THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

RECEIVED
FEB 16 2017
SC Court of Appeals

J. C. Nicholson, Jr., Circuit Judge

Appellate Case No.: 2016-000419

Rosemary Connelly, Respondent,

v.

Winsor Custom Homes, LLC, Appellant.

RESPONDENT'S FINAL BRIEF

Christy Ford Allen (SC Bar #15649)
John A. Massalon (SC Bar #10279)
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
callen@wmalawfirm.net.
jmassalon@wmalawfirm.net
ATTORNEYS FOR RESPONDENT

Stephen L. Brown, Esquire (SC Bar #66468)
Russell G. Hines, Esquire (SC Bar #72100)
Young Clement Rivers, LLP
Post Office Box 99
Charleston, South Carolina 29402
(843) 720-5488
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Case 1

Statement of Facts 3

Argument 6

a. Standard of Review 6
b. The trial court did not err in denying Winsor judgment as a matter of law 6
c. There court's failure to charge the open and obvious rule does not warrant reversal, nor was Winsor entitled to judgment as a matter of law on the basis of the open and obvious rule 11
d. Connelly's comparative negligence was not established to be more than 50% as a matter of law 13
e. The court did not abuse its discretion regarding the admission of the treating doctor's opinions on causation 15

Conclusion 26

TABLE OF AUTHORITIES

CASES

Austin v. Stokes-Craven, 387 S.C. 22, 691 S.E.2d 135, 145 (2010) 6

Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 40 S.E.2d 681 (1946) 19

Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) 7

Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) 14

Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997) 13

Bryant v. City of North Charleston, 304 S.C. 123, 403 SE.2d 159 (Ct. App. 1991) 13

Brazeale v. Piedmont MFG. Co., 184 S.C. 471, 193 S.E. 39 (1937) 20

Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635-36, 529 S.E.2d 758, 761-62 (Ct.App.2000)24

Callander v. Charleston Doughnut Corp., 205 S.C. 123, 126, 406 S.E.2d, 361, 362 (1991) 8, 12

Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997) 9

Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 444, 365 S.E.2d 324, 329 (Ct.App.1988) 7

Cf. Nelson v. Taylor, 347 S.C. 210, 217 (2001) 17

Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997) 13

Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978) 17

Darrell v. South Carolina Dept. of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) 7

Epps v. United States, 862 F.Supp.2d 1460 (D.S.C 1994), ...8,9

Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969) 19

Grice v. Dickerson, Inc., 241 S.C. 225, 127 S.E.2d 722 (1962) 19

Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) 24

Harrison v. Gallivan Const. Co., 188 S.C. 304, 304 199 S.E. 307, 309 (1938) 13

Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) 14

Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) 17, 18

Jones v. Cannerella, 297 S.C. 212, 215, 375 S.E.2d 352, 354 (Ct.App.1988) 12

Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 398, 171 S.E.2d 352, 354 (1969) 20, 21

Larimore v. Carolina Power & Light, 531 S.E.2d 535, 540–41 (S.C. App. 2000) 12

Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995) 15

Mizell v. Glover, 339 S.C. 567, 577, 529 S.E.2d 301, 306 (Ct. App. 2000) 15

Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998) 15

State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) 19

State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) 19

State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000) 19

State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) 19

State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005) 23

Tucker v. Reynolds, 268 S.C. 330, 334-34 (1977) 21

STATE STATUTES

S.C. Code Ann. § 19-1-150 25

OTHER AUTHORITIES

Hubbard, F. Patrick and Felix, Robert L., THE SOUTH CAROLINA LAW OF TORTS, p. p. 60, note 82, 121, 123-24 (4th ed. SC Bar 2011) 7

RULES

Rule 702, SCRE 18

Rule 411, SCRE 20, 23

I. STATEMENT OF THE CASE

This case arises out of Connelly's fall on Monday, June 6, 2011, on the public sidewalk adjacent to [redacted] Street on Daniel Island (hereinafter "Premises"). Winsor was serving as the general contractor for the purposes of constructing a home located on the Premises on behalf of Karen Nelson and John Edelen. Winsor had constructed a black plastic construction barrier fence on the Premises. The fence was in a state of disrepair on the day of the accident, became partially detached from its stakes, and blew into the sidewalk causing Connelly to fall face-first onto the sidewalk. Connelly suffered a broken nose, concussion, and head trauma which severed the olfactory nerves in the nasal and brain cavity (the cribriform plate) resulting in the loss of her sense of smell (anosmia) and reduction or distortion in her sense of taste (dysgeusia).

The case was tried against Winsor only; all other defendants had settled or were dismissed. The trial court heard pre-trial motions by Winsor regarding the expert qualifications of Dr. Thomas Funcik and Dr. Mark Ghegan, both Otolaryngologists (hereinafter "ENT") and Connelly's treating physicians, and a challenge to their ability to testify as to the cause of Connelly's anosmia and dysgeusia. (R. pp. 111-18). The trial court ruled in favor of Connelly, and held that both doctors were qualified to testify as to the cause of Connelly's anosmia and dysgeusia. (R. p. 118). Both doctors were unavailable to testify at trial, and as such their trial depositions were videotaped the week prior to trial. The parties exchanged edits to the video, no objections were lodged, and both edited depositions were played to the jury at trial.

During the course of the trial, Winsor made two motions for mistrial regarding the word "insurance" being raised in the presence of the jury. The first motion was made in response to

Connelly's testimony on cross examination regarding written correspondence that was sent by her husband to Winsor immediately following the June 6, 2011 incident. (Ct's Ex. 3, R. pp. 1231-33).

The exchange at trial was as follows:

> Q: And on the day after the accident, your husband contacted some folks to threaten legal action about this fall, right?
>
> A: I don't think he was threatening legal action about this fall. I think he was just telling them what happened. I think it was like, this is what happened and do you guys have insurance and whatever -- I don't know. I haven't read – I wasn't – I didn't write the letter, so I don't know what he meant.
>
> MR. BROWN: Your Honor --
>
> A: I don't know. I haven't read – I wasn't – I didn't write the letter, so I don't know what he meant.
>
> MR. HINES: Your Honor, I think we've got a matter of law to address. . .

(R. p. 243). Winsor's counsel did not show the correspondence he was asking about to the witness; the correspondence, however, was made a court exhibit. (R. pp. 250-51). In response to this testimony, Winsor immediately moved for a mistrial. The Court denied Winsor's motion and ruled that the mention of insurance was merely inadvertent. The court asked if Winsor wanted a curative instruction, and Winsor declined. (R. pp. 249-50).

The second motion for mistrial was in the midst of Dr. Funcik's video testimony, wherein he mentioned the process of pre-certifying health insurance coverage: "So when [sic] initially saw her, I handled it on a routine basis, which is to say that she needs some reduction at some later time. But we weren't ready to schedule the operating room and start pre-certifying her insurance company." (R. pp. 320-21). The court excused the jury, and denied the motion for mistrial finding that Winsor had made no objection prior to the video being played or during the video and that the reference was only to health insurance. (R. pp. 321-22). Thereafter the judge gave the jury a

curative charge to disregard any statement regarding the doctor getting prior authorization as to insurance, and struck reference from the record. (R. p. 323).

At the close of the evidence, Winsor moved for a directed verdict. The court denied the motion. Connelly moved for a directed verdict on the subject of negligence. The trial court granted *partial* directed verdict, finding that Winsor had a duty to maintain the Fence and that Winsor had breached that duty, allowing only the questions of causation, damages, and comparative negligence to go to the jury. (R. p. 566). The Court elected to apply general negligence principles and instructed the jury accordingly. The jury's verdict resulted in judgment for Connelly in the amount of Three-Hundred Twenty-Five Thousand Dollars ($325,000.00) (damages in the amount of Five-Hundred Thousand Dollars ($500,000.00), reduced by a Thirty-Five Percent (35%) allocation to Connelly for comparative negligence. (R. pp. 3-5).

II. STATEMENT OF THE FACTS

This case arises out of an incident that occurred on Monday, June 6, 2011, on the public sidewalk adjacent to [redacted] Street on Daniel Island (hereinafter "Premises"). On that date, Winsor was serving as the general contractor for the purposes of constructing a home located on the Premises on behalf of Karen Nelson and John Edelen (hereinafter "Owners"). In the due course of conducting its construction activities on the Premises, Winsor erected a black plastic barrier fence (hereinafter "the Fence"), also known as a silt fence, around the perimeter of the construction site. The purpose of the Fence was, at least in part, to keep construction debris from encroaching onto the public sidewalk and the property of others. (R. p. 428). On June 6, 2011, the Fence was not properly secured to its wooden stakes, and was in a state of disrepair. (R. pp. 383-84, 1218).

On the morning of June 6, 2011, Rosemary Connelly was jogging down the sidewalk on Daniel Island with her friend, Cori Smith (hereinafter "Smith"). Connelly and Smith's route took them past the Premises, and, while passing the construction site, a gust of wind caught the Fence and caused it to suddenly and unexpectedly traverse the sidewalk. The Fence entangled Connelly's leg, causing her to fall head first onto the ground. (R. pp. 166-67). Connelly suffered a broken nose, concussion, and head trauma which severed the olfactory nerves in the nasal and brain cavity (the cribriform plate) resulting in the loss of her sense of smell (anosmia) and reduction or distortion in her sense of taste (dysgeusia). Connelly, her running buddy and witness to the accident, and her daughter all testified to the timeline of Connelly's gradual awareness that her sense of smell was absent and taste were diminished. (R. pp. 183, 373, 471-73).

Winsor's only corporate witness and the owner of Winsor Homes, Jeffrey Thomas (hereinafter "Thomas"), admitted: (1) the Fence was erected by Winsor, (2) Winsor was responsible for supervising and reviewing the subcontractor's work, (R. p. 399), (3) it was Winsor's sole duty to maintain the Fence, (R. p. 402), (4) he was aware that his own workers or subcontractors often walked across the Fence causing it to come down, (R. pp. 406-07); (5) it was foreseeable that the fence could become airborne in the wind if allowed to become detached from its stakes (R. p. 410); (6) he had received warning three months prior to the accident that the fence at this site was in disrepair (R. p. 461), and (7) that the Fence was in a state of severe disrepair on the date of June 6, 2011 (R. pp. 409-10). Winsor brought no other witnesses to rebut any of these admissions. A photograph taken in March 2011 showed the fence intact, albeit drooping. (R. p. 1215). The Daniel Island ARB sent Appellant a Notice to Repair the Fence dated March 17, 2011 stating "the majority of the site fence is down, and there is no construction entrance on the job site. Please repair or fix as soon as possible." (R. p. 461). The accident happened on June 6, 2011.

Both witnesses to the accident testified that the Fence looked approximately the same as the photo one of those witnesses took the day after the accident, June 7, 2011. (R. p. 1218). Thomas testified he had no memory of repairing the Fence between March and June 2011, and instead speculated "I had to have fixed the fence" or I would have been fined. (R. pp. 462-464). Winsor presented no other evidence regarding any repair of the fence between March 17, 2011 and the date of the accident, nor did it present any evidence from the ARB to corroborate Thomas' testimony.

Two of Connelly's treating physicians testified by video. (R. pp. 838-1119). Dr. Funcik had seen Connelly the day after the accident, and performed surgery to repair her broken nose some months later. Dr. Funcik is a board certified physician in Head and Neck Surgery and Facial Plastic and Reconstructive Surgery. He testified that he had over 2000 hours of experience as attending physician in emergency rooms and trauma centers. (R. p. 8). Dr. Ghegan, also an ENT, later diagnosed Connelly with anosmia (loss of sense of taste due to severing of the olfactory nerves in the nasal and brain cavity), and dysgeusia (reduction or distortion in sense of taste). Their professional qualifications are not in question.

Both doctors testified that it was their opinion, to a reasonable degree of medical certainty, that the fall was the cause of Connelly's decreased sense of smell and decreased sense of taste, and that these conditions are permanent. (R. pp. 916-18, 927-28, 1070-71, 1073) And, the results of Connelly's University of Pennsylvania Smell Identification Test, administered by another physician in Dr. Ghegan's office, confirmed that she had anosmia. (R. pp. 1068-69). Dr. Ghegan's treatment records indicated that Connelly reported she had been experiencing loss of smell and reduced taste since June 2011, but began noticing it in the 6 months prior to that appointment date of 4/4/2013. (R. pp. 1178, 1180). Ghegan was informed by Connelly that she had a fall about two years prior, suffered a concussion and broken nose, and understood that she had hit her head in the

approximate location where the olfactory nerves come through the cribriform plate. (R. pp. 1057-1058). He testified he did not feel it was unusual for someone to wait months after an accident before consulting with an ENT about loss of smell. (R. p. 1096). Dr. Funcik treated Connelly related to her broken nose, and performed the nose surgery some months later as he recommended she wait until the swelling subsided. He also explained in detail the physiology of how a person loses his sense of smell, how the olfactory nerves work, and how blunt head trauma can cause those nerves to be severed from the cranial bone they attach to resulting in anosmia. (R., pp. 901-905, 1242 Demonstrative).

III. ARGUMENT

a. Standard of Review

Winsor has raised several different grounds for appeal, several of which involve different standards of review. Respondent will address the respective standard of review during the corresponding argument.

b. The trial court did not err in denying Winsor judgment as a matter of law

Only when there is no evidence to support the ruling or when the ruling is governed by an error of law can a directed verdict be overturned on appeal. Austin v. Stokes-Craven, 387 S.C. 22, 691 S.E.2d 135, 145 (2010) (citing Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997)). As set forth above, the Court denied Winsor judgment as a matter of law. The court directed a verdict in favor of Connelly on the first two elements of negligence, and held, as a matter of law, that Winsor owed Connelly a duty to use due care in its maintenance of the Fence, and that the evidence mandated a finding that Winsor breached that duty. The elements of causation, damages, and comparative negligence were decided by the jury.

Winsor claims that the trial court erred in relying on a general negligence duty to use due care in lieu of considering the "premises liability" negligence duty a property owner owes to invitees on his own property. "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." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The duty of care is that standard of conduct the law requires of an actor to protect others against the risk of harm from his actions. Carter v. R.L. Jordan Oil Co., 294 S.C. 435, 444, 365 S.E.2d 324, 329 (Ct.App.1988), rev'd on other grounds, 299 S.C. 439, 385 S.E.2d 820 (1989). This common law duty of due care includes the duty to avoid damage or injury to foreseeable plaintiff. Darrell v. South Carolina Dept. of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) (citing Terlinde v. J.F. Neely, Sr., 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (stating that the "key inquiry" in determining whether to impose liability is "foreseeability, not privity"). "The tortfeasor's liability . . . rests upon the tortfeasor's duty to exercise due care." Darrell 361 S.C. at 318, 605 S.E.2d at 15 (2004) (citing Barker v. Sauls, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986)).

Winsor suggests that the law of premises liability is distinct from the law of negligence, and that premises liability principles had exclusive application to this case. This suggestion, however, fails to recognize that the rules applicable to premises liability fall within the general law of negligence, not outside of it. "South Carolina uses a status or category system for determining the duty [a landowner or occupier] owed to *persons on the premises*." Hubbard, F. Patrick and Felix, Robert L., THE SOUTH CAROLINA LAW OF TORTS, p. 121 (4th ed. SC Bar 2011) (emphasis added). The law of negligence has developed to apply differing levels of duties owed by a landowner to persons on their property regarding dangerous conditions, depending on the classification of the injured person: licensee, invitee, adult trespasser, or child. Id. at 124-25.

Foreseeability remains a key underpinning to the limitations on the general duty to use due care imposed by these rules. Even further within the limitations on the duty of care in the premises liability context is the "open and obvious" doctrine. Connelly agrees that South Carolina adopted the Restatement Second of Torts version of this doctrine in 1991, which modified the common law rule wherein a landowner owed no duty to warn anyone of open and obvious conditions. See Callander v. Charleston Doughnut Corp., 205 S.C. 123, 126, 406 S.E.2d, 361, 362 (1991) (business owner had a duty to warn its elderly customers of broken stool, even though open and obvious, because owner should have anticipated the harm and had knowledge the customers often backed into the stools to sit down). Prior to Callander, an owner owed no duty to warn of open and obvious conditions. After Callander, the law recognized an exception to that rule where the owner should have anticipated the harm despite its obviousness. Id. Notwithstanding this modification, the open and obvious rule should be considered one of the most, if not the most, narrow of the "on the premises" duties because as long as the facts do not warrant a finding pursuant to the exception, the owner has no duty at all.

Contrary to Winsor's argument, neither the tort duties owed invitees nor the open and obvious rule applies in this case because Connelly was not "on the premises" nor was the dangerous condition "on the premises" when Connelly encountered it. With regard to persons "off the premises" and on a public right of way adjacent to the owner/occupier's land, the "landowner owes those on a public right of way adjacent to his land a duty of due care in the conduct of activities on his land." SC LAW OF TORTS, at p. 60, note 82, 123-24. In Epps v. United States, 862 F.Supp.2d 1460 (D.S.C 1994), the court thoroughly analyzed the nature of the duty owed when one controls property abutting a public sidewalk explaining that, in South Carolina

> the general rule appears to be that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk *unless* such a duty is imposed by legislation, *the abutter created an unsafe condition on the sidewalk*, or the abutter has a special property interest in the sidewalk. . . . See 39 Am.Jur.2d Highways, Streets, and Bridges § 365 (1968) ("An owner or occupant of land abutting on a highway, street, or sidewalk, who does not enjoy a private servitude in the way, does not, in the absence of statute or ordinance to the contrary, owe to the public a duty to keep the way in a safe condition, and is generally held not liable for injuries sustained by travelers thereon as a result of conditions which he has not *been instrumental in creating or maintaining*") . . . This is also the English common law rule . . . .

Id. at 1464. (emphasis added). Whether a duty arises in a given case may depend on the existence of particular facts. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997). Where a landowner or occupier has "created or maintained a hazard on the sidewalk, or the hazard is otherwise legally traceable to it," a duty of care is imposed. Epps, 862 F.Supp.2d at 1467.

In this case, the injury occurred off the owner's property, and was caused by a fence in disrepair, the disrepair of which allowed it to blow into and about the public sidewalk. Winsor installed the Fence, admitted that it was responsible for the Fence, was in control of the fence, and undertook to maintain the Fence as part of its construction job duties. (R. pp. 399, 402-04). Winsor testified that the purpose of the Fence was, at least in part, to keep construction debris from encroaching onto the public sidewalk and the property of others. (R. pp. 427-29). Connelly did not enter the owner's property for any purpose. Instead, Connelly asserted that the actions undertaken by Winsor with regard to its activities concerning the fence were not done with due care. In issuing the directed verdict, the trial court determined that it was foreseeable that Connelly could suffer injury if the Fence were not properly maintained.

In light of the undisputed facts in this case, some of which are somewhat unusual, the trial court properly found that Winsor owed Connelly, a person on a public right of way adjacent to the land it occupied and controlled, a duty of due care in the conduct of those activities. Those

activities in this case related only to the maintenance and inspection of the construction fence Winsor had installed. Regardless of the label placed on the duty, the result – finding a duty of due care with regard to the condition of the fence – was not an error of law.[1]

With regard to the trial court directing a verdict that Winsor breached the duty to use due care, only one reasonable inference can be drawn from the evidence. Connelly presented evidence that the Fence was in a significant state of disrepair on June 6, 2011. (R. pp. 335, 337, Photo 1218, 378-79, 409). Connelly also provided evidence that Winsor knew or reasonably should have known that the Fence was down and in a significant state of disrepair. (R. pp. 392-93, 405-06, Photo 1215, 432). Winsor admitted that it was aware that the Fence material could become airborne if it was detached from its stakes. (R. p. 410). Winsor testified that its workers would improperly climb over the similar fences as a shortcut to enter the site, instead of using the construction entrance, and that it had encountered that problem before. (R. pp. 406-07). Finally, Winsor had received a written warning less than three (3) months prior to the accident from the Daniel Island Architectural Review Board regarding the state of disrepair of this particular Fence and Winsor's failure to provide a proper construction entrance onto the site. (R. pp. 460-61).

The record contains no evidence to support Winsor's apparent argument that the Fence only came into a state of disrepair just prior to Connelly's accident, and nothing in the law of negligence requires Connelly to prove exactly the moment the dangerous condition came to exist. The testimony of Thomas that he had no memory of fixing the Fence between receiving that ARB

[1] Winsor states in its brief that Connelly abandoned its premises liability claim by the acceptance of the trial court's decision to charge causation and damages under a general negligence theory. Considering that the court had already directed verdict on the duty and breach of the duty, it is unclear how Connelly's handling of the jury charges could have waived any claim. As stated herein, the trial court reached the correct conclusion regarding the duty, as a matter of law.

notice and the accident date, but that he supposed he must have because he always does, does not require reversal. (R. pp. 462-64). Thomas was Winsor's only witness, other than a medical expert. Thomas was called to testify by Connelly in the case in chief. Winsor did not recall Thomas in its case in chief, nor did it call any other witness related to that issue. (R. p. 529)

Even when the question of notice of the condition of the Fence prior to the accident was raised, the trial court properly concluded that Connelly had presented uncontroverted evidence that the Fence was in disrepair, (R. pp. 559-60), that Winsor received notice of said condition, but had presented no evidence it had addressed the condition.[2]

There was evidence supporting the court's ruling, and no error of law was committed.

c. The court's failure to charge the open and obvious rule does not warrant reversal, nor was Winsor entitled to judgment as a matter of law on the basis of the open and obvious rule.

Winsor claims that it was entitled to judgment as a matter of law that it was not liable to Connelly because the dangerous condition was "open and obvious", and in the alternative, that it was reversible error for the trial judge not to charge the proposed "Known or Obvious Dangers" charge to the jury.

With regard to the jury charge and considering that the trial court granted directed verdict as to the duty and the breach of said duty, the charge actually given to the jury as whole was sufficient. "To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well. Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and

[2]There is nothing to indicate that the trial judge's ruling relied on res ipsa loquitor. Res ipsa goes to the issue of causation – that because some unsafe condition existed, it must have caused the alleged damages. The court did not direct a verdict on causation, and the jury was charged with the definition and prohibition of res ipsa as a basis for finding proximate cause. (R. pp. 601-02).

the issues involved." Larimore v. Carolina Power & Light, 531 S.E.2d 535, 540–41 (S.C. App. 2000) (citations omitted). When instructing the jury, the trial judge is required to charge only the current and correct law of South Carolina. See Jones v. Cannerella, 297 S.C. 212, 215, 375 S.E.2d 352, 354 (Ct.App.1988) ("A trial charge must be considered as a whole and claims of error in a portion of the charge must be viewed in light of and in context with the rest of the charge.").

In this case, the open and obvious rule affects the scope of the duty—and generally, the duty to warn, or lack of duty to warn of dangers *on* one's property. The open and obvious rule originates from the "traditional 'no duty to warn of the obvious.'" Callander v. Charleston Doughnut Corp., 305 S.E.2d 123, 125, 406 S.E.2d 362 (1991). The court eventually modified that the traditional rule in Callander by adopting the Restatement (Second) of Torts, §343(A) which added an exception. While the Restatement phrases the rule as "a possessor of land is not liable to," such is equivalent to modification of the scope of the duty itself, rendering it: a possessor of land does not owe a duty to invitees for harm caused by a condition whose danger is known or obvious. Then, the rule provides an exception to the lack of duty in that circumstance: there is duty owed (to warn) if the possessor of land should anticipate the harm, despite its being open and obvious.

In this case, the court found that there was a duty to use due care in the maintenance of the Fence by Winsor, *see infra* pp. 8-11. The injury did not take place on the owner's property, and there was no claim that Winsor should have warned Connelly; instead Winsor's alleged negligence was its failure to maintain the Fence, in light of its knowledge that it was in disrepair and that if airborne it could traverse the public sidewalk. This was not an error in law.

Further, Winsor presents only the fact of the verdict to establish prejudice. The absence of the known or obvious charge did not prejudice the jury.

d. Connelly's comparative negligence was not established to be more than 50% as a matter of law

Winsor claims that the condition of the Fence was open and obvious, and as such Connelly was more than 50% responsible for jogging near the Fence, as a matter of law. A pedestrian has the legal right to assume the absence of the defect that caused the fall. Bryant v. City of North Charleston, 304 S.C. 123, 403 SE.2d 159 (Ct. App. 1991) (cert denied, June 14, 1991) citing Kimbrell v. Bi-Lo Inc., 248 S.C. 365, 150 S.E.2d 79 (1966) (the fact that the plaintiff saw the ramp she fell on and was conscious of its existence was not determinative of contributory negligence), Harrison v. Gallivan Const. Co., 188 S.C. 304, 304, 199 S.E. 307, 309 (1938) (sufficient question of fact existed to submit defendant contractor's actionable negligence to the jury after boards were placed across a public sidewalk to aid the passage of construction trucks). No duty is imposed on a member of the general public to examine a public street or sidewalk to see if there is a defect or obstruction therein. See Id. However, should a member of the general public fail to observe ordinary care in avoiding a known danger, they may be held to be comparatively negligent. See Id. (while the principles are virtually identical, this case discusses the obsolete standard of contributory negligence that South Carolina courts have phased out in favor of comparative negligence).

It is well settled in South Carolina law that comparison of Connelly's negligence with that of Winsor is a question of fact for the jury to decide, and only in rare circumstances is the issue a question for law for the court. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); accord Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997). In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference that may be drawn from the evidence is that plaintiff's negligence exceeded fifty percent. Creech, 328 S.C. at 33, 491 S.E.2d at 575 (discussing

directed verdict standard); see also Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996) ("If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created" and a directed verdict motion is properly granted). Therefore, granting a motion for JNOV/judgment as a matter of law is generally not appropriate in a comparative negligence case. See Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (stating that summary judgment is normally inappropriate in a comparative negligence case).

In the instant case and viewing the evidence set forth at trial in a light most favorable to Connelly, it cannot be said that the only inference to draw from the evidence is that Connelly was more than 50% at fault for the June 6, 2011 incident. Although Connelly had seen the Fence on occasion prior to the incident (R. p. 139), she could not specifically recall what condition she observed it in. (R. pp. 166-68) Connelly was not familiar with silt fences, their construction, or the fact that an unsecured silt fence could catch the wind and become airborne. Connelly and Smith said they were not distracted at the time of the accident, were watching where they were running, and ran to the outer side of the sidewalk as they passed the partially downed Fence. (R. pp. 165-66). They both described the movement of the Fence in the wind as they approached as minimal and that the Fence moved suddenly and abruptly, ensnaring Connelly's foot just as they were passing. (R. pp. 140, 337-38, 355) While Connelly testified that she saw the Fence in disrepair and slightly fluttering in the breeze before jogging past it, she lacked the necessary knowledge to understand just how serious a hazard the Fence posed to pedestrians on the sidewalk — specifically that it could become airborne and ensnare her foot as she passed by.

Comparatively, Winsor admitted that it had knowledge that the Fence could become airborne, was aware of silt fences coming down, was aware that his workers were responsible for

bringing down the Fence, and the Fence was down prior to the accident — all of which is information that Connelly did not have.

The trial court properly allowed the question of comparative negligence to go to the jury.

e. *The court did not abuse its discretion regarding the admission of the treating doctors' opinions on causation.*

Winsor next argues that the trial court improperly admitted Connelly's treating physicians', Dr. Funcik and Dr. Ghegan, opinion that the accident was the cause of Connelly's loss of her sense of smell and reduction in sense taste. The qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of that discretion and prejudice to the opposing party. Payton v. Kearse, 329 S.C. 51, 60-61, 495 S.E.2d 205, 211 (1998); Mizell v. Glover, 339 S.C. 567, 577, 529 S.E.2d 301, 306 (Ct. App. 2000). An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support. Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

In determining whether or not a witness may be qualified to testify as an expert, South Carolina courts utilize a three-pronged inquiry. First, the trial court must find that the subject matter is beyond the ordinary knowledge or ken of the jury, thus requiring an expert to explain the matter to the jury. Id. (citing State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim)). Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Id. (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-

53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony)). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. Id. (citing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements)).

Respondent argues that the opinions by Funcik and Ghegan, both treating physicians, that Connelly's fall most likely caused her loss of smell and taste were not sufficiently "reliable." In the instant case, Dr. Funcik and Dr. Ghegan both are treating physicians of Connelly and are also board certified ENT medical doctors. Dr. Funcik is the board certified ENT who Connelly saw immediately after the accident, with whom she had a previous relationship, and who repaired Connelly's broken nose. Dr. Ghegan is the board certified ENT who eventually diagnosed Connelly with loss of taste and reduction in smell. In that capacity, both physicians physically examined Connelly, listened to her subjective complaints, and were able to utilize their medical knowledge and experience to diagnose her permanent condition, and opine as to the cause for that condition. Connelly's doctors also relied on the University of Pennsylvania Smell Identification Test ("SIT"), generally recognized as a proven diagnostic tool for anosmia (R. pp. 894-96). Not even Winsor's medical expert, Dr. Schlosser, testified that Funcik or Ghegan's methodology was wrong. Schlosser agreed that both Funcik and Ghegan were qualified to diagnose anosmia. (R. pp. 527). Instead, his opinion was limited to the conclusion that the loss of sense of smell/taste Connelly describes was not consistent with head trauma from a fall and a broken nose, and that such an injury is generally caused by a much more severe and acute injury. (R. pp. 516, 519-20). Further,

Schlosser agreed that Connelly's treating physicians had more information than him and that they were qualified to render opinions *as to the cause* of Connelly's injuries. (R. p. 527).

Winsor presents no authority for the proposition that a treating physician who is qualified in the medical field in which his opinions lie is not permitted to opine as to causation based on a clinical diagnosis. Cf. Nelson v. Taylor, 347 S.C. 210, 217 (2001) (medical expert testimony has been generally limited to "medical doctors," and instances where witnesses other than "medical doctors" may testify as medical experts are rare). In Nelson, the court rejected a physical therapist's opinion on causation of injury due to medical diagnosis and treatment exceeding the scope of his expertise. Id. See also Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978) (in a personal injury action, chiropractor was competent to testify as a medical expert to the extent of his knowledge and experience); Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986) (consulting psychologist permitted to give expert opinion concerning diagnosis, prognosis, and causation of plaintiff's mental and emotional condition).

Both physicians clearly stated that they were qualified to diagnose the cause of anosmia and associated dysgeusia, and there was undisputed testimony that the underlying methodology used to make such a diagnosis was within their expertise. Dr. Funcik testified that the science for diagnosing the cause of anosmia is reliable and that there have been no significant advances in the field in decades. (R. p. 854). Simply put, there is no specialty other than a board certified ENT better qualified to make a reliable determination of the cause of Connelly's injuries.

Respondent complains that Dr. Funcik never actually treated Connelly for the loss of smell/taste, yet he testified that once he had concluded she suffered from that condition, there is no treatment to perform. (R. pp. 854, 939) Funcik testified that if the absence of smell/taste does not return after such a traumatic injury, especially over some time, it would be common to conclude

it will not return because the nerve endings which were damaged and detached from the cranial bone have no way to reattach. There is no medical treatment to reattach the nerve endings to the cranial bone. It is simply untreatable. (R. p. 854). Questions about the lapse of time between the injury and when Funcik reached his conclusion on causation do not go to reliability of the treating physician's diagnostic methods, but to weight. Winsor selects excerpts from Funcik's testimony that he would not be the first doctor people would see for this particular condition, because he mostly practices ENT as a facial and plastic surgeon. This is not persuasive, and a complete reading of that portion of the testimony reflects that Dr. Funcik was speaking to the fact of his specialization within the field of ENT surgery is facial/plastic surgery. (R. pp. 853-54). He and Dr. Ghegan both testified that there is no specialty other than ENT to address this condition, it is simply rare, and because there is no ameliorative treatment, there are not a large volume of case studies or patients. The diagnosis is the extent of the available treatment.

Lastly, Winsor complains that Dr. Funcik relied partially on information received from others in forming his opinion, specifically information about the testimony of Connelly's daughter and Connelly about Connelly not noticing a bad smell in the refrigerator. (R. pp. 918—919, 922-923). South Carolina allows expert opinion testimony to be based partially on information received from others, even though the information itself may not be admissible, if such facts and data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Howle, 288 S.C. at 594, 344 S.E.2d at 162 (citations omitted).

Any flaws in Drs. Funcik and Ghegan's analysis go to the weight and credibility of their testimony, not its admissibility, and this expert testimony would supply specialized knowledge that would aid the jury in determining a fact in issue. See Rule 702, SCRE (providing a qualified expert may testify when "scientific, technical, or specialized knowledge will assist the trier of fact

… to determine a fact in issue"). Further, even if the jury had rejected the expert's testimony, the circumstantial evidence was sufficient to support the verdict. It is clear that expert medical testimony is not required in every case to establish a causal connection between an accident and subsequent injury or treatment. See Ballenger v. Southern Worsted Corporation, 209 S.C. 463, 40 S.E.2d 681 (1946). If the facts and circumstances proved give rise to a reasonable inference of a causal connection between plaintiff's present condition and the earlier accident, the absence of medical testimony need not be conclusive. See Gambrell v. Burleson, 252 S.C. 98, 165 S.E.2d 622 (1969); Grice v. Dickerson, Inc., 241 S.C. 225, 127 S.E.2d 722 (1962).

f. *There was no prejudice resulting from the mention of insurance at the trial.*

Winsor further contends that the Court erred in denying both its motions for mistrial based on the mention of the word insurance by Connelly during her testimony and the mention of health insurance by Dr. Funcik during his videotaped trial testimony. The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). A mistrial should be granted only when absolutely necessary and Winsor must show both error and resulting prejudice to be entitled to a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.'" State v. Rowlands, 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct. App. 2000) (quoting Gilliam v. Foster, 75 F.3d 881, 895 (4th Cir. 1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

Rule 411 of the South Carolina Rules of Evidence states "[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." SCRE 411. "By weight of authority, if counsel propounds a question which calls for proper evidence, the fact that an irresponsive or inadvertent answer includes a reference to insurance will not be ground for declaring a mistrial." Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 398, 171 S.E.2d 352, 354 (1969). " . . . A motion for a mistrial, because of anything occurring during the trial, is one addressed to the sound discretion of the trial judge, whose ruling thereabout will not be disturbed in the absence of an abuse of discretion amounting to an error of law." Id.

Winsor asserts that Connelly's use of the word "insurance" during her testimony at trial is more than inadvertent, and therefore the Court committed reversible error in denying its motion for a mistrial. In so arguing, Winsor gives significant weight to the distinction between a party to a proceeding making an inadvertent reference to liability insurance and a third party witness doing the same, and argues that Connelly bears more responsibility for her slip of the tongue than a third party witness. In support of this distinction, Winsor relies upon Brazeale v. Piedmont MFG. Co., which was cited by the trial judge in denying Winsor's motion. 184 S.C. 471, 193 S.E. 39 (1937).

The trial court also relied upon Keller v. Pearce-Young-Angel Co., 253 S.C. 395, 398, 171 S.E.2d 352, 354 (1969). In Keller, a case where two brothers' personal injury claims were consolidated for trial -- Benjamin Keller the plaintiff was a passenger in a truck driven by his brother Raymond Keller and both were injured in a collision with another vehicle being driven by the defendant. Id. at 396, 171 S.E.2d at 353. When testifying about the Benjamin's inability to

work as a result of the collision, Raymond testified that his brother had lost tools that were necessary for him to work, Id. at 397. "I called this insurance adjuster, I imagine it was, for [defendant] and he was supposed to come over." Id. The trial judge denied the motion for mistrial, ruling that the mention of insurance was merely an inadvertent "slip of the tongue" and noted "nearly everybody knows that nearly everybody has got insurance." Id. On appeal, the Supreme Court found that there was no abuse of discretion by the trial judge in denying the appellant's motion for mistrial and that appellant failed to establish that the inadvertent mention of insurance by the plaintiff resulted in any prejudice to the appellant. Citing Keller, the court affirmed the denial of a mistrial for plaintiff's mention of the word "insurance" in Tucker v. Reynolds, 268 S.C. 330, 334-34 (1977). The standard does not differ based on the role of the speaker. The burden is on Winsor to show not only error but also resulting prejudice to him. Id.

Winsor writes at length about Connelly's counsel's responsibility to advise Connelly not to mention insurance at trial and Connelly's level of sophistication — all apparently in an attempt to suggest that Connelly's mention of insurance was somehow not inadvertent. In this case, it was Winsor's question on cross examination that resulted in the mention of the word insurance. Winsor's counsel asked Connelly about a series of communications between her husband, a lawyer, and Thomas shortly after the accident. The correspondence specifically mentions a question as to Winsor's insurance. (R. pp. 1233). The specific question asked was if Connelly's husband contacted the defendant to threaten legal action -- to which the Connelly replied — I don't think he was threatening legal action; I think he was telling them what had happening and he is asking whether there is insurance. (R. p. 243).

Here we are faced with a situation very similar to the one presented in Keller. Connelly was asked a direct question during cross-examination regarding correspondence sent by her

husband, an attorney, to Winsor within days of the June 6, 2011 incident. When pressed to comment on the content of this correspondence via a direct question, she made the statement that it was her belief that her husband was inquiring as to whether or not Winsor had insurance. No further testimony was elicited as her cross-examination was immediately stopped for Winsor's motion for mistrial. Winsor refused the court's offer to give a curative instruction with regard to Connelly's mention of insurance in her characterization of the letter. (R. p. 250). The court did not give one at that time.

The correspondence Winsor asked Connelly about included a letter and four emails between Mr. Connelly and Winsor two days after the accident. (R. pp. 1231-33). These documents had been produced in discovery, and Mr. Connelly (the author) was present in the courtroom throughout the trial. The day following the accident, Mr. Connelly wrote Winsor and informed it of Connelly's fall and the dangerous condition of construction debris on the sidewalk. The entire text of the letter and emails are part of the record. Winsor responded later the same day by email and said that the sidewalk "is and has been clean" and that he would pass it on to the owners. The following day Mr. Connelly replied, and within his reply he said "Please have owners contact me with insurance information or their attorney may contact me." (R. p. 1233). Winsor's counsel had the correspondence, which plainly included the "please have owners contact me with insurance information" line. Winsor was free to file a Motion in limine prior to trial or to seek a limiting instruction to the witness, outside of the presence of the jury, prior to questioning her about the meaning correspondence, but did not. Winsor opened the door to the answer, and the testimony was immediately halted. The court ruled that the statement did not put the issue of liability insurance before the court, and if it did, it was inadvertent.

Furthermore, Winsor's contention that Connelly should be held more accountable for her response due to her level of education or her husband's profession is completely irrelevant. Connelly herself is not an attorney, nor has she received any specialized legal education. Based on the foregoing, the Court did not abuse its discretion in denying Winsor's first motion for mistrial.

Winsor also contends that the court abused its discretion in denying its second motion for mistrial, which was made in response to Dr. Funcik's mention of health insurance during his videotaped deposition. Rule 411 of the South Carolina Rules of Evidence applies only to evidence of liability insurance, and there is no rule of evidence barring the mention of health insurance at trial. Additionally, the edited version of the video had been agreed upon prior to trial. Winsor did not raise the utterance of the word "insurance" prior to the testimony, nor did it seek to further edit the video. The suggestion that any utterance of the word "insurance" demands a mistrial is simply not supported by even the text of Rule 411, which expressly lists instances where such a mention is not prohibited. Based on the foregoing, the Court did not abuse its discretion in denying Winsor's second motion for mistrial.

Lastly, any possible prejudice was lessened by the curative charge not to consider the mention of the word insurance in Dr. Funcik's testimony. See State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005) (regarding the admission of evidence or allowance of testimony, a curative instruction is generally deemed to have cured any alleged error.)

g. *The jury's verdict was not grossly excessive.*

Winsor alleges that the trial court should have granted it a new trial because the jury's verdict was excessive and the result of prejudice. When considering a motion for a new trial based

on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004); "If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted) (quoting O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)).

"The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal." Elam, 361 S.C. at 27, 602 S.E.2d at 781; see Crawford v. Charleston-Isle of Palms Traction Co., 126 S.C. 447, 120 S.E. 381 (1923) (observing the refusal to grant a new trial on the ground that the verdict was excessive was addressed to the sound discretion of the trial judge). "In deciding whether to assess error when a new trial motion is denied, the appellate court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party." Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635-36, 529 S.E.2d 758, 761-62 (Ct.App.2000) (footnote omitted). A jury's damages award is entitled to substantial deference. Harrison, 354 S.C. at 140, 580 S.E.2d at 115.

In the instant case, the resulting judgment in the amount of Three Hundred Twenty-Five Thousand & 00/100 Us Dollars ($325,000.00), after the reduction by the court of the 35% allocation of fault to Connelly, was neither excessive nor unduly liberal. Connelly's damages are not merely aches and pains that will heal with time. Connelly presented evidence at trial that she sustained a concussion, broken nose, permanently lost her sense of smell and suffers from a

permanent impairment to her sense of taste. While the senses of smell and taste are not as outwardly noticeable when lost as the senses of sight or hearing, they are no less important to one's enjoyment of life. Connelly must endure this permanent impairment for the rest of her life, which, as set forth by the life expectancy table in S.C. Code Ann. § 19-1-150, is another Twenty-Four and Eight Hundredths (24.08) Years.

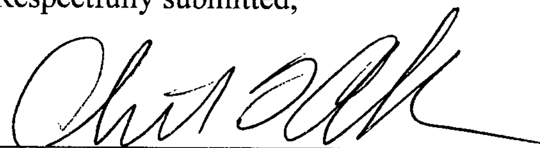
In its brief, Winsor asks this court to weigh the evidence differently and in its favor by arguing that Connelly was unaware or her loss of sense of smell (or did not understand such a loss was not part of a long healing process) until six months to one year after the accident. However, both treating physicians agreed that it would take some time to be sure the loss of sense of smell did not return, especially in conjunction with the healing of a broken nose.

While a different jury may have come to a determination that Connelly's activities after the accident did not warrant the amount of nonpecuniary damages awarded, the jury's determination is entitled to substantial deference. The comparison of the evidence presented to the amount of the verdict, especially once reduced by comparative negligence does not warrant reversal.

IV. CONCLUSION

Based on the foregoing, the trial court's findings as a matter of law, and verdict of the jury should be affirmed.

Respectfully submitted,



Christy Ford Allen (SC Bar #15649)
John A. Massalon (SC Bar #10279)
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
callen@wmalawfirm.net.
jmassalon@wmalawfirm.net

ATTORNEYS FOR RESPONDENT

CHARLESTON, SOUTH CAROLINA

February 15, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Judge

RECEIVED
FEB 16 2017
SC Court of Appeals

Appellate Case No.: 2016-000419
Common Pleas Case No.: 2013-CP-10-3251

Rosemary Connelly, Respondent,

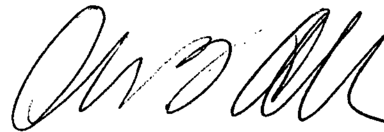
v.

Winsor Custom Homes, LLC, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief Complies with Rule 211(b), SCACR.

February 15, 2017



Christy Ford Allen (SC Bar #15649)
John A. Massalon (SC Bar #10279)
WILLS MASSALON & ALLEN LLC
Post Office Box 859
Charleston, South Carolina 29402
(843) 727-1144
callen@wmalawfirm.net.
jmassalon@wmalawfirm.net

ATTORNEYS FOR RESPONDENT