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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.: 2023-000807

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Unpublished Opinion No. 2023-UP-014 (S.C. Ct.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 .....

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUES

1. That the petition fails to present special and important circumstances justifying a discretionary writ of *certiorari* pursuant to Rule 242(b), SCACR.

2. That the Court of Appeals correctly affirmed the trial court's denial of Petitioners' motion for a directed verdict and motion for JNOV or a new trial against Respondent where:

   (a) the evidence and inferences at trial reasonably supported the jury's verdict that Respondent was not required to install fire sprinklers within the attics of the residential buildings of Palmetto Pointe.

   (b) the evidence and inferences presented at trial reasonably supported the jury's verdict that Respondent did not violate the Building Code since the unsubstantiated allegations of penetrations of interior firewalls at Palmetto Pointe due to the as built location of fire sprinkler risers was based upon fire sprinkler plans that were unsigned and unsealed and consequently not final plans for the location of fire sprinkler risers at Palmetto Pointe.

3. That the Court of Appeals correctly held the trial court's failure to charge Petitioners' requested jury charges Nos. 38 and 39 was not reversable error since the record on appeal contains neither any arguments for or against the requests to charge, nor a ruling by the trial court concerning these requests to charge, and therefore this issue was not preserved for appellate review, or in the alternative that the requests were otherwise covered by the trial court's charges given at the end of the trial.

4. That the Court of Appeals correctly affirmed the trial court's admission of testimony from defense expert Alan Schweickhardt.

STATEMENT OF THE CASE

The petition arises out of the Court of Appeals' unpublished opinion which affirmed the (1) trial court's denial of Petitioners' motion for directed verdict and motion for Judgment Notwithstanding the Verdict ("JNOV") or a new trial; (2) trial court's failure to charge the jury on Petitioners' requested jury charges Nos. 38 and 39; and (3) trial court's admission of alleged

inadmissible hearsay testimony. Respondent was the fire sprinkler subcontractor for the construction of Palmetto Pointe condominiums comprised of twenty (20) residential townhouse duplexes located in Folly Beach, South Carolina. Under its subcontract, Respondent installed the fire sprinkler systems within the twenty residential buildings (20), as well as the clubhouse. (R. p. 73, lines 22-25).

A construction defect lawsuit was filed by Petitioners on February 23, 2015, in the Charleston County Court of Common Pleas, alleging various and sundry construction defects, including defects in the design and installation of fire sprinkler systems. The lawsuit was tried by jury before Honorable Jennifer B. McCoy beginning on May 6, 2019, and concluding on May 16, 2019, at the conclusion of which the jury returned a unanimous verdict in favor of Respondent as to all claims asserted against it by Petitioners. On May 24, 2019, Petitioners filed a motion for judgment notwithstanding the verdict and/or for a new trial, which was denied by July 15, 2019, order of the trial court. A motion to reconsider was thereafter filed by Petitioners on July 25, 2019, which was also denied by the trial court order dated August 5, 2019.

A notice of appeal was filed by Petitioners on September 6, 2019, to the South Carolina Court of Appeals. Briefs were submitted by the respective parties and the record on appeal finalized and submitted. The oral arguments of counsel were heard by the Court of Appeals on September 15, 2022. Thereafter, on January 11, 2023, in a unanimous unpublished *per curiam* opinion, the Court of Appeals denied relief as to all the issues raised by Petitioners. (the "Subject Opinion"). On March 27, 2023, Petitioners filed a petition for rehearing, which was denied by order dated April 20, 2023. Petitioners now seek a writ of *certiorari* for review by this Court.

STANDARD OF REVIEW

South Carolina Appellate Court Rule 242(b)

Pursuant to the South Carolina Appellate Court Rules, "[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*." Rule 242(b), SCACR (emphasis added). Rule 242(b) provides an illustrative list of what constitutes special and important reasons that warrant the issuance of a writ of *certiorari*, including: (1) those in which there are novel questions of law; (2) those in which there is a dissent in the decision of the Court of Appeals; (3) those in which the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) those where there are substantial constitutional issues directly involved; and, (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. *Id*.

Motion for Directed Verdict and JNOV

A motion for judgment notwithstanding the verdict/new trial may be granted only if no reasonable jury could have reached the challenged verdict. *Burns v. Universal Health. Srvcs.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004). When considering a motion for JNOV the court is only concerned with the existence of evidence, and neither a trial nor an appellate court has authority to make determinations about the weight or credibility of the evidence, nor has the authority to resolve conflicts of testimony or evidence. *Id*. at 231-32, 603 S.E.2d at 611. The jury's verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict. *Id*. Additionally, if more than one inference can be drawn from the evidence, a grant of JNOV is improper. *Id*. All evidence and reasonable inferences from the evidence are viewed in the

light most favorable to the non-moving party. *Id*. A trial court's ruling on a JNOV motion will be reversed only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Id*. This deference respects that in a trial by jury it is the province of the jury, as the judges of the evidence, testimony, and witnesses, to weigh conflicting evidence and testimony and to determine the credibility and believability of conflicting evidence and testimony. *Small v. Pioneer Mach.*, 329 S.C. 448. 494 S.E.2d 835 (Ct. App. 1997).

Preservation of Issues for Appellate Review

"It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 497 S.E.2d 731, 733 (1988). The "Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court." *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910). An "appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court." *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995). A "question of law which was not presented to or passed upon by the trial court cannot be raised on appeal." *Gaffney v. Peeler*, 21 S.C. 55 (1884). **The "appellant has the burden of providing [an appellate court] with a sufficient record upon which [the appellate court] can make its decision."** *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) (emphasis added). **The "respondent – the "winner" in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."** *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (emphasis added). **"The appellate court may review respondent's additional reasons and, if convinced it is**

proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. (emphasis added)

Review of Jury Charges for Error

"In reviewing jury charges for error, [an appellate court] must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 547, 462 S.E.2d 321, 330 (Ct. App. 1995). A new trial is required only if the applicable principle of the requested jury charge "was not otherwise covered by the charge." Sanders v. W. Auto Supply Co., 256 S.C. 490, 497, 183 S.E.2d 321, 325 (1971).

Admission of Hearsay Testimony

"Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011). The "improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." Id. "Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." Id.

ARGUMENT

I. Petitioners Fail to Present Any Special and Important Reasons Justifying Discretionary Review of the Court of Appeals' Decision by this Court.

Petitioners continue to pursue this appeal due to dissatisfaction with the verdict rendered in Respondent's favor by the trial jury after a nine-day trial involving a "mountain" of conflicting evidence. (Subject Opinion p. 5). Likewise, Petitioners continue to pursue this appeal in search of an appellate court willing to usurp the trial jury. The Court of Appeals' decision applies well-established law in upholding the trial court's denial of Petitioners' motion for a directed verdict,

judgment notwithstanding the verdict or new trial, and ruling that the record provided no basis to reverse the trial court's failure to charge Petitioners' request to charge Nos. 38 and 39. Furthermore, the Court of Appeals correctly ruled that the admission of defense expert witness Alan Schweichardt's trial testimony was not reversable error because it was not prejudicial to Petitioners since there was other cumulative evidence consistent with Mr. Schweichardt's trial testimony, and therefore even if deemed hearsay the admission amounted to harmless error. The current petition does not raise any special and important reasons under SCACR 242 to warrant further review of the Court of Appeals decision. Therefore, Petitioners' request for a writ of *certiorari* should be denied.

Moreover, none of the examples listed in Rule 242(b) are applicable to this petition for the issuance of a writ of *certiorari.* First, this appeal raises no novel questions of law. Second, there was no dissent in the decision rendered by the Court of Appeals. Third, the decision of the Court of Appeals is not in conflict with any prior decision of this Court. Fourth, the trial decision and related rulings to which the petition for a writ of *certiorari* arises do not involve any constitutional issues. Fifth, this underlying action does not involve a federal question.

Furthermore, Petitioners fail to enunciate any reason for this Court to exercise discretionary review. Petitioners make no argument in the petition as to why this Court should exercise discretionary review that comports with Rule 242(b). Rather in this instance Petitioners are asking this Court to review the Court of Appeals decision, not because of any "special or important" reasons, but rather out of the continued pursuit of an appellate court willing to substitute its judgment of the trial evidence for that of the trial jury. As such, this Court should deny Petitioners' continued pursuit of this appeal.

II. The Court of Appeals correctly affirmed the trial court's denial of Petitioners' motion for a directed verdict and motion for JNOV or a new trial since the record on appeal is replete with evidence that reasonably supports the trial jury's verdict.

A. Since the evidence in the record on appeal presents a reasonable inference that Respondent was not required to install fire sprinklers within the attics of residential buildings of Palmetto Pointe, the Court of Appeals correctly affirmed the trial court's ruling on this issue.

Petitioners argue the Court of Appeals erred by not recognizing that the only reasonable conclusion to draw from the evidence at trial was that Respondent violated the City of Folly Beach Ordinance §90.08(C) by not installing sprinklers within the attics of the twenty (20) residential buildings. (Petition p. 9). This is the same argument Petitioners made in their final brief before the Court of Appeals. (Final Br. of Appellants p. 11; Subject Opinion p. 2). However, the Court of Appeals correctly disposed of this issue because a key piece of evidence in the record on appeal – the "Hall Letter" – can be reasonably viewed as informing the developer that the City of Folly Beach ordinance did not apply in-so-far as attic sprinklers were not required in the twenty (20) residential buildings of Palmetto Pointe. (Subject Opinion p. 3; R. p. 255, line 3 – p. 256, line 10; R. p. 268, line 10 – p. 269, line 14). Additionally, other evidence in the record on appeal supports the Court of Appeals ruling that this aspect of the City of Folly Beach ordinance did not apply to the residences of Palmetto Pointe. This additional evidence specifically included the trial testimony by Respondent's expert. (R. pp. 232 – 239). Accordingly, the evidence in the record on appeal presents evidence and reasonable inferences that Respondent was not required to install fire sprinklers within the attics of the residences at Palmetto Pointe.

While Petitioners go to great lengths to argue the Hall Letter did not itself constitute a variance allowing Respondent to avoid strict adherence to the City of Folly Beach Ordinance, the Court of Appeals correctly ruled that this variance dispute was not dispositive. (Final Br. of

Appellant p. 13; Petition p. 10). The Court of Appeals correctly reasoned that because the Hall Letter could be reasonably interpreted as confirmation of a variance of the City of Folly Beach ordinance requirement of attic sprinklers, the absence of direct evidence one way or the other of a variance was not dispositive. (Subject Opinion p. 3). Thus, direct evidence of whether a variance was or was not granted is immaterial to this issue on appeal. Accordingly, the Court of Appeals correctly affirmed the trial court's denial of Petitioners' motion for a directed verdict and motion for JNOV or new trial as to this issue.

B. Since the evidence at trial presented a reasonable basis that the final fire sprinkler plans for construction of Palmetto Pointe differed from the undated and unsigned fire sprinkler riser location plan introduced into evidence, the Court of Appeals correctly affirmed the trial court's ruling on this issue.

Petitioners argue that the Court of Appeals erred by not recognizing the only reasonable conclusion to be drawn from the evidence is that Respondent violated the Building Code by its location of fire sprinkler riser cabinets contrary to unsigned and unsealed fire sprinkler system plans introduced into evidence at trial. (Petition p. 14). As built fire sprinkler risers were located at the fronts of the residential units at Palmetto Pointe, while the unsigned and unsealed plans introduced at trial showed fire sprinkler risers located at the sides of each residential unit. (R. p. 241, lines 13 – 20; R. pp. 476-483). Petitioners raised this same argument in their final brief before the Court of Appeals. (Final Br. of Appellant p. 14). The Court of Appeals correctly disposed of this issue due to the existence in the record of evidence that the fire sprinkler plans introduced into evidence were not the final fire sprinkler plans for the construction of Palmetto Pointe. (R. p. 105, lines 6 – 24; R. pp. 259 – 262; R. p. 267, line 10 – p. 268, line 9; R. p. 476; Subject Opinion p. 4)

As reflected in the record on appeal, the fire sprinkler system plans of Palmetto Pointe admitted into evidence at trial were neither signed nor sealed. (R. p. 105, lines 6 – 24; R. pp. 259 – 262; R. p. 267, line 10 – p. 268, line 9;R. p. 476). The evidence in the record on appeal reasonably supports the finding that the plans admitted into evidence at trial were not the final plans for the sprinkler system installed and the location of the fire sprinkler risers at Palmetto Pointe. Further, there is expert testimony in the record on appeal that it is not uncommon for changes to occur between preliminary plans and final plans with regard to the layout of fire sprinkler systems, like that of the fire sprinkler systems installed at Palmetto Pointe. (R. p. 242, line 22 – p.243, line 2; R. p. 262, line 24 – p. 263, line 1). Even when changes are made between preliminary plans and final plans with respect to the layout of fire sprinkler systems, the final plans must be approved, which appears to have been the case based on testimony in the record on appeal that the fire sprinkler system of Palmetto Pointe as built was approved. (R. p. 243, line 22 – p. 244, line 23). Accordingly, since the sprinkler plans admitted into evidence at trial were unsigned and unsealed, and it was not uncommon for preliminary plans and final plans to evolve over the course of construction, and further since all final plans require code official approval, it was reasonable to infer the as built fire sprinklers were compliant with whatever final fire sprinkler plans were finally approved for the construction of Palmetto Pointe. Therefore, the Court of Appeals correctly affirmed the trial court's denial of Petitioners' motion for a directed verdict and motion for JNOV or new trial as to this issue.

III. The Court of Appeals correctly ruled the issue regarding Petitioners' request to charge Nos. 38 and 39 was not properly preserved for appellate review, and alternatively were otherwise covered by the trial court in the charges given.

Petitioners argue that the trial court erred by not charging Petitioners' requested jury charges Nos. 38 and 39. (Petition p. 15). Petitioners claim the requested instructions accurately stated the law applicable to the issues and evidence before the trial court, and that the trial court's failure to charge Petitioners' requested jury charges Nos. 38 and 39 was prejudicial. (Petition p. 16). However, the Court of Appeals correctly determined this issue was not properly preserved for appellate review. (Subject Opinion p. 4). Although the record reflects that the requested jury charges were submitted to the trial court, from the record the basis for the trial court's failure to charge those requests is silent. The record contains no arguments for and against those charges, and no ruling or reason by the trial court for not charging those requests. (R. pp. 677 – 679; R. pp. 286 – 289; R. pp. 338 – 371). In short Petitioners have failed to preserve and have therefore waived appellate review of this issue.

In contrast to an appellant, a respondent may at any point on appeal raise any additional reasons the appellate court should affirm the lower court's ruling, whether or not previously raised below. See *I'On L.L.C.,* 338 S.C. 406, 526 S.E.2d 716 (2000). The waiver of the requests to charge by Petitioners was brought to the attention of the Court of Appeals during oral arguments on September 15, 2022. The Court of Appeals correctly ruled the trial court's failure to charge Petitioners' requests to charge Nos. 38 and 39 was not reviewable.

In the alternative, the Court of Appeals correctly ruled Petitioners' requested charges Nos. 38 and 39 were otherwise covered in the jury instructions given by the trial court. Specifically, Petitioners' requested charge No. 38 was covered by the trial court's jury instruction on negligence *per se*. (Subject Opinion pp. 4-5; R. pp. 350 – 352). The trial court's instruction on negligence *per se* informed the jury that *any* violation of a statute, ordinance, or regulation would result in liability.

(R. p. 350, lines 19 – 21) (emphasis added). Petitioners' requested charge No. 38 stated that compliance with the 2003 International Residential Code would not negate liability from a breach of any other applicable provisions of local, state, or federal law. (R. p. 678). Consequently, the jury was effectively charged that if they determined that there had been no waiver of the City of Folly Beach Ordinance, and therefore as-built Respondent's fire sprinkler system violated that local ordinance, then Respondent could not avoid liability to Petitioner. Therefore, the Court of Appeals correctly ruled that the issue regarding Petitioners' request to charge No. 38 was otherwise covered by the trial court in the jury instructions given.

Likewise, the Court of Appeals correctly ruled Petitioners' requested charge No. 39 was otherwise covered in the jury instructions given by the trial court because the terms of the City of Folly Beach Ordinance were not in dispute based upon the evidence, testimony and issues presented at trial. (Subject Opinion pp. 5). In contrast, from the record the Folly Beach Ordinance language was referred to throughout the trial and was admitted as a demonstrative exhibit. (R. p. 92, lines 10 – 15; R. p. 205, lines 9 – 18; R. p. 207, line 24 – p. 208, line 4, lines 10-16, lines 19-22; R. p. 234, lines 4-8; R. p. 255; R. p. 257; R. p. 429) Therefore, the Court of Appeals correctly ruled the issue regarding Petitioners' request to charge No. 39 was otherwise covered by the trial court's jury instructions.

IV. The Court of Appeals correctly affirmed the trial court's admission of testimony by defense expert Alan Schweickhardt because the testimony was cumulative to other evidence.

From the record the co-defendant general contractor Complete Building Corporation's expert witness Alan Schweickhardt was permitted by the trial court to testify that after conversing with George Tittle, the then City of Folly Beach fire chief and authority having jurisdiction on fire

code issues during the construction of Palmetto Pointe, he never revised his proposed repairs of Palmetto Pointe to include the installation of fire sprinklers in the attics of the residences of Palmetto Pointe. (R. pp. 159 – 161). Petitioners argue the trial court erred in allowing this testimony of Alan Schweickhardt because it inferred the existence of an out of court statement by the authority having jurisdiction that the attic fire sprinkler requirement of the City of Folly Beach Ordinance had been waived. (Petition p. 20). Petitioners repeatedly have argued this amounted to the introduction of inadmissible hearsay. *Id*. However, the admission of Alan Schweickhardt's testimony, even assuming the testimony to be of itself inadmissible hearsay, was harmless error since there is cumulative evidence in the record on appeal that the Folly Beach Ordinance attic sprinkler requirement was waived, thus the admission of this testimony was, at most, harmless error. (Subject Opinion p. 5).

As reflected in the record several other witnesses at trial testified that based upon information provided to them, fire sprinklers were not required in the attics of the residential buildings of Palmetto Pointe. (R. pp. 159 – 161; R. p. 185, lines 20 – 22; R. p. 193, lines 8 – 22; R. p. 232, line 15 – p. 233, line 14). Accordingly, because there is cumulative evidence in the record that attic sprinklers were not required in the residences of Palmetto Pointe, the testimony at issue of Alan Schweickhardt was harmless and did not result in prejudice to the Petitioners. (Subject Opinion p. 5). Therefore, the Court of Appeals correctly affirmed the trial court's admission of this testimony.

CONCLUSION

For the foregoing reasons, this Honorable Court should deny the instant petition because it fails to meet the requirements of SCACR 242(b); the Court of Appeals properly affirmed the trial

court's denial of Petitioners' motion for judgment notwithstanding the verdict or in the alternative for a new trial; Petitioners' have waived the trial court's failure to charge the jury with Petitioners' requested jury charges Nos. 38 and 39; and the trial court's admission of testimony by defense expert Alan Schweickhardt amounts to harmless error.

Respectfully submitted,

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