THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No. 2007-CP-38-938

Ajoy Chakrabarti and Sukla Chakrabarti, ...Respondents

v.

City of Orangeburg, ...Petitioner

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was filed May 16, 2013 and finally ruled upon by the Court of Appeals on June 20, 2013.

QUESTIONS PRESENTED

1. In affirming the trial court's denial of motions for Directed Verdict and JNOV the Court of Appeals has apparently erred in concluding that Respondents presented evidence of a duty owed by Petitioner to Respondents.

2. In affirming the trial court's denial of motions for Directed Verdict and JNOV the Court of Appeals has apparently erred in concluding that Respondents presented evidence of a grossly negligent breach of duty owed to Respondents.

STATEMENT OF THE CASE

This negligence and inverse condemnation lawsuit was commenced by the service of Respondents, Ajoy and Sukla Chakrabarti's Summons and Complaint, which were filed on July 26, 2007, seeking actual damages for the Petitioner's alleged negligence in condemning as a nuisance, and then demolishing, the house located at 2243 Middleton Drive in Orangeburg, which they had purchased in 2003 following a house fire. Petitioner answered on September 25, 2007, asserting fourteen defenses, including, *inter alia*, collateral estoppel/*res judicata*; waiver; sole and comparative negligence of Plaintiffs; and Tort Claims Act immunity (15-78-60) for administrative acts of judicial or quasi-judicial nature (2), adoption or enforcement or compliance with any law (4), and institution or prosecution of any judicial or administrative proceeding (23).

Following denial of Petitioner's Motion for Summary Judgment, Respondents amended their Complaint so as to assert additional causes of action for inverse condemnation; wrongful condemnation and trespass. Petitioner answered the Amended

Complaint on October 10, 2011, asserting similar defenses.

The matter was tried October 5 – 7, 2011, with the question of inverse condemnation being tried by the bench, and all other causes of action, as well as the amount of just compensation being decided by the jury. The jury rendered its verdict of gross negligence and awarded the amount of $ 165,000.00 in negligence and $ 85,000.00 for just compensation in inverse condemnation. Petitioner moved under Rules 50(b), 52(b) and 59(a) SCRCP, for Judgment Notwithstanding the Verdict, and in the alternative, for a New Trial, or New Trial Nisi remittitur, and for an Order requiring Plaintiffs to elect a remedy. Respondents moved post-trial, to elect the negligence verdict of $ 165,000.00 and to preserve their right under the inverse condemnation award, in the event the negligence award is reduced or set aside. All of Petitioner's motions were denied and Petitioner timely filed its Notice of Appeal on February 1, 2012, which was served on Respondents' counsel on January 31, 2012.

The case was heard before the Court of Appeals on March 12, 2013. The Court of Appeals issued its decision affirming the trial court on May 1, 2013. Petition for Rehearing by the Court of Appeals was filed May 16, 2013 and the Court issued its Order denying Rehearing on June 20, 2013.

ARGUMENT

1. In affirming the trial court's denial of motions for Directed Verdict and JNOV the Court of Appeals has apparently erred in concluding that Respondents presented evidence of a duty owed by Petitioner to Respondents.

Petitioner initially moved for directed verdict at the conclusion of Respondents' case, asserting that the Respondents had not presented any evidence of that duty claimed to be owed to Respondents by Petitioner.

The elements which must be shown in order for a plaintiff to recover on a negligence cause of action are well recognized in traditional negligence analysis: "To recover on a claim for negligence, a plaintiff 'must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach.'" Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) (citing Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 464 S.E.2d 330 (1995)). See also, Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). "The court must determine, as a matter of law, whether the law recognizes a particular duty [, and] [i]f there is no duty, then the defendant in a negligence action is entitled to a directed verdict."

At the time when Petitioner moved for directed verdict, was made, Respondents had presented no evidence of Petitioner's duty to Respondents, and the record was consequently devoid of any evidence of such a duty.

Respondents presented their case through 9 witnesses, beginning with Ajoy Chakrabarti, App. p. 42 – p. 144; Sam Fields, App. p. 145 – 149; Andrew Beach, App. p. 150 – 157; Thomas Darby, App. p. 158 – 179; Johnnie Coulter, App. p. 180 – p. 213; Bruce Holler, App. p. 214 – 219; Kenneth Middleton, App. p. 220 – 224; Orangeburg City Manager John Yow, App. p. 225 – p. 229; and Code Enforcement Official, Gene Nelson, App. p. 230 – p. 233.

None of these witnesses' testimony either identified or described a duty which Petitioner owed to Respondents. Additionally, Respondents failed to present any documentary evidence or exhibit which might serve as a guide for the duty or the standard of care for municipalities faced with decisions for unsafe or nuisance structures.

Respondents argued in response to City's Directed Verdict Motions, (App. p. 237, ll. 17 – 19; p. 238, ll. 1 - 7) "[w]e believe there is sufficient evidence in the record that makes it a jury question of all matters he raised." Additionally, in response to Petitioner's specific assertion of a lack of evidence of the standard to be observed, Respondents argued to the trial court: "[t]hey' re required to adhere to their own standards, and that's what we're saying they didn't do. They didn't even follow what they said they were going to do in the letters". App. p. 238. L. 22 – p. 239, l. 1.

The failure of proof by Respondents at that point justified the grant of City's motion. Nevertheless, despite Respondents' lack of evidence of this critical element of their cause of action, the trial court denied Petitioner's initial directed verdict motion, through the following colloquy, saying:

THE COURT: [M]y take in that is, I think all the citizens need to be safe and secure in their property. I think that's one of the duties that the city has. Now, if the city is going to exercise their police powers then they've got to do it according to, you know, whatever the city ordinances and regulations are. And whether or not they complied I believe is a jury question. So . . .

MR. KULMALA: With all due respect - - -

THE COURT: Yes, sir.

MR. KULMALA: - - in order to determine whether they complied with it the pattern or the requirement, the standard that they're supposed to comply with needs to be established, and I don't believe that there's been any evidence through the plaintiff's case that establishes what we're supposed to do in order to do it correctly.

THE COURT: And just for the - - my take on it is, they have introduced a number of

letters from the city. Mr. Nelson testified that he had notified them pursuant to being the City Administrator, and before he got on the stand we had all those letters into evidence where they sent them, what I believe was the city's position. Was that not correct?

MR. KULMALA: The city's letters would be certainly statements of the city's actions or intended actions.

THE COURT: Alright. Therefore, it seems to me that there is sufficient evidence in the record to create a factual question for the jury to determine whether or not they were grossly negligent. . .

* * *

THE COURT: [A]t this time I believe the plaintiff has made sufficient argument that it should go to a jury question. . .

App. p. 239 – 240.

Notwithstanding the trial court's reference to letters of the City received in evidence, those letters did not establish nor define the City's duty toward Respondents. There remained an absence or lack of evidence of that duty and Respondents failed to meet their burden as to the first element of negligence, duty. With no evidence of Petitioner's duty in the record at the close of Respondents' case, Petitioner's directed verdict motion should have been granted, and the case should not have been submitted to the jury.

2. In affirming the trial court's denial of motions for Directed Verdict and JNOV the Court of Appeals has apparently erred in concluding that Respondents presented evidence of a grossly negligent breach of duty owed to Respondents.

The Court of Appeals affirmed the trial court's denial of Petitioner's motions for directed verdict and for JNOV, concluding that "when the facts are viewed in the light most favorable to the Chakrabartis, the record shows Orangeburg issued a second building permit to the Chakrabartis six months before demolishing their house, and Orangeburg produced no evidence of a date when substantial construction on the property had ceased for any significant period, much less the required two years" and that "evidence was presented that Orangeburg did not follow the proper procedure in demolishing the Chakrabartis' house" Order, App. p.744.

In reaching this conclusion, the Court of Appeals apparently misunderstood or misinterpreted the ground for demolition relied upon by the City, resulting in the Court's erroneously holding that Respondents had presented evidence of Petitioner's breach. The ground for demolition announced by Petitioner in its letter to Respondents on June 13, 2005, was that "it has been over two years that you have been working on this property, and it is still not completed, no more time can be allowed." App. p. 543. The IPMC refers to "cessation of normal construction of any structure for a period of more than two years". IPMC, § 110.1.

The Court of Appeals interpreted this ground as advocated by Respondents; essentially, that the requirements for deciding to demolish are not satisfied if there was any construction activity within the two years preceding demolition. Petitioner asserts that this interpretation is incorrect; that the focus of the Code is on there being a two year period without *normal construction*. This is inferentially explained by reference to the 6

month terms for the permits issued by the City, suggesting that the project would be completed within 6 months, under normal construction.

In order to demonstrate the City's failure to meet this requirement, Respondent would need to have presented evidence that their *normal construction* was not interrupted for two years. Under the evidence presented, Respondents simply failed to do so. The various and random steps presented by Respondents and noted by the Court of Appeals, simply do not amount to *normal construction*. Acknowledging that the selected demolition ground requires Petitioner to show a cessation of *normal construction* for two years, the counterpoint is that, in order to show gross negligence by Petitioner, the Respondent must present evidence of normal construction within the two final years, which they did not and could not do.

Respondents' failure in this respect, supports the grant of Petitioner's motion for directed verdict on the close of Respondents' case. The second element of a negligence cause of action which a plaintiff must allege and prove is a breach of duty by a negligent act or omission. Carolina Chloride, Inc. v. Richland County, 714 S.E.2d at 873. "There can be no inference of negligence from the mere fact of injury, and that the burden is on the plaintiff to produce some reasonable evidence tending to show some breach of duty owed to him." Covington v. Atlantic Coast Line R.R. Co., 158 S.C. 194, 155 S.E. 438, 442 (1930).

Not only had Respondents failed to present evidence of Petitioner's duty as discussed in detail above, they also failed to present evidence of a breach of duty by Petitioner, or that Petitioner deviated from the appropriate standard of care. At that point, with no evidence of duty or standard of care and consequently no evidence of any breach,

Petitioner was entitled to a directed verdict. That initial directed verdict motion appropriately pointed out the failure of Respondents' proofs, and the motion should have been granted at that time.

During Petitioner's case, the City offered the International Property Maintenance Code as the standard of care to be observed for condemnation and demolition activities of unsafe buildings. Respondents did not dispute that the IPMC defined the City's responsibilities in addressing nuisance structures, and the relevant portions of the IPMC were included in the instructions to the jury. (App. p. 447 – 452); but failed to present evidence that the demolition decision was the result of Petitioner's grossly negligent or willful deviation from the provisions of the IPMC. No witness testified that Petitioner either violated the IPMC or did not properly follow it.

In affirming the trial court's denial of the directed verdict motions, the Court of Appeals referred to the testimony of several witnesses which revealed some construction activities inside of two years before demolition. In particular, the Court considered testimony of work items by contractor Johnnie Coulter, who was hired in December 2004, performed work on the roof and ceilings, studded walls, placed insulation, did some electrical work, and installed sheetrock, and that he was working on the house until Orangeburg bulldozed it. Those several work items however, were sporadic and minimal, and can in no way be considered to be *normal construction.*

Respondents' failure to establish any breach of the requirements of the IPMC by Petitioner is succinctly stated by Petitioner's expert witness, Jim Meggs, who testified that "It doesn't, just given the chronology here **it doesn't seem that there was ever normal construction."** App. p. 358 (Emphasis added).

CONCLUSION

The Court of Appeals' affirmance of the trial court's decisions on Petitioner's directed verdict, JNOV and new trial motions reveals an apparent error in two respects in that the Respondents had failed to present evidence of two essential components of a negligence case: duty and breach of that duty. Because Respondents' lack of evidence was raised initially upon the close of Respondents' case, it would have been appropriate at that time for Petitioner's motions to have been granted.

Respectfully submitted.

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July 19, 2013
Barnwell, South Carolina

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PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Respondent's Counsel, C. Bradley Hutto, by depositing a copy of it in the United States Mail, Postage prepaid, on July 19, 2013, addressed as follows:

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July 19, 2013

South Carolina Supreme Court
Daniel E. Shearouse, Clerk
1231 Gervais Street
Columbia, South Carolina

via hand delivery

Re: Ajoy Chakrabarti and Sukla Chakrabarti vs. City of Orangeburg
Case No.: 2007-CP-38-938
Case Tracking #: 2012207348

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari, Proof of Service on opposing counsel, and three (3) copies of the Appendix, along with filing fee check in the amount of $ 100.00. I would appreciate your filing the Petition and Appendix and returning the additional clocked copy of each to me.

Please accept my kind regards,

Most Respectfully,

Pete Kulmala

PK/ah
Enclosure
cc: S.C. Court of Appeals, Clerk
C. Bradley Hutto, Esquire