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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955

Court of Appeals Case No. 2019-001520
Unpublished Opinion No. 2023-UP-014 (S.C. Ct. App. filed January 11, 2023)

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and on behalf of all others similarly situated, Petitioners,

v.

Island Pointe, LLC, Complete Building Corporation, Tri-County Roofing, Inc., WC Services, Inc., Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC, Eloy Alonzo Vasquez, JMC Construction, Inc., and JMC Construction, LLC, Defendants,

Of which WC Services, Inc. is the Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

By and through its undersigned counsel, pursuant to Rule 242(d)(1), SCACR, Petitioners[1] certify that the Court of Appeals filed its opinion in this matter on January 11, 2023 (the "Subject Opinion"), affirming the trial court; that Petitioners timely petitioned the Court of Appeals for rehearing; and that the Court of Appeals denied Petitioners' petition for rehearing by order filed April 20, 2023.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the trial court's denial of Petitioners' motion for a directed verdict and motion for JNOV or a new trial against WCS?

A. Did the Court of Appeals err in not recognizing that the only reasonable conclusion to draw from the evidence is that WCS violated the Building Code by failing to comply with the Attic Sprinkler Requirement?

B. Did the Court of Appeals err in not recognizing that the only reasonable conclusion to draw from the evidence is that WCS violated the Building Code by failing to install the fire sprinkler systems in accordance with the Sprinkler Plans and by damaging the Firewalls?

II. Did the Court of Appeals err in affirming the trial court's refusal to give Petitioners' requested jury charges Nos. 38 and 39?

III. Assuming, *arguendo*, this point is material to Question/Argument I.A, did the Court of Appeals err in affirming the trial court's admission of (and refusal to strike) inadmissible hearsay testimony from defense expert Alan Schweickhardt?

STATEMENT OF THE CASE

This construction defect lawsuit was commenced on February 23, 2015, in the Charleston County Court of Common Pleas. (R. pp. 9–26.) It involves the construction of twenty (20)

[1] "Petitioners" refers, collectively, to Plaintiffs/Appellants, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, individually, and on behalf of all others similarly situated.

townhouse-style duplexes—a total of forty (40) individual units—and common elements in Folly Beach, South Carolina, known as Palmetto Pointe.

Development of Palmetto Pointe began in or about 2005,[2] and certificates of occupancy had been issued for all buildings involved in this suit by the end of 2007. (R. pp. 492–540.) The construction work was done by general/prime contractor Complete Building Corporation ("CBC") and various lower-tier contractors, among them, Defendant/Respondent, WC Services, Inc. ("WCS"). WCS was the subcontractor responsible for supplying and installing fire sprinkler systems. (R. pp. 467–475.)

Petitioners' operative complaint asserts causes of action against WCS for negligence and breach of the implied warranty of workmanlike service. (R. pp. 27–45.) These claims are based on allegations that WCS violated the applicable building code in two ways, each consistent throughout all the units involved in this case, each by itself providing a basis of liability under both Petitioners' negligence and warranty theories: (1) WCS did not install fire sprinklers in the attics of the units, thus failing to comply with an applicable local law that required it to do so, and (2) WCS did not install the fire sprinkler systems in accordance with the only plans approved by the only engineer certified to design fire sprinkler systems and improperly installed components (piping) within, and thereby damaged, the fire-suppression walls separating each of the 20 pairs of adjoining units (the "Firewalls").

The case came on for a jury trial from May 6–16, 2019, the Honorable Jennifer B. McCoy presiding. The following pertinent—and incontrovertible—evidence was presented at trial:

- The applicable building code was the 2003 International Residential Code (the "Building Code"). (R. pp. 88:13–89:11.)

- The Building Code did *not* nullify any applicable provisions of local, state, or

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[2] (*See* R. pp. 431–465.)

federal law. (R. pp. 93:15–94:11.) The violation of any such law constituted a violation of the Building Code.

- WCS's contract with CBC required it to "[f]urnish all material, labor, and equipment necessary to complete all FIRE SPRINKLER SYSTEM AND RELATED work in accordance with **the City of Folly Beach's fire sprinkler system requirements** . . . ." (R. p. 467 (emphasis in original).)

- Section 90.08 of the Folly Beach Code of Ordinances (the "Folly Beach Sprinkler Ordinance") was in effect during the construction of Palmetto Pointe. (R. pp. 89:23–98:1; R. pp. 429–430; R. pp. 662–663.)

- *With only one exception* (explained below), the Folly Beach Sprinkler Ordinance required fire sprinklers to be installed in the attics of all two-family dwellings (the "Attic Sprinkler Requirement"). (R. pp. 429–430; *see also* R. pp. 662–663.)

- All 20 of the duplexes involved in this suit are two-family dwellings.

- *The only way* to avoid the Attic Sprinkler Requirement was to obtain a *variance* under Subsection (D) of the Folly Beach Sprinkler Ordinance, which provides, "Variances . . . may [(only)] be granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council." (R. pp. 429–430; *see also* R. pp. 662–663.)

- There is no evidence that a variance from the Attic Sprinkler Requirement was granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council.

- Attached to WCS's contract with CBC was a copy of a letter from Folly Beach Building Official Tommy Hall to Tommy Browne, a representative of Palmetto Pointe's developer, dated March 6, 2006, "**RE: The fire suppression systems at the 'Peas Island Development'**" (the "Hall Letter"). (R. pp. 474–475 (emphasis in original); *see also* R. p. 467.)

- The body of the Hall Letter reads as follows:

> This letter is to recap our meeting February 14, 2006. That meeting was scheduled by you and was for clarification of The City of Folly Beach's fire sprinkler system requirements. Present at that meeting was [Fire] Chief George Tittle, Tommy Hall, Building Official, Chris Union, and yourself.

> [The Folly Beach Sprinkler Ordinance] covers the City's requirements for fire sprinkler systems. Your project requires the following:
>
> 1. Each unit will be equipped with an NFPA 13D fire sprinkler system.
> 2. Per [Subsection (C) of the Folly Beach Sprinkler Ordinance], you may omit the garage area where there is a 1 hr. fire construction separating the dwelling from the garage.[[3]]
> 3. The "Club House" must also be sprinkled in accordance with its primary occupancy.
> 4. The area around the entrance gate must be widened to accommodate a fire truck.
>
> I am enclosing a copy of [the Folly Beach Sprinkler Ordinance] for your reference. If I can [b]e of further assistance call me . . . .

(R. p. 474.)

- WCS did not install sprinklers in any of the attics of the 40 individual units at Palmetto Pointe.

- Only one set of engineer-certified fire sprinkler plans (the "Sprinkler Plans") is known to exist. (R. pp. 476–483.)

- The Sprinkler Plans were designed by WCS employee Chad Christopher ("Christopher") and certified by outside engineer Chris Constantine ("Constantine"), and Constantine's stamped plans admitted in evidence at trial are the *only set he approved*. (R. pp. 169:24–177:5; R. pp. 194:6–195:14; R. p. 201:5–22.)

- Neither Christopher nor Constantine was ever provided a copy of WCS's contract with CBC, the Folly Beach Sprinkler Ordinance, or the Hall Letter, and had they known of these documents, the Sprinkler Plans would not have designed/certified

[3] To be clear, this permission to omit garage sprinklers is granted by the Folly Beach Sprinkler Ordinance itself. (R. pp. 202:3–209:16; R. pp. 429–430.) It does not require the grant of a variance; nor does it otherwise constitute any modification of or deviation from the plain language of the ordinance.

as they were. (R. p. 182:7–11; R. pp. 185:4–186:3; R. pp. 202:3–207:23.)

- The Sprinkler Plans did not call for any penetrations within the Firewalls (which are, of course, *interior* walls shared by adjoining units), but rather called for piping to be installed only within *exterior* walls. (R. pp. 182:21–184:8; R. p. 201:5–22; R. p. 466; R. pp. 476–483.)

- Contrary to the Sprinkler Plans, WCS installed piping within the Firewalls, penetrating them at multiple levels within every unit. Each penetration caused damage and is an uncontested Building Code violation. This condition negates the fire rating of every one of the Firewalls. (R. pp. 90:18–106:19; R. pp. 109:23–111:5; R. pp. 116:17–119:23.)

At the close of all evidence, Petitioners timely moved for a directed verdict as to WCS's liability on both causes of action, arguing that the only remaining question for the jury was as to the amount of damages caused by WCS's wrongful acts/omissions. (R. pp. 271:8–284:11.) Despite describing it as "probably as close a call of a directed verdict I've seen in a while . . . ," the trial court denied Petitioners' motion. (R. p. 284:8–24.)

Before submitting the case to the jury, the trial court denied Petitioners' timely request that it give their proposed charges Nos. 38 and 39.[4] Number 38 instructed that the Building Code did not nullify any provisions of local, state, or federal law. (R. p. 678.) Number 39 was the substance of the Folly Beach Sprinkler Ordinance. (R. p. 679.)

The jury returned a verdict in favor of WCS on both claims. (R. pp. 1–4; *see also* R. pp. 5–6.)[5]

Petitioners timely moved for JNOV or a new trial. (R. pp. 680–687; R. pp. 699–708; *see also* R. p. 397:20–22.) The trial court denied the motion by order filed July 15, 2019. (R. p. 7.)

[4] Via email during trial, on May 13, 2019, the trial court asked the parties to submit proposed jury charges. Petitioners' counsel submitted Petitioners' proposed jury charges Nos. 38 and 39 via email on May 14, 2019. (R. pp. 677–679.)

[5] The jury returned a verdict in favor of Petitioners on their claims against other defendants who are not parties to this appeal.

It denied Petitioners' timely motion for reconsideration[6] by order filed August 6, 2019. (R. p. 8.)

This appeal timely followed by notice served and filed September 6, 2019,[7] and in due course, it was briefed and made ready for decision. Following oral argument on September 15, 2022, the Court of Appeals decided the appeal on January 11, 2023, via the Subject Opinion, affirming the trial court. As certified above, the Court of Appeals denied Petitioners' timely petition for rehearing on April 20, 2023.

This petition for a writ of certiorari timely follows.

STANDARD OF REVIEW

Motions for Directed Verdict and JNOV

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Public Transp.*, 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). When considering such motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Creech v. South Carolina Wildlife & Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Essentially, the job of the reviewing court is the same as the trial court: to determine whether a verdict for a party opposing the motion is reasonably possible under the facts as liberally construed in his favor. *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). In doing so, the court must determine whether any evidence existed on each element of the cause of action. *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824

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[6] (R. pp. 709–715.)

[7] (R. pp. 723–740.)

(1989).[8] "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998). This rule, however, does not authorize submission of speculative, theoretical, or hypothetical views to the jury. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997); *see also The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.") Where the evidence is susceptible to but a single interpretation, a directed verdict is proper. *LeFont v. City of Myrtle Beach*, 430 S.C. 534, 539, 846 S.E.2d 355, 357 (Ct. App. 2020).

New Trial Motions, Jury Charges, and Evidentiary Issues

Motions for a new trial, requests for jury charges, and the admission or exclusion of evidence are all within the discretion of the trial court and subject to an abuse-of-discretion standard of review. *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (new trial motions); *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (jury charge requests); *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010) (evidentiary issues). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole*, 378 S.C. at 404, 663 S.E.2d at 33.

Questions of Law

The appellate court "is free to decide questions of law . . . with no particular deference to the trial court." *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014).

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[8] The elements of a negligence claim are (1) a duty of care owed by the defendant to the plaintiff, (2) the defendant's breach of that duty by a negligent act or omission, and (3) damages to the plaintiff proximately resulting from the defendant's breach of duty. *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). To prevail on a claim for breach of the implied warranty of workmanlike service, the plaintiff must show that the builder failed to perform its work in a careful, diligent, and workmanlike manner. *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008).

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's denial of Petitioners' motion for a directed verdict and motion for JNOV or a new trial against WCS.

The evidence at trial unequivocally showed that WCS violated the Building Code in two independent ways—(1) by failing to comply with the Attic Sprinkler Requirement and (2) by failing to follow the Sprinkler Plans and installing piping components within the Firewalls, thereby damaging the Firewalls—each of which was by itself sufficient to establish WCS's liability under both Petitioners' negligence and warranty theories. Most respectfully, the Court of Appeals should have found that the trial court should have granted Petitioners judgment as a matter of law as to WCS's liability[9] on both of these bases—or, at a bare minimum, on at least one of them—and, in turn, that Petitioners were and are entitled to judgment against WCS for at least nominal damages, warranting the jury's assessment of an award for punitive damages, because of WCS's violation or invasion of Petitioners' rights by violating the Building Code. *See Kincaid v. Landing Development Corp.*, 289 S.C. 89, 92–93, 344 S.E.2d 869, 872 (Ct. App. 1989) (supporting the proposition that violation of an applicable building code is negligence per se); *Gordon v. Rothberg*, 213 S.C. 492, 504, 50 S.E.2d 202, 208 (1948) ("Where, as in this case, the legal rights of the [plaintiff] had been invaded, the law presumes that he suffered some actual damages, and it was therefore not improper for the trial judge to direct a verdict for such form of damages against the

[9] Petitioners recognize that, because of the "partial" nature of their directed verdict and JNOV motions (arguing, as they did, for judgment as a matter of law as to liability only), correction of the trial court's error in denying these motions would take the form of a new trial on damages. *See* S.C. Code Ann. § 15-33-125 ("A new trial may be granted to the plaintiff on the issue of damages only and not liability when the only reasonable inference to be drawn from all the evidence, viewed in the light most favorable to the defendant, is that the plaintiff is entitled to a verdict in his favor on the issue of liability as a matter of law. Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages.").

appellants, leaving the amount thereof to be determined by the jury.”).

A. Like the trial court, the Court of Appeals erred in not recognizing that the only reasonable conclusion to draw from the evidence is that WCS violated the Building Code by failing to comply with the Attic Sprinkler Requirement.

Violation of an applicable building code is negligence per se. *See Kincaid*, 289 S.C. at 92–93, 344 S.E.2d at 872. There is no reasonable way in which WCS’s failure to comply with the applicable law and the terms of its contract with CBC (requiring its compliance with the applicable law) can be deemed as anything other than negligent conduct and a breach the implied warranty of workmanlike service.

The only potential route for WCS to try to escape this result is by arguing that the Attic Sprinkler Requirement, though undoubtedly in effect at the relevant time, somehow did not apply to Palmetto Pointe. On this record, however, that route is a dead end.

There are only two places in the record to which WCS might conceivably point to try to suggest its work at Palmetto Pointe was exempted from the Attic Sprinkler Requirement. One is the Hall letter, which is quoted in full above. The other comes from the testimony of defense expert Alan Schweickhardt during a certain line of questioning by WCS’s counsel.

Mr. Schweickhardt was retained to develop a competing scope of work for repairing defects in various areas at Palmetto Pointe. (R. p. 158:20–159:8; R. p. 161:15–23.)

WCS’s counsel asked Mr. Schweickhardt a series of questions aimed at pointing out the fact that the installation of attic sprinklers was not among the repairs he identified as being needed in any of his reporting. (R. pp. 158:20–162:14.) WCS’s counsel elicited testimony from Mr. Schweickhardt that some two (2) years before trial—ten (10) years after Palmetto Pointe was built—he had spoken with now-deceased former Folly Beach Fire Chief George Tittle on the

phone.[10] WCS's counsel continued his line of questioning, focused on the fact that, despite having spoken with Mr. Tittle years ago, Mr. Schweickhardt had still not included the installation of attic sprinklers in his repair scope. (R. pp. 159:21–161:15.) Critically, Mr. Schweickhardt explained that "the intent of [his] scope [wa]s not to cover the fire sprinklers because [he] knew [WCS's retained expert] Mark Lazo . . . was *the* expert in the fire sprinklers," to whom Mr. Schweickhardt expressly "defer[red] . . . on the fire sprinkler installation in the attic." (R. p. 161:15–23 (emphasis added).) However, WCS's counsel inquired, nevertheless.

Petitioners' counsel objected to this testimony as impermissible hearsay and lacking foundation. However, the testimony was heard by the jury without limiting instruction from the trial court.

Setting aside the trial court's error in allowing this testimony from Mr. Schweickhardt (which error is addressed in Argument III below), neither it nor the Hall Letter is any use to WCS here, as neither of these provides any evidence of the only thing that could possibly matter: a variance granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council. Neither Mr. Schweickhardt's testimony nor the Hall Letter constitutes direct *evidence* of the required variance; nor can they reasonably be said to constitute *evidence* from which a reasonable inference can be drawn that would allow a jury to conclude the required variance was granted. At best, they are mere springboards for impermissible speculation, plainly insufficient to create a jury question. *Huffines,* 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.").

Most respectfully, the Court of Appeals erroneously affirmed the trial court in this regard,

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[10] About what, we do not know. (R. p. 160:13–14 ([WCS's counsel:] "Your Honor, I'm not asking him to tell us what George Tittle said.").)

concluding, "[t]here is a reasonable inference the developer was instructed that it did not need to include sprinklers in the attics." (Subject Opinion p. 2.) Emphasizing that the standard of review required it to view the evidence in the light most favorable to WCS, prohibited it from deciding credibility issues or resolving conflicts in the testimony or evidence, and only allowed it reverse the trial court where there is no evidence to support the ruling below, the Court of Appeals explained this conclusion as follows:

> A key piece of evidence is a memo—the "Hall Letter"—memorializing a meeting between the developer, the fire chief, and a local building official. The letter begins by referencing Folly Beach's local sprinkler system requirements, but after that, the letter explains the development's sprinkler systems must comply with a national standard. That standard does not require attic sprinklers in this situation. Then, the letter references two particular provisions (and only those two provisions) of the local sprinkler ordinance. We agree with WCS that it is possible to read the letter as informing the developer that the national standard applies and (by implication) that attic sprinklers are not required.
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> ***
>
> The parties dispute whether the Hall Letter is or is not an official "variance" from the building code. We do not think that distinction matters. As noted above, it is possible to read the letter as a communication that Folly Beach was requiring the individual units in this development to comply with NFPA 13D, the national standard. And beyond that, we cannot overlook the fact that the development was periodically inspected throughout the construction process and that building officials ultimately certified the units as fit for occupancy. This is some evidence the officials deemed the units as complying with the applicable code. The trial court properly held this was a jury question.

(Subject Opinion pp. 2–3.)

Contrary to the view set forth in the Subject Opinion, it is not *reasonably* possible to read the Hall Letter as a communication that NFPA 13D applied in lieu of the Folly Beach Sprinkler Ordinance. The Hall Letter, of course, predated, and was attached to, WCS's contract with CBC,

yet WCS's contract with CBC still expressly required WCS to "[f]urnish all material, labor, and equipment necessary to complete all FIRE SPRINKLER SYSTEM AND RELATED work in accordance with **the City of Folly Beach's fire sprinkler system requirements** . . . ." (R. p. 467 (emphasis in original).) Indeed, WCS's own expert, Mr. Lazo, expressly admitted that WCS's contract with CBC required sprinklers to be installed in the attics of the units. (R. p. 528:14–23 ("[Q:] And [the Hall Letter] . . . makes specific reference to the City of Folly Beach code of ordinances, correct? [A:] That's correct. They had to reference that. [Q:] And, attaches [the Folly Beach Sprinkler Ordinance] . . . , correct? [A:] Yes. They had to, they had to attach that because the IRC in 2003 doesn't require sprinklers in these dwellings. [Q:] Sure, but the contract does, right? [A:] Yes.").) And it is patently unreasonable to read the Hall Letter itself as a communication that Folly Beach was only requiring compliance with NFPA 13D. The Hall Letter does not, as the Subject Opinion states, merely "*referenc[e]* Folly Beach's local sprinkler system requirements . . . [before] explain[ing] [that] the development's sprinkler systems must comply with a national standard,"[11] it expressly states that the "[Folly Beach Sprinkler Ordinance] *covers The City's requirements for fire sprinkler systems*" and "enclose[es] a copy of [the] ordinance for . . . reference." (R. p. 474 (emphasis added).) Obviously, there would be no reason to reference the Folly Beach Sprinkler Ordinance if it were not applicable. And even Mr. Lazo agreed that, to the extent of any conflict between the applicability of NFPA 13D and the Folly Beach Sprinkler Ordinance, "[y]ou would follow the most stringent criteria," which would mean following the Folly Beach Sprinkler Ordinance and the Attic Sprinkler Requirement. (R. p. 257:4–14.)

But in any event, even if it were reasonably possible to read the Hall Letter as the Subject Opinion states (i.e., "as a communication that Folly Beach was requiring the individual units in

[11] (Subject Opinion p. 2 (emphasis added).)

this development to comply with NFPA 13D, the national standard"), Petitioners were nonetheless entitled to judgment as a matter of law against WCS as to liability, because the only way to avoid the Attic Sprinkler Requirement was to obtain a variance under Subsection (D) of the Folly Beach Sprinkler Ordinance,[12] and there is no evidence that a variance from the Attic Sprinkler Requirement was granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council. Indeed, WCS itself does not contend that a variance was granted, only that the Attic Sprinkler Requirement was "not enforced" by the Fire Chief or was "waived" as evidenced by the Hall Letter. (Br. of Respondent p. 14 ("Respondent contended that the attic sprinkler requirement of the municipal ordinance was not applicable to Respondent's work, was not enforced by the authority having jurisdiction, and as evidenced by the March 6, 2006 fire suppression letter . . . had been waived.").)

The Court of Appeals' view that the issue of "whether the Hall Letter is or is not an official 'variance' from the building code"[13] does not matter is erroneous for the same reason that the Court of Appeals erred in "[]look[ing] [to] the fact that the development was periodically inspected throughout the construction process and that building officials ultimately certified the units as fit for occupancy" as "some evidence the officials deemed the units as complying with the applicable code." (Subject Opinion p. 3.) NFPA 13D itself is incorporated into the Building Code. (R. p. 214:11–12.) "The provisions of [the Building Code] shall not be deemed to nullify any provisions of local, state, or federal law." (R. p. 214:13–20.) Without question, the Folly Beach Sprinkler Ordnance was a local law in effect during the construction of Palmetto Pointe. (R. pp. 89:23–98:1; R. pp. 429–430; R. pp. 662–663.) And the Building Code expressly states that "[i]ssuance of a

[12] (R. pp. 429–430; *see also* R. pp. 662–663.)
[13] (Subject Opinion p. 3.)

certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or any other ordinances of the jurisdiction." (R. p. 258:8–20.) Every construction defect case involves buildings which were periodically inspected. The fact that the building officials did not catch this code violation does not excuse it.

B. Like the trial court, the Court of Appeals erred in not recognizing that the only reasonable conclusion to draw from the evidence is that WCS violated the Building Code by failing to install the fire sprinkler systems in accordance with the Sprinkler Plans and by damaging the Firewalls.

Similar to I.A above, the only potential route for WCS to try to escape the inescapable conclusion of its liability (under both negligence and warranty theories) for installing the sprinkler system contrary to the Sprinkler Plans is for WCS to argue that the Sprinkler Plans might have been superseded by some other, later set of plans it did follow—a purely theoretical set of plans, of which there is no evidence on which to even reasonably conclude their existence, much less their substance and whether they were followed. Here again, WCS is armed with no more than impermissible conjecture and speculation, plainly insufficient to create a jury question. *Huffines*, 365 S.C. at 188, 617 S.E.2d at 130.

Most respectfully, the Court of Appeals erroneously affirmed the trial court in this regard, concluding, "a jury could reasonably infer that the final plans for the project differed from the plans that were placed into evidence at trial." (Subject Opinion p. 4.) Again pointing to the applicable the standard of review (requiring the evidence to be viewed in the light most favorable to WCS, prohibiting the grant of directed verdict or JNOV where the evidence yields more than one inference or its inference is in doubt, and only allowing it to reverse the trial court where there is no evidence to support the ruling below), the Court of Appeals explained this conclusion as follows:

> While it is difficult to believe that the only approved set of plans in the record are not the final plans approved by a licensed engineer, we hold the trial court did not err in letting this issue go to the jury. . . . WCS's expert testified that changes to design plans regularly occur in the field and that a building official always ensures that the installed system conforms to the plans before approving the system. This expert said building officials must have permitted changes to the original design because the project successfully received the national standard certificate of material and testing, which is completed by the sprinkler subcontractor and either a representative of the owner or the building official after physically inspecting and pressure testing the installed system. We hold that a jury could reasonably infer that the final plans for the project differed from the plans that were placed into evidence at trial.

(Subject Opinion pp. 3–4.)

Contrary to the view set forth in the Subject Opinion, WCS's expert's testimony was to the effect that the certificate of material and testing followed a hydrostatic test for leaks, not an inspection to ensure that the installed system conformed to the plans. (R. pp. 242:22–245:21.) Moreover, WCS's expert expressly admitted on cross-examination that he "can't say that there [are] any other [plans]" besides the Sprinkler Plans. (R. pp. 261:17–263:3.) The jury could not use WCS's expert's testimony to reasonably infer that the final plans for the project differed from the plans that were placed into evidence at trial, only to speculate in this regard. Further still, conceptually, to look to an approval by the building official as evidence of actual compliance with the Building Code is no better than construing the "[i]ssuance of a certificate of occupancy . . . as an approval of a violation of the provisions of this code or any other ordinances of the jurisdiction," which, again, the Building Code expressly forbids. (R. p. 258:8–20.)

II. The Court of Appeals erred in affirming the trial court's refusal to give Petitioners' requested jury charges Nos. 38 and 39.

The trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence. *Wall v. Suits*, 318 S.C. 377, 458 S.E.2d 43 (Ct. App. 1995).

If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. *Sanders v. Western Auto Supply Co.*, 256 S.C. 490, 183 S.E.2d 321 (1971). Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error. *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991).

Petitioners' requested jury charges Nos. 38 and 39 accurately stated the correct law and should have been charged to the jury. Furthermore, there was ample evidence to support the charges to the jury. Indeed, it was beyond dispute that WCS did not install attic sprinklers. Petitioners were clearly prejudiced by the trial court's erroneous refusal to give their requested jury charges Nos. 38 and 39, as they were the only controlling law applicable to the Attic Sprinkler Requirement.

The trial court erred in refusing to give these charges, then again in denying Petitioners a new trial in response to their post-trial motion raising this error, which error plainly prejudicial and eversible. Petitioners were, and are, entitled to a new trial against WCS, which, as noted above, should be as to damages only, because Petitioners are entitled to judgment as a matter of law against WCS as to liability.

Most respectfully, the Court of Appeals erroneously affirmed the trial court in this regard, concluding, (a) that this issue is not preserved for review and (b) that, in any event, Petitioners' challenge to the trial court's refusal to give their requested jury charges Nos. 38 and 39 is without merit, because "the trial court adequately charged the jury with respect to South Carolina law." (Subject Opinion p. 4.) The Court of Appeals explained this conclusion as follows:

> This issue is not properly before us. While it is uncontested that the POA requested these charges over email and that the trial court did

> not charge them, the record does not contain any arguments for, arguments against, or rulings on these charges until the POA's motion for a new trial and the trial court's subsequent Form 4 order denying that motion. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) ("Appellant has the burden of providing [an appellate court] with a sufficient record upon which [the appellate court] can make its decision.").
>
> Even so, the trial court adequately charged the jury with respect to South Carolina law. We believe charge 38, stating the international residential code does not nullify any provision of a local ordinance, was generally covered by the court's charge on negligence per se. *See Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 547, 462 S.E.2d 321, 330 (Ct. App. 1995) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial."); *Sanders v. W. Auto Supply Co.*, 256 S.C. 490, 497, 183 S.E.2d 321, 325 (1971) (requiring a new trial only if the applicable principle was "not otherwise covered by the charge").
>
> As to charge 39, which would have charged the Folly Beach sprinkler ordinance, we believe that given the jury charge as a whole and in light of the evidence and issues presented at trial, the trial court did not abuse its discretion. The key issue for attic sprinklers was the developer's argument that it had been led to believe attic sprinklers were not required. Here, the issue was what the Hall Letter said. The terms of the local ordinance were not in dispute. *See Bragg*, 319 S.C. at 547, 462 S.E.2d at 330 ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.").

(Subject Opinion pp. 4–5.)

Contrary to the view set forth in the Subject Opinion, this issue was properly before the Court of Appeals. While "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate

review,"[14] it must be remembered that "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

As the Subject Opinion acknowledges, "it is uncontested that [Petitioners] requested these charges over email and that the trial court did not charge them." (Subject Opinion p. 4.)[15] In requesting the charges, Petitioners necessarily contended that they that were warranted based on the evidence, correctly stated the law, and were not otherwise covered by the charge, and by declining to give the charges despite Petitioners' request, the trial court necessarily disagreed with Petitioners' contention.[16] Certainly, the trial court had a fair opportunity to rule on this issue, and indeed did so by declining to give the requested charges, and the Court of Appeals has a platform for meaningful appellate review.

Regarding the merits of this issue, Petitioners' requested jury charges Nos. 38 and 39 were not adequately covered by the trial court's jury charge, and the trial court's refusal to give the requested charges necessarily prejudiced Petitioners. It must be remembered that the trial court expressly instructed the jury as follows:

> I have the additional duty now to charge you the law applicable to this case. *It is your duty as jurors to accept and apply the law as I now state it to you*. If you think you have any idea as to

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[14] *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

[15] In fact, for its part, WCS services has not argued that this issue/argument is unpreserved. (*See* Br. of Respondent pp. 13–14.)

[16] It would be irrational for the trial court to decline to give the requested charges for some reason other than its disagreement with Petitioners' contention that they were warranted based on the evidence, correctly stated the law, and were not otherwise covered by the charge, and for the trial court to act on such a basis would trigger the futility exception to the raised-to-and-ruled-upon requirement. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.").

> what the law is or what the law ought to be and it does not agree with what I tell you the law is, you must forget that idea because you are sworn to accept the law and apply the law exactly as I state it to you.

(R. p. 340:8–15 (emphasis added).)

To be sure, the trial court charged the jury as follows regarding negligence per se:

> Where there is a duty arising from a statute, ordinance, or regulation and the plaintiff shows the defendant violated the statute, ordinance, or regulation, such violation is negligence per se. The violation of any of the provisions of a statute, ordinance, or regulation is negligence per se. That is, negligence in an[d] of itself, negligence as a matter of law. Negligence per se simply means you, the jury, need not decide if a defendant acted as would a reasonable person or entity under the same circumstances. The statute, ordinance, or regulation fixes the standard of conduct required of a defendant, leaving you merely to decide whether the defendants breached the statute, ordinance, or regulation.
>
> If the defendants did, this failure to take due care is established as a matter of law. The only issue then left for you to determine is whether the defendant's conduct proximately caused damage to the plaintiff. According, proof of a violation of a statute, ordinance, or regulation is, in fact, proof of negligence. Thus, your only concern then would be whether such violation of the statute, ordinance, or regulation was the proximate cause of the damages to the plaintiff.
>
> The violation of a statute, ordinance, or regulation does not constitute recklessness, willfulness, and wantonness per se, yet such violation, if shown, is evidence of recklessness, willfulness, and wantonness and may be considered in connection with all other facts and circumstances surrounding the case.
>
> In determining whether the defendants have been reckless, willful, and wanton, municipalities in South Carolina are charged by statute with adopting and implementing building codes. If a building code has been adopted as a statute, any violation of that building code constitutes negligence per se. If you find that the defendants violated a statute, ordinance, or regulation, your verdict may support a recovery of damages if such violation proximately caused or proximately contributed to the damages alleged by the plaintiff.

(R. pp. 350:16–353:3.)

But even assuming, *arguendo*, that the substance of Charge No. 38 is somehow covered by the trial court's charge on negligence per se, it was not enough for the trial court to charge the jury on the general principle of negligence per se. Without question, the Folly Beach Sprinkler Ordinance was the *law* in effect at the pertinent time and place, with WCS itself "stipulating to the accuracy and authenticity of the copy of the ordinance marked as a Court's exhibit . . . ." (Br. of Respondent p. 14.) Indeed, when objecting to the Folly Beach Sprinkler Ordinance being admitted into evidence, WCS's counsel stated, "We object to the introduction of the *law* to be going back to the jury in the course of the case." (R. p. 254:2–12 (emphasis added).) For the trial court to charge the jury that it must follow only "the law as I now state it to you" and then to state the law that the jury must follow so as to leave out the Folly Beach Sprinkler Ordinance did irreparable prejudice to Petitioners' case against WCS.

III. Assuming, *arguendo*, this point is material to Question/Argument I.A, the Court of Appeals erred in affirming the trial court's admission of (and refusal to strike) inadmissible hearsay testimony from defense expert Alan Schweickhardt.

As explained above, the aforementioned testimony by Mr. Schweickhardt provides no basis to support affirmance of the trial court. But out of an abundance of caution, Petitioners also maintain it was error for the trial court to allow it.

To the extent there is any way a jury could infer from Mr. Schweickhardt's testimony that a variance had been granted, it would have to derive from the idea (which itself is unfounded speculation, incapable of supporting a jury verdict, *see Huffines*, 365 S.C. at 188, 617 S.E.2d at 130) that Mr. Tittle told Mr. Schweickhardt that a variance had been granted, unquestionably an out of court statement (by Mr. Tittle) offered in evidence to prove the truth of the matter asserted and therefore inadmissible hearsay. *See* Rule 801, SCRE; Rule 802, SCRE. This, and similar

hearsay and innuendos permitted after the door had been opened with Mr. Schweickhardt, should not have been permitted to occur.

Most respectfully, the Court of Appeals erroneously affirmed the trial court in this regard, concluding, that the challenged testimony "did not prejudice [Petitioners], and thus, its admission is not reversible error." (Subject Opinion p. 5.) The Court of Appeals explained this conclusion as follows:

> "[T]he improper admission of hearsay is reversible error only when the admission causes prejudice." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997). There was a mountain of testimony in this case that people involved in this development were under the impression that attic sprinklers were not required. Indeed, another expert testified later and gave similar testimony after explaining that information from someone like the fire chief was information that experts in his field reasonably relied upon when forming opinions regarding fire code issues as well as the design and installation of fire sprinkler systems. *See id.* ("Where the hearsay is merely cumulative to other evidence, its admission is harmless."). For these reasons, we find the testimony in question did not prejudice the POA, and thus, its admission is not reversible error.

(Subject Opinion p. 5.)

Assuming, *arguendo*, there is other testimony in the record to the same effect as Mr. Schweickhardt's, the Court of Appeals overlooked the fact that it came after the door had been impermissibly opened with Mr. Schweickhardt and should not have been permitted to occur. Indeed, as the Subject Opinion expressly states, the other expert testimony to which the Court of Appeals cites came "later." (Subject Opinion p. 5.)

CONCLUSION

For the foregoing reasons, Petitioners ask this Honorable Court to grant the instant petition, to reverse the Subject Opinion, and either to directly decide this appeal anew via an opinion that

reverses the trial court and remands this case for a new trial against WCS on damages only or, as a lesser alternative, for a new trial absolute, or, alternatively, to remand the matter for any such further proceedings as may be needed to effectuate the reversal of the Subject Opinion and the trial court rulings challenging in this appeal.

<SIGNED ON THE FOLLOWING PAGE>

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June 12, 2023