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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No.: 2022-001747

Constance Brown, individually, and as Guardian ad Litem for Zamaria Stuckey, a minor under the age of 14 ……..……………………....…………………Respondent,

v.

Firelane Family Apartments LP, D/B/A Deer Park Apartments ..…………………….Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING THE VERDICT ON PUNITIVE DAMAGES.

STATEMENT OF THE CASE

This appeal arises out of a jury verdict against the Appellant (hereinafter "Owner") in which the jury awarded Respondent (hereinafter "Plaintiff") punitive damages in the amount of $750,000.00.

A Complaint was filed on January 26, 2018, alleging Owner was negligent in causing injuries to Plaintiff's fifteen (15) month old child (hereinafter "ZS"), while they were visiting a family member who resided at Owner's apartment complex known as the Deer Creek Apartments located in Columbia, South Carolina (hereinafter "the Complex").

Owner filed and timely served an Answer and demanded a trial by jury.

A jury trial took place beginning on September 7, 2022, and concluding on September 12, 2022. At the conclusion of Plaintiff's case-in-chief, Owner moved for a directed verdict, which was denied. After the presentation of Owner's case and the close of all evidence, both Plaintiff and Owner moved for a directed verdict, which were denied. The jury was charged and at the conclusion of the charges, Owner objected to the punitive damages charge, which was overruled. Plaintiff did not make any objections to the charges.

The jury returned a verdict against Owner and awarded actual damages in the amount of $1,386.950.00 and punitive damages in the amount of $750,000.00.

Owner timely filed a Motion for Judgment Not Withstanding the Verdict ("JNOV") as to the award of punitive damages only. Plaintiff timely filed a Motion for Costs. On November 14, 2022, the trial court issued an Order denying Owner's motion and granting Plaintiff's motion.

A Notice of Appeal was filed and timely served.

STATEMENT OF FACTS IN SUPPORT OF APPEAL

A. Background leading to injury.

This premises liability case involves injuries sustained by ZS at approximately 5:00 p.m. on August 1, 2015, while visiting Plaintiff's sister, Chenay Brown (hereinafter "Sister") who lived at the Complex for approximately one (1) year prior to the accident. [Complaint; TT pp. 130, lines 18-25; 277, lines 9-11].

The Complex has multiple apartment buildings as well as a fenced playground near the entrance. Sister's apartment building is two stories. At the center of the building is a breezeway with stairs to the second floor. At the front of the breezeway is a sidewalk that runs the length of the building and a parking lot. Along with the sidewalk are diamond plate metal planks that cover cuts in the concrete sidewalk where the gutters on the second story drain into the parking lot. [TT pp. 131-36; Trial Exhibits 2-12, 14 photos].

On August 1st, Plaintiff, ZS, and Plaintiff's two other children went to Sister's apartment between Plaintiff's work shifts. Sister and her two children were at the apartment when Plaintiff arrived. [TT p. 286]. When they arrived, Plaintiff and her kids took their shoes off and put them by the front door. [TT p. 349].

After sitting in the living room with sister and the children, Plaintiff went into a back bedroom with the ZS, Plaintiff's older daughter, and her niece ("DB") to watch movies. [TT p. 137].

Sister remained in the living room with her young son, when she received a call on her cell phone. Sister told her older son who was in another bedroom with Plaintiff's son "to keep an eye on things" and she ran out the front door and walked to the end of the building, which from her door to the end of the building is approximately forty-four (44) yards or almost a half a football field.[1] [TT pp. 138-39, 153-54].

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[1] Sister confirmed she did not know if her son was even awake when she yelled out to keep an eye on things. [TT p. 151].

Plaintiff fell asleep in the back room with ZS. At some point, Plaintiff felt a tap on her shoulder from five-year-old DB,[2] who said, "momma outside, I'm going to take [ZS] outside." Plaintiff cracked an eye to see if ZS was up and then DB took ZS. Plaintiff did not say anything to DB and fell back to sleep. [TT pp. 286-87].

As Sister was on the phone at the end of the building walking around, she noticed her young son who previously was in the living room come out of the breezeway on his scooter and roll up the sidewalk. ZS was not with him. After anywhere from a few seconds to up to a minute, Sister heard a weird scream and turned to look back to the breezeway and saw ZS standing. Sister ran to ZS which took four to six seconds and noticed ZS was standing barefoot on one of the diamond plate covers, at which time Sister picked up ZS and took her inside. [TT p. 139; 155].

After ZS left the bedroom, Plaintiff fell back to sleep and was later awoken by a scream. Plaintiff got out of bed and ran down the hall and then Sister came into the apartment holding ZS. [TT p. 288].

The undisputed testimony at trial was ZS left the apartment without shoes, walked to the front of the breezeway and onto the sidewalk. At some point ZS walked onto a diamond plate. The only other family members present was Sister and her young son.

ZS suffered significant burns on both feet.

B. Facts related to sidewalk and diamond plate cover.

(a) Builder's testimony.

[2] [TT p. 157].

William H. McCauley III is the president of Creative Builders, Incorporated.[3] [McCauley Depo p. 6, lines 6-10]. Creative Builders is a commercial contractor located in Greenville, South Carolina. The company is licensed in several states and constructs multifamily, medical, senior care and assisted living facilities. [*Id*., p. 6, line 11-p. 7, line 12].

Mr. McCauley grew up in the construction industry. He worked in every field of the industry during summers while in high school and through college. Mr. McCauley graduated from Clemson University with a degree in what is now known as Construction Sites and Management approximately thirty (30) years ago. Mr. McCauley immediately began working for Creative Builders, which was started by his father. He became president of the company in 2006 or 2007. Mr. McCauley holds a general contractors license in South Carolina, North Carolina, Tennessee, Georgia, and Virginia. Creative Builders has been constructing multifamily affordable apartment housing for many years in these states. [*Id*., p. 8, line 5-p. 11, line 9].

Creative Builders constructed the Complex for the Douglas Company/Owner. Mr. McCauley testified that he has known the owner, David Douglas, for thirty (30) years and Creative Builders has constructed fifteen (15) to twenty (20) multifamily affordable apartment projects for the Douglas Company in that time. [*Id.*, p. 11, line 10-p. 14, line 13].

Testifying as to the specifics of constructing an affordable housing project versus a conventional market-rate project, Mr. McCauley testified that there is an added layer of inspections during and at the conclusion of construction that does not occur in conventional

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[3] The witness's *de bene esse* video deposition was played at trial as he was out of state at the time. [TT p. 468]. Citations hereon will be to his deposition.

projects. In addition to the standard inspections from building code administrators, there are additional state agency inspections and wage interviews. [*Id*., p. 15, line 17-p. 16, line 22].

Limiting the question to the construction of sidewalks, parking lots, and common areas, which was where the injury in this case occurred, Mr. McCauley testified that numerous inspections take place. Mr. McCauley testified first there would be site inspections on the pitch and fall, water and sever profiles, and underground utilities, which had to be approved prior to covering up the site with pavement or concrete. [*Id*., p. 17, lines 2-16].

Then compaction testing and inspections are performed before paving can take place. After that, code officials test and inspect the sidewalks and connections to the breezeways. [*Id.*, p. 17, lines 17-21].

Mr. McCauley went on to discuss additional inspections for an encroachment permit from the drive out to the main access, fire lines, sprinklers, and sewer. [*Id*., p. 17, line 22-p. 18, line 6].

At the end of construction, there is another series of inspections that take place before a Certificate of Occupancy is issued, which then allows the building to be occupied by tenants. [*Id*., p. 18, lines 7-p. 19, line 1].

Concerning the installation of the diamond plate, Mr. McCauley testified that the drainage system used for the Complex allowed for water to collect in the roof gutters, move down the building through a downspout, run underneath the ground and deposit into the parking lot where the water would ultimately travel to a storm drain. The purpose of the design is to allow clean removal of the rainwater without ponding around the building. [*Id.*, p. 19, line 19-p. 20, line 12]. An alternative possibility is to have the downspout end at the

ground and to install a splash block which allows the water to dissipate on the ground. [*Id.*, p. 20, line 18-p. 21, line 19].

Mr. McCauley testified that the drainage method used at the Complex was much more expensive to construct but a better choice. [*Id.*, p. 21, line 20-p. 22, line 3].

Mr. McCauley testified that Creative Builders follows all state and local building codes, which is required to get a final inspection and a Certificate of Occupancy. [*Id.*, p. 22, lines 4-16].

Concerning the diamond plate at issue in this case, Mr. McCauley testified the covering had been used in other projects for the same or similar use. Mr. McCauley stated that aside from this lawsuit, he was not aware that the use of the covering on a sidewalk for the purpose used at the Complex violated any ordinance, building regulation, or the International Building Code. Mr. McCauley testified that he was not aware of any ordinance, code, or regulation that required the diamond plate to have a protective coating or covering applied to it when used as it was at the Complex. [*Id.*, p. 23, line 11-p. 24, line 15].

Finally, Mr. McCauley testified that the International Building Code is what has been adopted in the states in which he constructs buildings, including South Carolina. Mr. McCauley has no knowledge of the International Safety Organization (hereinafter "ISO"). [*Id.*, p. 22, line 24-p. 23, line 10].

(b) Architect's testimony.

Patrick Iannelli is a licensed architect who was involved with the construction of the Complex.[4]

[4] The witness's deposition was read at trial as he was out of state at the time. [TT p. 466, lines 6-15]. Citations hereon will be to his deposition.

Mr. Iannelli graduated from Clemson University with an undergraduate degree in 1991 and obtained his graduate degree in 1996. Mr. Iannelli has been a licensed architect since 2002. [Iannelli Depo, p. 5, line 25-p. 6, line 24]. Mr. Iannelli's practice is focused on multifamily dwellings. [*Id.*, p. 6, line 25-p. 7, line 11].

Mr. Iannelli testified that the construction of the Complex, which was built in 2008,[5] was governed by the International Building Code, the Housing Authority's regulations, the ANSI accessibility code, and the ADA code. [*Id.*, p. 9, line 18-p. 10, line 16].

Mr. Iannelli testified that he has personally designed diamond plate coverings onto sidewalks and other exterior usages, which he said is "a common practice." [*Id.*, p. 15, line 22-25]. Mr. Iannelli testified that there are multiple methods for addressing the roof water drainage in a commercial project. First, the water could be allowed to drain on the surface and over the sidewalk. A second option is to cut into the sidewalk and create a flume to allow the water to drain underneath the surface and cover the cut with some type of grate, which was done at the Complex. The third choice is to cut into the curb, but that option is limited. [*Id.*, p. 16, lines 1-24].

Mr. Iannelli testified that he did not choose the design for the Complex, which was managed by a civil engineer. However, he testified that he collaborated with the civil engineer and would perform monthly or bi-monthly site visits during construction. [*Id.*, p. 11, line 14-p. 12, line 24].

In terms of selecting a grate to cover the flume, Mr. Iannelli testified that an open grate would pose a problem with high heels as something could get caught in the grate. A

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[5] The Complex was constructed in 2006. [Price Depo p. 22, lines 13-15].

solid diamond plate is another choice. A third choice is to dig the flume deep enough that it could then be covered with concrete. However, the third choice is limited if the intent is to drain the water into the curb. [*Id.*, p. 17, lines 2-17].

In the present case, Mr. Iannelli reviewed a photo of the subject sidewalk and diamond plate. Mr. Iannelli testified that using a pipe in lieu of cutting through the sidewalk and covering the flume may result in the pipe displacing and the concrete cracking, which would create a tripping hazard. Mr. Iannelli testified that the sidewalk design was very reasonable and that he thought it was reasonable to use diamond plate as the flume cover as it gives added strength and keeps it from becoming slippery during a rainstorm. [*Id.*, p. 19, line 5-p. 20, line 4].

Additionally, Mr. Iannelli testified that he was not aware of a similar product to diamond plate to be used as a flume cover. Mr. Iannelli also stated that while the diamond plate could be painted, it would be flaking all the time due to constant exposure to the elements, and it would be an ongoing maintenance issue. [*Id.*, p. 20, lines 5-15].

Mr. Iannelli was not aware of any instance of a child being burned by stepping on diamond plate in the summer. [*Id.*, p. 20, Lines 16-25].

(c) Civil Engineer's testimony.

Matthew Hines is a civil engineer, president, and chief engineer at the Dennis Corporation, which is an engineering consulting firm in Columbia, South Carolina. [TT p. 469, lines 13-19].

Mr. Hines obtained a bachelor's degree in chemistry from Presbyterian College. He later obtained a bachelor's degree in civil and environmental engineering from the University of South Carolina in 2011. Mr. Hines is a licensed professional engineer ("PE").

Mr. Hines was retained by Owner to render an expert opinion as to whether the diamond plate on the sidewalk was appropriate and if the use of the diamond plate on the sidewalk violated any industry standards or building codes. [TT p. 476, lines 14-22].

Mr Hines testified that as a professional civil engineer, he has seen diamond plates used multiple times on projects on different job sites. [TT p. 480, line 20-p. 481, line 6].

In his expert capacity, Mr. Hines researched the general use of diamond plate, and he discovered standard details or drawings of diamond plate by North Carolina municipalities that use them as well as Texas, the Florida Department of Transportation, and the Department of Veterans Affairs. [TT p. 481, lines 7-22]. However, Mr. Hines found no limitations in the areas that the diamond plates could be used. [TT p. 481, line 23-p. 482, line 10].[6]

Mr. Hines testified that South Carolina has adopted the South Carolina building code, which is based off a model code called the International Building Code. [TT p. 482, lines 11-17].

Mr. Hines testified that the design of the sidewalk, including the decision to use the diamond plate as a cover for the drainage flume, would wall under a civil engineer's expertise. [TT p. 483, lines 3-9].

Mr. Hines opined that using the flume drainage method and diamond plate cover was a very commonly used application and material to address a drainage concern through a walkway. He stated that a heavy-duty cover would be used to cover the flume to provide continued functionality and safety of the sidewalk, without creating a tripping hazard. The

[6] Mr. Hines stated the Department of Veterans Affairs specified that a coating be applied but did not provide a reason for the application. The only specification was the color.

diamond plate supports long-term wear, it is durable, and it supports the weight loads required by building codes. [TT p. 483, lines 10-22; p. 485, line 4-p. 483, line 14].

Mr. Hines opined that he was not aware of any code or regulation that would prohibit the use of a diamond plate as a flume cover in the way it was used at the Complex. [TT p. 483, line 23-p. 484, line 13].

(d) Lee Ann Price testimony

Ms. Lee Ann Price has been the asset manager for Douglas Development/Owner since 2011.[7] [Price Depo p. 9 lines 11-17]. Ms. Price testified that Owner is in the business of developing low-income tax credit multifamily housing in North Carolina, South Carolina, Virginia, and Tennessee. Owner has 58 locations. [Price Depo p. 11, line 17-12, line 7].

Ms. Price testified that the flume drainage system with the diamond plate cover is standard and is common at most of Owner's properties. [TT p. 30, line 4-p. 31, line 7]. Ms. Price stated the drains are built in accordance with the architectural plans and specifications, which were approved by the city. [TT p. 31, lines 8-17].

Ms. Price stated that the Complex is inspected annually by the lenders and investors that are involved in the tax credit development. Additionally, the management company performs quarterly inspections. South Carolina Housing Finance Agency, which oversees the low-income tax credit program, conducts inspections annually, and beginning in 2014, every three (3) years. [TT p. 37, line 11-p. 39, line 1].

Ms. Price testified that the diamond plate cover was never considered to be hazardous. Prior to this lawsuit, there had never been an issue or report of an issue with

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[7] The witness's deposition was read at trial. [TT p. 232, lines 8-11]. Citations hereon will be to her deposition.

the diamond plate covering at any of the 54 properties. Owner has been in the business of having these complexes built since the 1980s, with no reports of any issues with the diamond plate covering. [TT p. 49, lines 2-16].

(e) Ashley Ackerman testimony.

Ashley Ackerman is the regional property manager for Intermark Management, which is the management company hired by Owner to manage the Complex.[8]

Ms. Ackerman testified that the on-site property manager of the Complex must walk the property daily and look for anything that is out of place, e.g., broken items, trash, items needed repairs, resident violations. [TT p. 20, line 24-p. 21, line 21]. Ms. Ackerman confirmed that the management company's maintenance department performs annual inspections, the regional manager performs bi-annual inspections, the State Housing Authority performs its inspections of the property every three (3) years, and unit inspections, including the exteriors, are performed whenever a new tenant moves in or a lease is renewed. [TT p. 36, line 17-p. 37, line 11; p. 74, line 2-p. 75, line 15].

Concerning the specific diamond plate cover, Ms. Ackerman testified that she did not see the cover as hazardous since it was obvious, and the responsibility of a parent to take care of a child. [TT p. 84, lines 1-16]. As a property manager, Ms. Ackerman did not see the diamond plate as a hazard and equated the situation as if someone threw down a lit cigarette or if there was broken glass and a parent let a child walk around unsupervised. [TT p. 85, lines 13-23].

(f) Danny Perry testimony.

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[8] The witness's video deposition was played at trial. [TT p. 223, lines 11-21]. Citations hereon will be to her deposition.

Danny Perry is the senior maintenance employee for Intermark Management, which provides management and maintenance for the Complex. Mr. Perry oversees the maintenance and inspections of approximately 70 or so properties located in Maryland, Virginia, Tennessee, North Carolina, and South Carolina. [TT p. 234, line 24-p. 236, line 3].

Mr. Perry testified that he performs one (1) inspection per year on each property managed by Intermark in addition to assisting the site-specific maintenance personnel if needed. [TT p. 236, lines 16-21].

Mr. Perry testified that he was never made aware that the diamond plate covers were a hazard or violation of the IPMC. Mr. Perry stated the Complex has state inspections, city inspections, his inspections, and regional inspections looking to make sure the property is hazard free. [TT p. 243, lines 5-17].

Mr. Perry stated that he never wrote up a diamond plate cover as a hazard in any of his inspections because "it's not a hazard." Mr. Perry testified that he has three (3) to five (5) properties with the same type of diamond plate cover. Mr. Perry checks sidewalks for trip hazards, broken sidewalks, and cracked sidewalks. When inspecting the diamond plate covers, he checks to make sure they are not damaged, loose, or a trip hazard. He also stated there have been no other problems with the diamond plate covers at any other property. [TT p. 243, line 23-p. 244, line 24].

Mr. Perry has been in property maintenance for twenty-one (21) years. He testified that if during an inspection he sees a crack in a sidewalk, the crack must be repaired. If there is a hole in a wall, the hold must be repaired. If grass is in the sidewalk, it must be repaired. If stones are loose, they must be repaired. If a parking lot has a pothole, it must be repaired. If there is refuge, trash, old bedding that has been discarded, it must be

removed. Despite not knowing the specific requirements codified in the IPMC, Mr. Perry confirmed that he complies with the requirements. [TT p. 246, line 19-p. 248, line 17].

(g) Plaintiff's expert testimony.

Plaintiff retained Bryan Durig to render an opinion concerning the safety of the diamond plate cover. Mr. Durig obtained a Bachelor of Science degree in mechanical engineering, a Master of Science in mechanical engineering, and a Doctorate of Philosophy in mechanical engineering. [TT p. 166, lines 1-11].

Mr. Durig testified that based on his research of the accident, the temperature was approximately 96 degrees when the accident occurred. [TT p. 173, lines 3-9]. Mr. Durig described the diamond plate as twelve (12) inches wide and four (4) feet long, which was covering a break in the concrete which allowed water from the drainpipe to drain into the parking lot rather than over the sidewalk. [TT p. 174, lines 10-20].

Mr. Durig testified that he did a site inspection and, using a thermal imaging device, took temperature measurements of the diamond plate that ranged from 151, 154 and 157 degrees.[9] The latter measurements were taken towards the landscape side of the diamond plate. [TT p. 175, line 7-p. 176, line 1]. Mr. Durig also took temperature readings of the concrete sidewalk and stated those readings of 133 and 134 degrees were consistent with previous readings taken years before by another professional engineer, Mr. Shields. [TT p. 176, lines 15-23; p. 177, lines 22-25].

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[9] Concerning the temperature readings taken by Mr. Durig, the ISO stated the measurement of the surface temperature shall be carried out by using an electrical thermometer with a contact sensor. However, Mr. Durig admitted he did not use a contact sensor. [TT p. 201, lines 7-17].

Mr. Durig discussed a publication known as the ISO, which discussed the burn thresholds for different materials. [TT p. 180, lines 13-16]. Based on the publication, Mr. Durig stated that the temperature of 157 degrees on the diamond plate was in the instantaneous range for a burn. [TT p. 182, lines 1-7]. Mr. Durig also testified that a thermal burn could occur in three (3) seconds on a metal plate at 140 degrees. [TT p. 185, lines 4-11].

Mr. Durig testified that the IPMC, which was adopted by Richland County in 2005, "basically, tells you how to maintain your buildings . . .. Because you can build a nice brick building, but if you don't maintain it, it's going to fall apart." [TT p. 185, line 16-page 187, line 5].

According to Mr. Durig, IPMC section 302.3 basically states that you need to maintain your sidewalks, walkways, parking places, and similar locations in a hazard-free condition. [TT p. 187, line 17-p. 188, line 2].

Mr. Durig opined that because the temperature of the diamond plate was in the 140 to 157 degree range, it was "hazardous" based on the ISO publication. Therefore, Mr. Durig concluded the diamond plate was not maintained to be free from hazardous conditions and therefore violated the IPMC. [TT p. 188, lines 3-23].

Mr. Durig testified that the ISO standards he relied upon *is not a standard that has been adopted by the State of South Carolina*. While he stated the ISO is an "accepted industry standard that's used across the country," he only was able to refer to HVAC applications. [TT p. 193, line 21-p. 194, line 5].

Mr. Hines testified the ISO has only been adopted on the densities and weights of cotton bails relative to the fire code or hazardous material section of the code, and in

matters concerning the weight of fiber reinforced concrete walls. It has not been adopted by any state concerning the construction of multifamily dwellings. [TT p. 487, lines 3-19].

Mr. Durig confirmed that construction of the building is governed by the International Building Code. Mr. Durig confirmed that the International Building Code also cross-references different standards, such as ASTM. However, the International Building Code *does not* reference *any* ISO discussed by Mr. Durig, as he confirmed. Mr. Durig was not aware of *any* building code referencing any ISO. Mr. Durig did not know if the ISO has been adopted in any state in the United States with regard to construction. Mr. Durig is not aware of any local or county ordinance that has adopted the ISO in South Carolina. Mr. Durig could not say if the ISO is even an industry standard in the construction of commercial apartment complexes. [TT. p. 197, line 20-p. 200, line 11]. Mr. Durig testified that the International Building Code does not address thermal issues related to sidewalks. [TT p. 219, lines 9-13].

Mr. Durig also opined that an uncoated metal surface on a sidewalk walking surface at the apartments at a 140 to 150 degree range would be considered a hazardous condition in violation of ASTM 51636 industry standard. However, the scope of ASTM 51636 stated that it covered the design and construction guidelines and minimum maintenance criteria for new and existing buildings and structures to provide reasonably safe walking surfaces for pedestrians *wearing ordinary footwear*. [TT p. 211, line 5-p. 213, line 14].

Mr. Durig confirmed that the IPMC provides a commentary to assist as a guideline. Mr. Durig testified that the commentary stated, where terms are not defined in the IPMC, one may look at other codes such as the International Building Code if the term is defined

there. Mr. Durig confirmed the ISO was not listed in the seven additional codes listed within the IPMC. [TT p. 214, lines 5-23; p. 218, lines 1-11

When asked if the diamond metal plate had been maintained in the same condition that it was when installed, Mr. Durig testified "I think from maintaining or keeping it from being deteriorated, yes." [TT p. 220, lines 2-12]. Mr. Durig agreed that the condition of the diamond plate cover was not a repair issue, because it was structurally sound. [TT p. 220, lines 13-21].

Mr. Hines opined that he inspected the diamond plate where ZS was injured and that the diamond plate did not violate the IPMC. Mr. Hines stated the diamond plate was in good condition, free from corrosion and that it could support the loads that are required. It did not present a tripping hazard, it was slip resistant, and it did not appear modified from its original state. [TT p. 488, line 9-p. 489, line 12].

In response to the IPMC commentary stating walking surfaces that have deteriorated to a condition that presents a hazard to pedestrians must be repaired or replaced to eliminate the hazard, Mr. Durig confirmed that the diamond plate did not deteriorate to a point where it created a hazard. [TT p. 221, lines 6-18].

STANDARD OF REVIEW AND APPLICABLE LAW

A. Standard of appellate review

When reviewing the denial of a motion for directed verdict or JNOV, the evidence and the reasonable inferences that can be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 561, 619 S.E.2d 5, 9 (Ct. App. 2005) (internal citations omitted). This Court will reverse the trial court "only where there is no evidence to support the ruling." *Id.* If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the

motion should be denied. *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 200, 621 S.E.2d 363, 366 (Ct. App. 2005).

B. Law on punitive damages

In *Atkinson v. Orkin Exterminating Co*., the Supreme Court of South Carolina gave a historical summary of the purpose of punitive damages. The Supreme Court opined as follow:

> The practice of awarding punitive damages originated in principles of criminal law "to deter the wrongdoer and others from committing like offenses in the future." Historically, our courts have recognized that punitive damages are intended to punish a wrongdoer when "criminal" conduct is intertwined with civil causes of action. This Court has held that "[p]unitive damages also serve to vindicate a private right to the injured party."

Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004) (internal citations omitted).

In South Carolina, the well-established purposes of punitive damages "are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378–79, 529 S.E.2d 528, 533 (2000) (internal citations omitted).

As mentioned by the *Atkinson* court, punitive damages may also serve to "vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Id.*

> Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been ***willfully*** invaded; and indeed, it may be said that such damages in a measure compensate or satisfy for the ***willfulness*** with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others.... Punitive damages have now come, however, to be generally, though not universally, regarded, not only as punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state.

Id. (emphasis added).

To be awarded punitive damages, "the plaintiff has the burden of proving *by clear and convincing evidence* the defendant's misconduct was willful, wanton, or with reckless disregard for the plaintiff's rights. *Mishoe*, 366 S.C. at 201, 621 S.E.2d at 366 (internal citations omitted) (emphasis added).

"If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014).

Recklessness is the conscious failure to exercise due care, which is illustrated by the following example given by the court:

> I may be engaged in some activity, driving a wagon, rolling a wheel barrow, riding a horse, or driving an automobile, I may not be giving that due attention to it that I ought to, I may not be exercising that due care which the law says I must exercise, if my conduct is so characterized we call that negligent conduct. If I should proceed in that conduct whatever I am doing with reference to another, to the point that I become conscious that I am not exercising that due care which the law says I must exercise, if I am conscious of it and continue in it and know that I am not exercising due care, I have passed beyond the realm of simple negligence and gone into that realm which we recognize as reckless, wanton or willful, they are related terms.

Parker v. Simmons, 163 S.C. 42, 161 S.E. 169, 170 (1931).

ARGUMENTS

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING THE VERDICT ON PUNITIVE DAMAGES.

At the conclusion of the directed verdict argument on punitive damages, the trial court concluded there was *no evidence* of willful or wanton conduct, but the trial court

found evidence sufficient to submit the charge of punitive damages to the jury after a lengthy discussion on negligence per se related to the alleged violation of the IPMC. [TT p. 532, line 2-p. 534, line 20; p. 535, lines 18-19].

At the charge conference, Owner withdrew the request to bifurcate the issue on punitive damages but confirmed that the ruling allowing the punitive charge was limited solely to recklessness and negligence per se and the court confirmed that it was limited to recklessness. [TT p. 568, line 1-p. 569, line 25].

The trial court charged the jury in part the following regarding negligence per se:

> In this case, the plaintiff claims that the defendants failed to follow the following ordinance, which states sidewalk, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair and maintained free from hazardous conditions.
>
> This is from the 2015 International Property Maintenance Code, or also known as the IPMC. The failure to follow this ordinance is negligence per se as a matter of law. If you find that the defendant failed to follow this ordinance, you must then decide whether the failure proximately caused the plaintiff's injuries.

[TT p. 684, line 21-p. 685, line 7].

The trial later charged the jury on punitive damages as follows:

> All right. Ladies and gentlemen of the jury, next, we will discuss punitive damages. If you award actual damages, you may also consider an award of punitive damages. Punitive damages are intended to punish the defendant for extraordinary and outrageous misconduct and to prevent the defendant and others from committing similar acts in the future.
>
> Punitive damages can only be awarded when conduct of the defendant has been something more than mere negligence. The evidence must establish that defendant's acts were reckless, willful and wanton, meaning there was a conscious failure to exercise due care, a conscious indifference to the rights and safety of others, a reckless disregard thereof.
>
> If you find that the defendant's conduct was willful, wanton or reckless, you may award the plaintiff punitive damages. To support an award of punitive damages, the plaintiff must prove by clear and convincing evidence that the

conduct complained of included a consciousness of wrongdoing at the time of the conduct.

Clear and convincing is more than just a preponderance or greater weight of the evidence that we talk about earlier, that which requires only proof which persuades you that a party's claim is more likely true than not true. On the other hand, clear and convincing proof is not as high a standard as the burden of proof in criminal cases, which is beyond a reasonable doubt.

Clear and convincing proof leaves no substantial doubt in your mind. It means that the evidence is not ambiguous, doubtful, equivocal or contradictory. Convincing means persuading by proof or argument causing one to believe in the truth of what is asserted. Clear and convincing proof establishes in your mind not only that the fact is probable, but that it is highly probable.

Before awarding punitive damages, you must consider and weigh four elements which may be pertinent to the facts of the case. You must first consider the relationship between any punitive damage award and the harm caused.

Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct and any concealment. Thus, any penalty imposed should bear relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by you.

Secondly, any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed -- or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.
Next you should consider whether the award and the amount of any punitive damages award may deprive the defendant of any profits derived from the improper conduct and whether the ill gotten profits should be properly regarded to the plaintiff.

Finally, any award of punitive damages must be limited to punishment and, thus, may not effect economic bankruptcy. To this end, the defendant's ability to pay any punitive damages award should be considered. However, the economic bankruptcy factor is not an absolute bar to n award of punitive damages.

The plaintiff claims that the defendant acted with recklessness, willfulness and wantonness and that, therefore, the plaintiff is entitled to punitive damages from the defendant.

> Recklessness means a conscious failure to use reasonable care. A person who was negligent acts carelessly, however, a person who acts recklessly, willfully and wantonly is not only careless, but is also aware that he or she is being careless.

[TT p. 687, line 14-p. 690, line 10].

A. The trial court erred in charging the jury on punitive damages.

"Under current South Carolina precedent, negligence per se is evidence of recklessness requiring the trial court to submit the issue of punitive damages to the jury." *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 354, 683 S.E.2d 818, 823 (Ct. App. 2009), *aff'd,* 398 S.C. 90, 727 S.E.2d 407 (2012).

As previously set forth, the trial court engaged in a lengthy discussion with counsel concerning the directed verdict motion as to whether evidence of the violation of the IPMC qualified as negligence per se and, if so, it called for a punitive damages charge. [TT p. 532, line 2-p. 534, line 20]. The trial court concluded there was evidence of a violation of the IPMC and, therefore, evidence of recklessness calling for a charge for punitive damages. The trial court erred.

"Maintain" in the present context means (verb) "to keep in an existing state *especially* to keep in good condition; (transitive verb) "to keep in an *existing state* (as of repair, efficiency, or validity); preserve from failure or decline. *Merriam-Webster Dictionary*.

When asked if the diamond metal plate had been maintained in the same condition that it was when installed, Mr. Durig testified "I think from maintaining or keeping it from being deteriorated, yes." [TT p. 220, lines 2-12]. Mr. Durig agreed that the condition of the diamond plate cover was not a repair issue, because it was structurally sound. [TT p. 220, lines 13-21]. Mr. Durig agreed that the condition of the diamond plate cover was not a

repair issue, because it was structurally sound. [TT p. 220, lines 13-21]. Mr. Durig confirmed that the diamond plate did not deteriorate to a point where it created a hazard. [TT p. 221, lines 6-18].

Mr. Durig's position was simple. Based upon the ISO cited, which has not been adopted in South Carolina, or in any other state addressing construction of multifamily dwellings, the diamond plate cover was "hazardous" when it was installed and continued to be a hazard. [TT p. 221, lines 16-18]. Since the unadopted ISO deemed the diamond plate "hazardous," it therefore, according to Mr. Durig, violated the IPMC.

Since there was no evidence the installation of the diamond plate violated any federal, state, local, or county building code, regulation or ordinance, it cannot be said that the diamond plate was a known construction defect. Since the IPMC addresses maintenance of properties after construction, keeping the diamond plate in the condition in which it was when installed cannot be evidence of a violation of the IPMC.

Therefore, the trial court erred in finding there was any evidence of the violation of the IPMC, and the trial court erred in charging the jury on punitive damages for recklessness/negligence per se. [TT p. 687, line 14-p. 690, line 10].

B. The trial court erred in not setting aside the punitive damage verdict as there was not clear and convincing evidence to support a punitive damages award.

As presented above, the trial court determined there was no evidence of willful or wanton conduct but charged the jury on punitive damages due to evidence, albeit erroneous, of recklessness based on the violation of the IPMC/negligence per se. [TT p. 568, line 1-p. 569, line 25].

Reckless or willful and wanton conduct, all have the same meaning—the conscious failure to exercise due care. *Solanki*, 410 S.C. at 237, 763 S.E.2d at 619. Since the trial court concluded there was no evidence of willful and wanton conduct, the only basis for submitting the punitive charge to the jury would be based on negligence per se, i.e., the purported violation of the IPMC.

However, as clearly shown from the jury charge on punitive damages above, the trial court *did not* charge the jury that a finding of negligence per se is evidence of recklessness. [TT p. 687, line 14-p. 690, line 10]. In fact, on the issue of recklessness, the trial court only informed the jury that "[r]ecklessness means a conscious failure to use reasonable care. A person who was negligent acts carelessly, however, a person who acts recklessly, willfully and wantonly is not only careless, but is also aware that he or she is being careless." [TT p. 690, lines 6-10].

As the trial court concluded at the directed verdict stage that there was *no* evidence of willful or wanton conduct, and the trial court did not charge the jury that negligence per se is evidence of recklessness, there was no evidence upon which a reasonable jury could conclude that Owner was reckless, as reckless, willful and wanton all have the same meaning, absent the charge of negligence per se as evidence of recklessness. Therefore, the trial court erred in denying the Motion for Judgment Notwithstanding the Verdict on the punitive damages award.

Additionally, there was no evidence of a conscious failure to use reasonable care. There was no evidence that Owner, or its agents, were not only careless, but were also conscious that they were being careless in failing to discover and/or remediate or replace the alleged "hazardous condition." *Solanki*, 410 S.C. at 237, 763 S.E.2d at 619.

As detailed extensively above with citations to the trial transcript, there was uncontested testimony from the licensed builder and licensed architect that the diamond plate cover was proper for its use at the Complex, that it is widely used in other projects, and that there is no building code, ordinance or regulation prohibiting the use of the diamond plate as a cover for the drain flange.

There was testimony of the inspection process required to get a certificate of occupancy, which required the county to inspect and approve the premises, including the sidewalks with the steel plates. The premises, including the sidewalks and steel plates, were inspected and a Certificate of Occupancy was issued.

Owner's expert civil engineer testified that the use of the diamond plate at the Complex, under the conditions present, was not only acceptable, but he would have utilized the same method within a reasonable degree of civil engineering certainty.

There was testimony that the South Carolina Housing Authority inspected the premises on a yearly and then every three-year basis. The uncontested testimony from the management company witnesses was that a notice of non-compliance, violation, or issue was never raised about the steel plates by the authority.

There was uncontested testimony that the on-site property manager walked the property daily, that the regional manager walked the property at least twice a year if not more, and the asset manager for Owner also walked the property, all of whom were looked for hazards or items that needed repair.

The maintenance supervisor testified that he walked the property at least once a year during the annual inspection looking for hazards or items that needed to be repaired or replaced. While the maintenance supervisor did not have specific knowledge of the

IPMC, which is a permissive code, he testified that the IPMC requirements were actually addressed during his inspections.

Finally, the only evidence that the diamond plate constituted as hazard was discovered by Mr. Durig seven (7) years after ZS's injury and four (4) years after this lawsuit began. Additionally, Mr. Durig's conclusion was based upon the ISO, which has not been adopted by any recognized organization in the United States relative to the construction of sidewalks, walkways, or other areas of ingress or egress of commercial buildings. Moreover, in measuring the temperature of the diamond plate, Mr. Durig used testing equipment and methods not prescribed by the unadopted ISO upon which he relied to base his opinion.

Based on the above, the trial court erred in setting aside the award for punitive damages.

CONCLUSION

For the reasons set forth, Appellant respectfully requests that the trial court's Order denying the Motion for Judgment Notwithstanding the Verdict as to Punitive Damages be reversed.

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