutional issues involved. Fifth, there are no special or important reasons for granting certiorari. See *Poston v. State*, 339 S.C. 37, 528 S.E.2d 422 (S.C. 2000) (no right to discretionary appeal from a decision of a Court of Appeals decision affirming conviction); *State v. Lyles*, 381 S.C. 442, 673 S.C.2d, 811 (S.C. 2009) (no special and important circumstances to justify certiorari review). In sum, this case is a garden variety premises liability action which does not meet the requirements of Rule 242, SCACR and thus, this Court should reject the Petition for Certiorari without further review.

If this Court believes the requirements of Rule 242, SCACR have been met, then the only question is: Did the Court of Appeals correctly affirm the circuit court's decision to grant a new trial?

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF A NEW TRIAL BY THE CIRCUIT COURT.

A. **The Court of Appeals did not misapprehend the distinction between negligence and gross negligence.**

The City argues that the Court of Appeals in its decision does not know the difference between negligence and gross negligence. The Court of Appeals, however, correctly stated the law when it said:

Normally, the question of what activity constitutes gross negligence is a mixed question of law and fact. However, 'when the evidence supports but one reasonable inference, the question becomes a matter of law for the court. *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).

The Court also correctly noted that "Evidence of industry standards, customs or practices is often highly probative when defining a standard of care." *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477, 534 S.E.2d 289, 290 (Ct. App. 2000).

Further, relevant case law was specifically referred to in the Court of Appeals opinion in this case. In *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24,35, 491 S.E.2d 571, 576 (1997), the plaintiff was injured after she fell off a public boat dock at Steamboat Landing in Charleston County. 491S.E.2d at 572. The dock had a railing on only one side, and Creech fell off the other side that did not have a railing. The jury returned a verdict for Creech, finding her 49% negligent, the County 16% negligent, and the Wildlife Department 35% negligent. 491 S.E.2d at 572-573. The court affirmed the verdict, holding: "In short, based on the evidence, the jury reasonably could have inferred that Wildlife Department was negligent in its design and construction of Steamboat Landing." 491 S.E.2d at 576.

Much like *Creech*, Ciampanella did nothing wrong to cause his injuries. He was walking along the walkway and stopped to watch the sunset. As soon as he leaned against the railing it collapsed, causing him to fall to the ground and fracture his vertebrae. Just as the Court found in *Creech*, a jury could reasonably find here that the City was negligent in the design and construction of the beach access walkover.² Thus, the Court of Appeals properly relied on *Creech* in affirming the circuit court's decision to grant Respondent's motion for new trial.

There was also other evidence besides Ciampanella's testimony in the record. It included the testimony of Engineer Alan Campbell, an expert witness for the plaintiff who was qualified without objection, who stated that industry standards introduced into evidence were very, very similar to those in place when the walkover was constructed with very, very, very minimal changes. (Court of Appeals Opinion, p. 4). Campbell further testified it would be correct to say that the codes have been updated a little bit, but the basic safety structures remain the same since the 1980s. (Court of Appeals Opinion, p. 4).

The Court of Appeals also found Campbell's testimony satisfied the evidentiary test for granting a motion for new trial. Specifically Campbell testified that the City should have used half inch lag bolts rather than number 9 screws because those screws were very, very high maintenance due to the rate of corrosion. (Court of Appeals Opinion, p. 5). Campbell also explained that because the screws do not last very long it's not recommended. He emphasized the screws were just not recommended. Campbell also testified that small diameter screws caused extensive corrosion and that corrosion isn't good construction. Campbell also opined that the lag bolts would have been much larger diameter, specifically a half inch diameter and they would have penetrated all the way through

² The present case is stronger than *Creech* in that the City has not argued Ciampanella is comparatively negligent.

the posts so they would have gone in one side with the head of the bolt on the one side and the nut with a washer on the other side.

In fact, Respondent's expert offered damaging testimony that the City created the hazard by using the wrong size and type of fasteners for the construction of a public beach access walkover. (R. p. 314, lines 21-25; p. 315, lines 1-25). Campbell testified that the fasteners the City used are not recommended by the South Carolina Department of Health and Environmental Control's Office of Ocean and Coastal Resource Management (OCRM). (R. p. 314, line 25; p. 315, lines 10-22). In his words, OCRM recommends half-inch diameter bolts for handrails, but the City used number 9 screws which are three-sixteenths of an inch in diameter. (R. p. 315, lines 10-14.) He testified that number 9 screws are not within industry standards because the screws are too small in diameter and corrode too easily. (R. p. 317, lines 7-21).

The evidence offered by Campbell, along with Ciampanella's testimony, squarely makes the issue of gross negligence a jury question. Our courts have consistently stated that gross negligence is a factually controlled concept whose determination best rests with the jury. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002). "[A]lthough the [C]ourt is tasked with determining a party's legal duty, the jury, as the factfinder, is tasked with determining whether that duty, which may incorporate industry standards, has been breached." *Walker v. DDR Corp.*, No. 3:17-cv-01586-JMC, 2019 U.S. Dist. LEXIS 3732, 2019 WL 142303 (D.S.C. 2019).

The Court of Appeals also carefully considered the Campbell testimony and found that the evidence by Campbell in the record supported the circuit court's decision to grant a new trial consistent with the rule that the grant or denial of a new trial is discretionary with the trial court. In sum, Campbell's testimony establishes the factual issue of whether there was conscious disregard to follow industry standards in building the walkway.

B. The Court of Appeals did not overlook or misapprehend the distinction between testimony establishing the construction of the walkway and the testimony establishing the maintenance or inspection of the walkway.

Petitioner attempts to discount the testimony of Alan Campbell, the expert presented at trial. Campbell's testimony is discussed in detail in the Court of Appeals Opinion. Campbell stated as follows:

- Campbell testified industry standards at the time of construction and at the time of the injury were very, very similar with very, very minimal changes. (Court of Appeals Opinion, p. 4).
- Campbell testified that the basic safety structures from the codes remained the same since the 1980s. (R. p. 277, lines 19-23).
- Campbell stated the IPM Code required handrails and guardrails to be firmly fastened and capable of supporting normally imposed loads and should be maintained in good condition. (R. p. 279, lines 3-24; p. 374, lines 16-25; p. 375, line 1; p. 270, lines 5-14; p. 271, lines 18-25).
- Campbell testified a 30-to-40-pound load would have been exerted when Ciampanella leaned on the rail. (R. p. 336, lines 15-20; p. 279, lines 3-24; p. 301, lines 22-25; p. 302, lines 1-2).
- Campbell opined the City did not construct with screws which complied with the requirements of the code. (R. p. 269, lines 6-10).
- Campbell testified that using half-inch lag bolts was preferable for such construction. (R. p. 315, lines 15-18).

- Campbell testified that number 9 screws required a very, very high maintenance schedule because of the fast rate of corrosion. (R. p. 564; p. 273, lines 16-22; p. 330, lines 11-25; p. 331, lines 6-19).
- Campbell testified that the number 9 screws did not last very long and were not recommended. (R. p. 317, lines 14-25; p. 318, lines 1-24).
- Campbell testified you should use something much larger in diameter with heavier galvanized coating. (R. p. 319, lines 20-25; p. 314, line 25; p. 315, lines 1-14).
- Campbell testified that the smaller diameter screws would deteriorate much quicker than larger bolts. (R. p. 317, lines 20-25; p. 318, lines 1-2).
- Campbell testified that corrosion in the rail was extensive and showed an absence of good construction. (R. p. 317, lines 7-13; Exhibit 19, R. p. 564; R. p. 273, lines 4-22; R. p. 330, lines 11-25).

This testimony, along with Campbell's statements that the City violated the 1994 Standard Building Code, the 2012 International Property Maintenance Code, and the Beach Management Act, were more than enough to show that the City built the beach walkover access in violation of codes and thus a jury could find gross negligence. (R. p. 581, Exhibit 26; R. 681; R. 685; R. p. 281, lines 12-25; p. 282, lines 1-2).

Thus, viewed in the light most favorable to Respondent, the evidence presented clearly established that a jury could find the City was grossly negligent.

Campbell's testimony can best be described that the City failed to construct the beach walkover access consistent with the industry standards and practices. Campbell stated the City's employees used the incorrect screws in the construction of the walkover. The City violated the 2012 International Property Maintenance Code which requires a walkover be structurally sound. The City

also violated the 1994 Standard Building Code and 2000 International Building Code, all of which were adopted by the City of Myrtle Beach. The City employees knew of the construction problems with using number 9 screws because many of the beach walkover accesses had rusted screws and there were failures throughout the system. The Beach Management Act recommends a bolt through style construction and not the use of screws in handrails. The dune walkover guidance provides industry standards regarding corrosion. The method of construction by City employees violated the dune walkover guidelines which require all beach walkover accesses be built in accordance with the International Building Code. The Standard Building Codes from the 1980s have not changed. The sand dune management brochure has a schematic detailing the proper construction of beach walkovers and requires bolts and handrails. The pictures offered into evidence show severely rusted screws which did not have the correct diameter when installed. The City's employees' method of testing the railings for strength did not meet the standard building code. A number 9 screw was not appropriate for this type of use. The City did not build the beach walkover access railings in compliance with the 200-pound concentrated force requirement as required for all railings. The City of Myrtle Beach did not construct the guardrails consistent with industry standards and the railing would have only held 30-40 pounds. Ciamparella was injured as a result of the failure to use the correct bolts along with withdrawal failure. The City failed to use lag bolts to secure the stringers along the bottom of the railings. The City was aware of and knew about the conditions by constructing the beach walkover access in violation of the Standard Building Code, the International Building Code and the International Property Maintenance Code.

Thus, in light of all this evidence which the circuit judge weighed in considering the motion for a new trial, the Court of Appeals properly declined to reverse his decision. The reason for this, of course, is that the Court of Appeals and this Court must only look to see if there is "evidence in the

record to support the circuit court's decision." In this case, there was abundant evidence and thus the Court of Appeals did not abuse its discretion.

C. The Court of Appeals did not abuse its discretion in affirming the trial court.

The Petitioner argues that the Court of Appeals erred in affirming the trial court because according to Petitioner, Respondent's evidence only applied to maintenance of the dunes walkover. In fact, Respondent's evidence was substantial. Campbell offered testimony that the City had improperly constructed the beach access walkway including violating applicable building codes and standard industry practices. (See R. p. 581, Exhibit 26, R. p. 681; R. p. 685; R. p. 281, lines 12-25, R. p. 282, lines 1-2).

A few sections of the transcript testimony of Alan Campbell highlight the issue of whether the City was grossly negligent is a matter for the jury. They are as follows:

Q. Do you have an opinion to a reasonable degree of engineering certainty as to whether or not the applicable -- or the beach walkover that Mr. Ciampanella violated the 2012 International Property Management Code?

A. They did violate it. They did not satisfy those requirements. It was dangerous, it collapsed, and he was injured. So, therefore, they did not protect public welfare.

(R. p. 271, lines 18-25; p. 272, line 1).

In another part of the transcript, Campbell was asked the following question:

Q. Do you have an opinion to a reasonable degree of engineering certainty as to whether or not the City of Myrtle Beach violated the 2012 and earlier International Property Management Code, based on its maintenance, construction and repair of the dunes walkover in this case on August 19, 2014?

A. They did not meet the requirements of the code.

(R. p. 324, lines 22-25, p. 272, lines 1-3).

Q. And tell the jury why they didn't meet the requirements.

A. Because this code is published in the interest of the public welfare and life safety, and it addresses unsafe conditions. And if unsafe conditions exist or are identified, they shall be repaired. And that did not occur in this situation because the fasteners for the rail corroded through and collapsed and caused an injury.

(R. p. 325, lines 4-12)

Later on in the transcript Campbell was asked the following question:

Q. Do you have opinion to a reasonable degree of engineering certainty as to whether or not the City' maintenance, construction and repair of the guard rail at the 77th Avenue beach walkover on August 19, 2014 met that particular provision of the Code?

A. They did not.

(R. 327, lines 18-23)

Additional questions were asked which also illustrate violations of building code. They are as follows:

Q. Do you have an opinion to a reasonable degree of engineering certainty, based on everything you have seen in the case, as to whether or not rails had the 200-pound limit on August 19, 2014 when Mr. Ciampanella leaned on the rail?

A. Absolutely not.

(R. p. 335, lines 21-25; p. 336, line 1).

One final question in the testimony of Campbell in the transcript illustrates this point:

Q. Do you have an opinion to a reasonable degree of engineering certainty as to whether or not this was improper construction and improper maintenance in this particular situation on August 19, 2014 when Mr. Ciampanella was injured?

A. Absolutely yes.

(R. p. 345, lines 17-22)

In sum, this testimony offered by Plaintiff creates a jury issue. This Court since 1935 has stated "It is always for the jury to determine whether a party has reckless, willful and wanton intent." *Rails v. Saleeby*, 117 S.C. 431, 182 S.E.2d 750 (1935) (cited by *Wise v. Broadway*, 315 S.C. 273, 433

S.E.2d 857 (1993). Here, the issues and facts as to whether the work performed by the City in building the beach walkover was grossly negligence is a jury issue. As stated above, there is sufficient evidence that the City could be found grossly negligent in the work it performed based on the applicable building codes. Violations of a building code are negligence per se and are evidence of gross negligence. *Wise v. Broadway*, 315 S.C. 273, 433 S.E. 2d 857 (1993). In *Wise v. Broadway*, the Court found, "The causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring a submission of punitive damages to the jury." *Wise v. Broadway*, 315 S.C. 273, 433 S.E. 2d 857 (1993) (citing *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978)). Finally, violation of a statute or building code does not constitute recklessness, willfulness and wantonness per se, but is some evidence that the defendant acted willfully and wantonly. (citing *Keel v. Seaboard Air Line Railway*, 108 S.C. 390, 95 S.E. 64 (1918)).

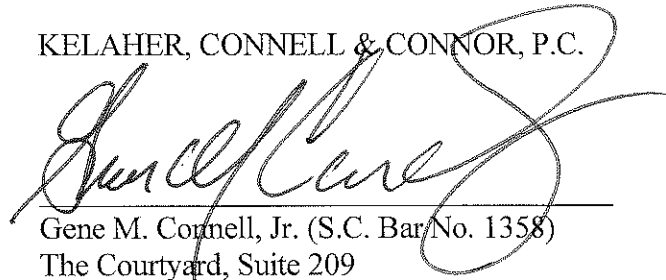
CONCLUSION

In short, the Court of Appeals opinion should be affirmed. Gross negligence is a mixed question of law and fact and should be presented to the jury unless the evidence supports only one reasonable inference. See *Clyburn v. Sumter Cnty. Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885 (1994). In this case, Campbell's testimony established numerous building code violations from which a jury could decide that the City was grossly negligent in the construction of the beach walkover access. Based on these facts and the standard of review, there are no novel questions of law. There was no dissent by a judge of the Court of Appeals in this case. This decision does not conflict with any prior decision of this Court, and there are no substantial constitutional issues. Further, there are no special considerations and certiorari is not a matter of right but of judicial discretion. Thus, this Court should deny the petition because there are no special or important reasons to review this case.

In the alternative, if this Court grants certiorari, the Court of Appeals followed the proper standard of review and its decision should be affirmed.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr. (S.C. Bar No. 1358)
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net

Julian Z. Hanna (S.C. Bar No. 2667)
Julian Z. Hanna and Associates, P.A.
14323 Ocean Highway, Suite 4105
Pawleys Island, S.C. 29585
(843) 237-3431 (phone)
(843) 237-4659 (facsimile)

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Attorneys for Respondent