

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

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Jul 27 2022

S.C. SUPREME COURT

Opinion No. 2022-UP-085 (filed March 2, 2022)
Case No. 2014-CP-26-07790

Richard Ciampanella,Respondent,

v.

City of Myrtle Beach,Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner the City of Myrtle Beach (the “City”) references and incorporates its Statement of the Case articulated in its Petition for Writ of Certiorari. Further, the City notes the City appealed the trial court’s partial grant of a new trial on the issues of grossly negligent construction and design. No cross-appeal was filed by Respondent, thus the other unappealed rulings of the trial court are the law of the case. Town of Mt. Pleasant v. Jones, 335 S.C. 295, 298-99, 516 S.E.2d 468, 470 (Ct.App. 1999) (a lower court’s unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct). Accordingly, the narrow issue before the Court of Appeal was whether the trial judge properly granted a new trial on Respondent’s claims for grossly negligent construction and/or design of the walkover, *i.e.* whether there was evidence presented at trial that the City constructed or designed the walkover in a grossly negligent manner. See Norton v. Norfolk S. Ry., 350 S.C. 473, 567 S.E.2d 851 (2002) (“Upon review, a trial judge’s order granting or denying a new trial will be upheld unless the order is ‘wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.’”). Simply stated, assuming *arguendo* that Respondent’s expert established a standard of care, which the City denies, his opinion that the dune walkover could have been “better” designed and constructed does not constitute evidence of gross negligence to justify the grant of a new trial in this matter. For those reasons, the Court of Appeals abused its discretion in affirming the trial court’s grant of a new trial.

ARGUMENT

I. A Writ of Certiorari is Warranted

Respondent contends that this case does not fall within the “general reasons” why this Court should grant certiorari pursuant to Rule 242, SCACR. While Rule 242, SCACR “indicate[s] the character of reasons which will be considered” when determining whether this Court should grant certiorari, the Rule specifically states that these characters of reasons are “neither controlling nor fully measuring the Supreme Court’s discretion or power to grant review in general...” Rule 242, SCACR. Accordingly, the reasons are not limited to those articulated in Rule 242(b)(1)-(5), SCACR. For these reasons, as well as those articulated in its Petition for Writ of Certiorari, the City avers this Court should grant its Petition for Writ of Certiorari.

II. *Creech* is Distinguishable Because It Involved a Total Absence of Care

The trial court, Court of Appeals, and Respondent all cite to and rely upon Creech v. S.C. Wildlife & Marine Res. Dep’t, 328 S.C. 24, 491 S.E.2d 571 (1997). As an initial matter, Creech does not directly address gross negligence.

Further, in support of its ruling, the trial court cited Creech, which allowed a claim against the S.C. Wildlife & Marine Resources Department for negligent design and construction of a public dock/fishing pier to survive directed verdict where enough evidence was presented for a jury to infer negligence. Notably, the landing from which Creech fell had a railing on only one side. 328 S.C. at 27, 491 S.E.2d at 572. In affirming the denial of directed verdict, the Creech Court noted that the Department’s argument that safety rails were unnecessary was premised on the assumption that the landing was designed as a boating dock. Id. at 34, 491 S.E.2d at 576. However, there was conflicting evidence presented that the landing was designed as a fishing pier,

for which safety rails were necessary. Id. Thus, the jury could reasonably infer that the Department was negligent in its design and construction of the landing. Id.

There was no discussion in Creech of whether a simple or gross negligence standard applied. “Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.” Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). “It is the failure to exercise slight care.” Id. Thus, the complete absence of the railing in Creech could have satisfied even the higher gross negligence standard.

Unlike the total absence of a railing alleged in Creech, the present case involves allegations of negligent design and construction related to the type of fasteners used and the amount of concentrated force that the walkover railing could withstand. Specifically, Respondent advanced two theories at trial regarding the existence of evidence concerning negligent construction and/or design of the walkover: 1) that the walkover was constructed with screws rather than lag bolts and 2) that the walkover could not withstand the allegedly required 200 lbs. of concentrated force. Ultimately, however, as more thoroughly articulated in Section III, below, Respondent is unable to establish either an applicable standard of care or that the construction method employed breached the standard asserted.

III. Respondent’s Expert Admitted That the Design Used by Appellant Was a Sufficient Alternate Design, Precluding a Finding of Gross Negligence

Respondent contends that his 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” and that this testimony “squarely makes the issue of gross negligence a jury question.” (Resp. Return to Pet. p. 7). However, Respondent’s expert admitted that the design used by Appellant was a sufficient alternate design.

Mr. Campbell's opinions in the instant case are similar to those criticized by the Court of Appeals in Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 389, 701 S.E.2d 776, 780 (Ct. App. 2010). Similar to the present case, the plaintiffs in Nelson failed to present evidence that the construction of the parking lot violated any code or building standard in effect at that time. 390 S.C. at 389-90, 701 S.E.2d at 780. Additionally, their expert could not state that current building or safety standards for parking lots applied to the lot in question. Id. at 390, 701 S.E.2d at 780. The expert's testimony that "raised sidewalks are preferred over wheel stops" was equally unavailing. Id. Nonetheless, the Nelson plaintiffs' principal proof of negligence rested upon their expert's testimony that the design of the parking lot created an unreasonable risk of harm because the wheel stops were improperly constructed and installed and/or the defendant should have installed curbing. Id. at 392-93, 701 S.E.2d at 781. The Nelson Court affirmed the trial court's finding that the plaintiffs' expert's assertion of alternate parking lot designs was insufficient to create a question of fact as to the defendant's duty to conform to any of those designs. Id. at 393, 701 S.E.2d at 781. Rather, the expert attested only to his own preferences rather than to the requirements of any law, ordinance, or recognized industry safety standard, which did not, as a matter of law, establish the defendants' duty. Id.

As discussed in Appellant's Brief, Respondent's expert, Mr. Campbell, ultimately acknowledged the City's use of screws rather than lag bolts was appropriate:

- Q. ...But the use of 10 or 12 wood screws, that's an appropriate application; do you agree or not?
- A. In some circumstances, it could be.
- Q. I'm talking about 77th Avenue North. If the City used size #10 – number 9, 10, or 12 screws, is that an appropriate size screw for that application?

- A. As long as – yes, as long as they inspect and maintain it properly, which they absolutely did not.

(R. p. 375, lines. 9-16).¹ Likewise, upon review of the actual numbers of screws and nails used to construct the walkover railing, Mr. Campbell conceded the original construction would satisfy the 200-pound concentrated force requirement he testified was applicable. (R. p. 381, lines 3-25; p. 382, line 9 – p. 383, line 7).

Upon *in camera* questioning by the trial court, Mr. Campbell admitted that in addition to the construction methods he referenced in his testimony, “truthfully, you can build it differently, there are alternative methods of construction.” (R. p. 294, lines 1-21). He conceded that a dune walkover could be designed “without going as heavy,” though use of such a design would necessitate more maintenance. (R. p. 294, line. 22 – p. 295, line. 12).

Similarly, in front of the jury, Mr. Campbell said that a smaller diameter screw “could have worked” but would create a high maintenance schedule because of the fast rate of corrosion, such that the City would “either need to maintain it on a regular basis or construct it in a much stronger manner using bolts instead of screws.” (R. p. 317, line 14 – p. 318, l. 2; see also R. p. 319, line 14 – p. 320, line 5). He explained that with galvanized coating “you’re pretty well protected” for approximately seven years, after which time the corrosion process accelerates. (R. p. 329, line 13 – p. 331, line 5; R. p. 340, line 22 – p. 341, line 1). Mr. Campbell said that the use of lag bolts instead of screws “probably would greatly have extended that maintenance schedule to make everything last a lot longer” and would have made the end of the fastener visible for monitoring corrosion. (R. p. 342, line 10 – p. 343, line 3). Nonetheless, he agreed that there are varying levels of acceptable construction practices – good practices and best practices – and that the quality and

¹ Mr. Campbell’s critique of the City’s inspection routine is irrelevant here as the trial court’s order expressly limits the new trial to design and construction issues. (R.*, New Trial Order).

durability of materials used impact the life of the project. (R. p. 353, lines 4-23). With respect to the dune walkover at issue, Mr. Campbell further agreed that, as constructed, on “day one, it’s good.” (R. p. 384, lines 8-11; see also R. p. 383, lines 16-20).

Moreover, the Court of Appeals’ reference to Mr. Campbell’s testimony fails to articulate the applicable standard or code regarding the design and construction. Rather, the Court only cited Campbell’s testimony that the industry standards introduced were “very, very similar” to those in place when the walkover was construction “with very, very minimal changes.” The reference to this testimony alone fails to identify the applicable code and subsequent breach in effect at the time the dune walkover was designed and constructed.

“While gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court.” Id. Our courts have found summary judgment and directed verdict proper in the face of allegations of gross negligence in a variety of circumstances. See, e.g., Clyburn v. Sumter County District Seventeen, 317 S.C. 50, 451 S.E.2d 885 (1994) (holding evidence of exercise of at least “slight care” precluded liability for gross negligence); Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) (same); Pack v. Associated Marine Institutes, Inc., 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004) (same); Marietta Garage, Inc. v. S.C. Dep’t of Pub. Safety, 337 S.C. 133, 140, 522 S.E.2d 605, 609 (Ct. App. 1999) (holding gross negligence claim barred where officer made physical investigation of wrecking company’s former storage location and hand delivered notice to company, indicating at least a slight degree of care). The courts have also made clear that the fact that more might have been done does not negate a finding that a defendant exercised at least slight care. See Etheredge, 341 S.C. at 312, 534 S.E.2d at 278 (“[T]he fact that the School District might have done more does not negate the fact that it exercised ‘slight

care.”); Pack, 362 S.C. at 246, 608 S.E.2d at 138 (“The fact that more might have been done does not negate a finding that RMI employees exercised at least slight care.”).

Here, like in Nelson, Mr. Campbell’s testimony did not establish a duty for the City to conform to the design he suggested was “best” and would require the least amount of care and maintenance. Rather, Mr. Campbell’s testimony established that the dune walkover was designed and constructed in an acceptable manner that may require more frequent maintenance. The crux of Mr. Campbell’s opinion continually came back to maintenance. Mr. Campbell couched all of his concessions regarding adequate alternate methods of construction of a walkover, and the construction of the 77th Avenue walkover in particular, in the fact that subsequent inspection and maintenance would be necessary. (R. p. 353, lines 4-23; R. p. 375, lines 6-21; R. p. 383, lines 8-15). As noted *supra*, however, the trial court did not grant a new trial on the causes of action related to maintenance, security, or supervision of the walkover and reaffirmed its prior ruling that such claims are precluded by §15-78-60(16) due to lack of evidence of actual notice. There was no cross-appeal filed by Respondent related to this ruling that limited the causes of action. Thus, looking strictly at the evidence related to the design and construction of the dune walkover, Mr. Campbell’s testimony establishes only that the City could have constructed the dune walkover in a manner that would have required less subsequent maintenance, but not that the dune walkover as designed and constructed reflects a failure to exercise slight care. Consequently, the Court of Appeals reliance on Mr. Campbell’s testimony to uphold the grant of a new trial by the trial court is without support because there is no evidence to support a finding of gross negligence in the original design and construction of the dune walkover.

IV. The Court of Appeals Misapprehended Respondent's Expert's Testimony as it Relates to Design or Construction and Maintenance or Inspection of the Walkway

The Court of Appeals misapprehended Mr. Campbell's testimony, when it stated that "Campbell opined the City did not construct the walkover with the ability to withstand a 200 pound force," as it concluded that this testimony presented evidence from which a jury could find the City breached the standard of care. However, this testimony relied upon by the Court of Appeals was not placed into context of the entirety of Mr. Campbell's opinions. Indeed, Mr. Campbell did not testify that the City constructed the walkover without the ability to withstand a 200 pound force as articulated in Mr. Campbell's relied upon standards. Rather, Mr. Campbell explicitly agreed that the three screws together, used in the original construction, met the 200 pound concentrated force requirement. Mr. Campbell only limited that testimony but stating that the use of screws is appropriate "so long as the City properly maintained and inspected the construction," a cause of action or theory that the trial court did not grant a motion for new trial. (R. p. 564, p. 273, lines 16-22, p. 330, lines 11-25; po. 331, lines 6-19).

Further, the simple reference by the trial court, Court of Appeals, and Respondent to the International Property Maintenance Code evinces the misapprehension in distinguishing between construction and maintenance. The Maintenance Code is precisely what its name connotes, a *maintenance* code—not a design or construction code. Mr. Campbell explained the Maintenance Code is a "document for, basically maintenance and repair because *the International Building Code is a design document....* But [the Maintenance Code] is more addressed towards repair, maintenance, and to a certain extent, life safety...." (R. p. 324, emphasis added). The reliance by the trial court and Court of Appeals of Mr. Campbell's testimony opining to the application of the code evinces that the Court of Appeals overlooked the fact that the narrow issue presented is the design and construction of the walkover—not the maintenance or inspection of it.

As thoroughly outlined in the Petition, testimony related to maintenance and inspection cannot be relied upon by either the trial court or the Court of Appeals due to the narrow ruling on the motion for new trial. Respondent relies upon the same maintenance and inspection testimony in arguing that there is evidence in which a jury could infer the City breached the standard of care. The reliance upon the same is in error.

V. The Court of Appeals—in Reliance Upon Testimony Referencing the International Property Maintenance Code—Abused its Discretion in Affirming the Trial Court

Respondent contends that the Court of Appeals did not abuse its discretion in affirming the trial court. In his return, Respondent cites to several excerpts of Mr. Campbell’s testimony that Respondents contends “highlight the issue of whether the City was grossly negligent is a matter for the jury.” However, every referenced question and answer from the excerpts cited by Respondent relate to maintenance and inspection. The reliance of such—including that by the trial court—is controlled by an error of law and, therefore, the Court of Appeals erred in finding the trial court did not abuse its discretion in granting a new trial.

CONCLUSION

For the reasons articulated herein, as well as those articulated in its Petition for Writ of Certiorari, the City respectfully requests the Court reverse the decision of the Court of Appeals, which affirmed the Circuit Court’s Order granting Respondent a new trial.

Respectfully submitted,

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