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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

CASE NO. 2014-CP-26-7790

RECEIVED
JAN 10 2019
SC Court of Appeals

Richard Ciampanella Respondent

vs.

City of Myrtle Beach Appellant

MOTION TO DISMISS APPEAL

The Respondent, Richard Ciampanella, hereby moves for a dismissal of the appeal filed herein by the Appellant City of Myrtle Beach. The grounds for this motion are that the order of the lower court is not immediately appealable. The Respondent further moves for attorney's fees and costs to defend the appeal and for the filing of this motion.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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January 9, 2019

Attorneys for Respondent

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MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO DISMISS APPEAL

This matter is before the Court based on Respondent's Motion to Dismiss the Notice of Appeal dated December 21, 2018. The City of Myrtle Beach appeals an Order of the Trial Court granting a new trial pursuant to SCRCP 59. Briefly stated, Ciampanella was a visitor to the City of Myrtle Beach and was using a beach walkover access when he leaned against the railing which collapsed and severely injured Ciampanella. A trial was held and at the close of the Plaintiff's case, the trial court granted a directed verdict. Thereafter, Ciampanella filed a timely motion for a new trial which was granted by the trial judge in an Order dated September 25, 2018. The City of Myrtle Beach then moved for reconsideration which was denied. A written Order Denying Defendant's Motion for Reconsideration was issued on November 21, 2018.

APPLICABLE LAW

The law in South Carolina on the appealability of the granting of a new trial is summarized by Wallace K. Lightsey in South Carolina Jurisprudence, Appeal and Error, §26(e), as follows:

Section 14-3-330 of the South Carolina Code explicitly allows direct appeal of “[a]n order affecting a substantial right made in an action when such order...grants or refuses a new trial.” Nevertheless, because of the constitutional and statutory restriction of the appellate jurisdiction in law cases to “correction of errors of law,” a party may appeal an order granting or refusing a new trial only when the trial court’s decision is based upon a principle of law. Thus, an appeal does not lie from a decision predicated on the trial court’s determination as to whether the verdict is contrary to the fair preponderance of the evidence, whether the verdict is excessive or inadequate, whether the parties received a fair trial, or whether the jury understood the issues in the case. Moreover, if the trial court’s decision involves questions of law and fact, it is unappealable. [citations omitted.]

Thus, because the trial judge’s decision in this case is not a final order, it is not immediately appealable. See *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573, 698 S.E.2d 856, 859 (Ct. App. 2010).

The trial judge’s decision to grant a new trial was predicated on the testimony of the experts regarding the negligent construction and design of the beach walkover. The Court in its Order Denying Defendant’s Motion for Reconsideration found the issue of the effective date of the various building codes as well as the testimony of the expert witness concerning the appropriateness of the type and number of screws used to be factual issues for the jury. The trial judge’s order clearly falls within S.C. Code § 14-3-30 since his opinion involves questions of law and fact. Further, our courts have held that in the event that a new trial is granted based upon factual issues, then the grant of the new trial is not immediately appealable. See *Epting v. Bell*, 260 S.C. 305, 195 S.E.2d 608 (1973); *Able v. Yang*, 259 S.C. 362, 191 S.E.2d 781 (1972); *Sellers v. Sears Robuck & Co.*, 252 S.C. 271, 166 S.E.2d 1 (1969). See also *Knight v. Johnson*, 244 S.C. 70, 135 S.E.2d 372 (1964).

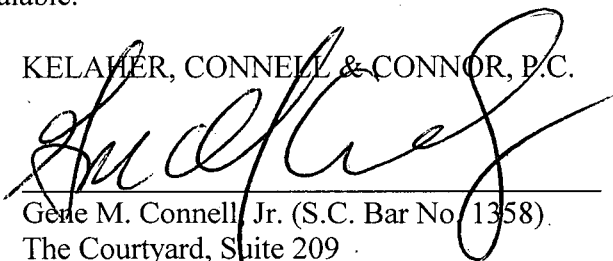
Each of these cases make clear that a new trial granted by the judge which involves questions of law and fact cannot be appealed and is interlocutory. This is clearly in keeping with overwhelming South Carolina case law that requires a final judgment in order to file an appeal. See *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E. 2d 176, 179 (1990). A “final judgment” requires that the ruling dispose of all issues in the action. *Link*, 302 S.C. at 5 n. 3, 393 S.E.2d at 178 n. 3 (1990).

In this case, the trial judge makes no final judgment, but simply holds that the issues presented are for the jury alone and are factual issues.

CONCLUSION

For the reasons stated above, the Respondent Ciampanella requests this Court dismiss the Appellant’s appeal on the basis that the order for new trial in this case is based on legal and factual issues and therefore is not immediately appealable.

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Motion to Dismiss Appeal and Memorandum of Law in Support of Motion to Dismiss Appeal** on the Respondent, on the 9th day of January 2019, by depositing a copy of same in the United States Mail, postage prepaid, to:

William A. Bryan, Jr., Esquire
Amy L. Neuschafer, Esquire
Stephani L. Mascella, Esquire
COLLINS & LACY, P.C.
11945 Grandhaven Drive, Suite D
Murrells Inlet, SC 29576

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 9th day of January, 2019.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

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* OF COUNSEL

January 9, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Appellate Case No. 2018-002270
Richard Ciamparella v. City of Myrtle Beach
C/A No. 2014-CP-26-7790
Our File No. 2014-0324C

RECEIVED

JAN 10 2019

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of a Motion to Dismiss Appeal, Memorandum of Law in Support of Motion to Dismiss Appeal and Proof of Service in the above-captioned case. I also enclose a check for \$50.00 for the filing fee. Please return a filed copy to me in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated documents on counsel of record.

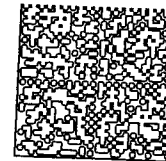
With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures
cc w/enc.:

William A. Bryan, Jr., Esquire
Amy L. Neuschafer, Esquire
Stephanie L. Mascella, Esquire
Julian Z. Hanna, Esquire



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To

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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