THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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, ...Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

The Trial Court erred in denying Appellant's Motions for Directed Verdict/JNOV on the Negligence cause of action because Respondents presented no evidence of a grossly negligent breach of any duty owed to Respondents.

Respondents contend that they presented ample evidence of a grossly negligent breach of duty owed by Appellant. In particular, Respondents contend that they presented evidence of the "City's absence of care demonstrated when City failed to follow its own International Property Maintenance Code". Brief of Respondent p. 5. Respondents argue that City was grossly negligent in its demolition decision when it delivered to Respondents the June 13, 2005 letter instructing Respondents to demolish or have the building demolished. R. 543. City asserts that Respondents have not shown that the decision to demolish was inconsistent with or violated the International Property Maintenance Code, and consequently, there is no evidence of gross negligence.

Respondents argue that the testimony of City's expert, Jim Meggs, proves that City's decision to demolish did not comply with the IPMC. Reference to portions of Meggs's testimony which were not discussed in Respondents' Brief, reveals otherwise.

Demolition is addressed in section 110 of the IPMC:

The code official shall order the owner of any premises upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, to demolish and remove such structure; or if such structure is capable of being made safe by repairs, to repair and make safe and sanitary or to demolish and remove at the owner's option; or where there has been a cessation of normal

construction of any structure for a period of more than two years, to demolish and remove such structure.

IPMC (2000).

In support of their argument, Respondents quoted briefly from Meggs testimony on the matter of "cessation of normal construction". The impression gleaned from that limited excerpt is reflected in the conclusory statement in Respondents' Brief: "Going beyond any lay interpretation of the meaning of the ordinance's use of the phrase 'cessation of normal construction', City's expert agreed that the standard was two years after stoppage not two years after the initial issuance of the building permit". Brief of Respondent, p. 9.

That cryptic dismissal of the phrase "cessation of normal construction" exposes the key deficiency in Respondents' argument. Placed within context it is clear that Mr. Meggs's testimony does not support Respondents' position:

Q: So, we know the last one doesn't apply because clearly a building permit had been issued within five or six months. So, it couldn't have been, no building - -

A: I think the question there whether there had been, whether that was evidence of normal construction. It doesn't, just given the chronology here **it doesn't seem that there was ever normal construction.** But that's, that's a - -

R. 358, (Emphasis added). Meggs explained further on redirect:

Q: So, essentially, what that addresses is, if you're not making normal building progress and you're just doing some hit or miss or making something here and here but you're not progressing the way normal construction does, then that triggers that two year provision?

A: I think that's the, it's got to be the common sense reading on that section, yes.

Q: Okay. And, of course, we know that we go from April of O Three to June of O Five in this case?

A: Yes, sir.

R. 366.

Ultimately, Meggs stated his opinion that the City had complied in all respects with the guidance of the IPMC for purposes of condemnation and decisions to demolish. R. 343.

Proof of City's compliance with the IPMC is found in the testimony of other witnesses and documentary evidence as well. Review and examination of that evidence provides compelling proof that there was a cessation of normal construction of longer than two years on the Middleton Street restoration project. "Cessation of normal construction" is apparent in the testimony of Durwood Bowden, Gene Nelson, Code Enforcement Officer and Dan Cherry.

Durwood Bowden, Director of City's Department of Public Works, explained the City's inspections of the stages of construction projects:

Q: Okay, what does the City do with respect to construction pursuant to permits?

A: We inspect to see that it does comply, and we, if there are deficient items we will identify those items.

Q: And what's the trigger for your department making inspections?

A: Typically it's going to be at the various stages of construction when the contractor reaches a certain stage he knows before, like he can put the sheetrock up that a rough in inspection has to take place, and he would call for it. Now, there are times when perhaps if there's a lot of time expired and you don't get any calls obviously you need to ride by and see if there's construction work going on and they're not calling you. . .

R. 281-281.

Significantly, Bowden also noted, in connection with the passage of 26

months from the first permit until the demolition notice: " And let me, on the last question, one of the things that's important is whether activity continues on the project". R. 284.

Dan Cherry, serving as Code Enforcement Officer during the summer of 2004, testified about his observations when he visited the house more than 15 months after issuance of the first permit : "Went and looked at the structural part of the house, and when we were there you could see that the fire had went through the house and the integrity of the frame had been breached so that the house was going to have to be reconstructed or repaired". R. 251.

Cherry's testimony further revealed the lack of progress, and implicitly, cessation of normal construction, as of summer, 2004(R. 250):

Q: And from a code enforcement standpoint what is notable in that photo (R. 556) ?

A: The, still further evidence of the fire and there's nothing been done to go forward, I mean, nothing has been done to correct it.

Q: Actually fire damage. Does that indicate whether or not the fire damage had been cleaned up?

A: No, sir, it has not.

R. 254.

Importantly, Cherry's testimony also demonstrates inferentially that the cessation of normal construction subsisted for two years before demolition. When asked about the amount of time, in his experience, was typical for construction of a 3500 square foot house, Cherry testified:

Q: . . . how much time do you find to be the reasonable range for building a Thirty-five hundred square foot house?

* * *

A: - - - Thirty-five hundred square feet, it could be anywhere from Ninety to a year.

R. 263.

Following this summer 2004 inspection, Cherry, Bowden and Nelson met with Dr. Chakrabarti to discuss the way forward, following Respondents' change from owner acting as contractor. Durwood Bowden explained the reason and need for the change as well as City's direction after the inspection and meeting of summer, 2004:

Q: And during the meeting what of concern to you as Director of Public Works, came out about the status of construction?

A: Well, obviously, I was very concerned that the, that what was being covered up was not acceptable and had to be stopped. But the biggest thing that came out was that Dr. Chakrabarti said that they didn't intend to live in the house.

* * *

Q: And how does that relate to the owner acting as builder requirement?

A: He cannot be the contractor any longer on that project. . . .

R. 286 – 287.

The new direction to be taken after that meeting was set forth in City's letter (R. 537) to Respondents dated September 9, 2004: The existing permit would be voided and work would stop; Respondents were to have an architect evaluate the project and submit a plan within 30 days; and a new permit would then be issued.

The new permit (R. 538) was issued December 7, 2004, minus the identification of an architect. Bowden explained that the requirement for an

architect's plan was subsequently relaxed: "I am confident that the agreement was that he would replace all the fire damaged members in the structure of the house". R. 289.

Gene Nelson testified to the status of construction when he came on board in 2004, and the lack of construction progress between summer, 2004, and June 2005:

Q: . . . you're aware that there had been two permits for fire damage restoration on that house, is that correct?

A: That's right. One was issued before I came there. The second one was issued just shortly after I came.

Q: So, the April Two thousand three, permit had already been in effect before you came?

A: It had been effect and actually been expired and extended and extended, and expired.

* * *

Q: Now, prior to the house being demolished, did you have an occasion to go into the house and make a video recording on the construction, the details of the construction?

A: Yeah, right prior to issue the letter of condemnation we went out to look at the house and that's the time that we did the video to see what was, you know, before we issued the letter we wanted to see what had been done. We'd given him the second permit, what's been done? So we went out there to look at it and see whether the final condemnation was the right thing to do.

Q: And so, the video that you recorded which we played in Court yesterday, I don't believe you were here, the video that you recorded, that was done just before June Thirteen of Two thousand five?

A: That's correct.

Q: Within several days before?

A: Yes, sir.

Q: And had all of the charred material been removed?

A: Nothing had been removed, it was the same condition it was in when I first took the still pictures back in Two thousand four.

R. 380 – 381. Nelson's 2004 still pictures were received in evidence. R. 552-565; R. 261.

The June 2005 video tapes of the house, compiled by Gene Nelson and Jeff Mitchum of City/s Department of Public Safety. (Exh D- 34, in possession of Clerk) show the precise condition of the house just before demolition. The graphic video-images of still visible fire damage and charred wood structure, soot-discolored tiles and fixtures, and fire-related debris, along with stock-piled construction materials, is a stark contrast with the testimony of Respondent Ajoy Chakrabarti, that the house was "just about ready to be occupied". R. 104.

The permits themselves and other project correspondence show not only that there was a lack of normal construction, but also the City's efforts to work with Respondents toward completion of the project. Respondents were informed in March 2003 that the house was condemned and declared unsafe because "the house is burned, unfit for use and a public nuisance". R. 526. Initially, under the April 2003 permit, (R. 528 – 530), the entire project was scheduled to be completed by August 2003, with the exterior to have been completed by June 2003. Significantly after that date passed, by letter of May 19, 2004 (R. 531), Respondents were given a 60 day time extension to complete exterior repairs. By letter of August 5, 2004, (R. 533 - 534) the repairs still not having been completed, Respondents were given 30 days to complete the exterior, and an additional 90 days to complete the inside of the house.

City then inspected the site in late summer 2004, had a meeting with Respondents on September 9, 2004, and issued the letter, R. 537, that same date. On December 7, 2004, City issued Respondents a new permit (R. 538) with an expiration/completion date of June 10, 2005. Respondent Ajoy Chakrabarti admitted that the project had not been completed by the June 10, 2005 date established in the permit, (R. 104).

Considering the history of the project from March 2003 until June 2005 in light of the IPMC demolition ground of cessation of normal construction for two years, there is little doubt that the requirement was met. Respondents' work on the project was so sporadic, especially between the inspection in summer 2004 and demolition decision in June 2005; it is questionable whether or not Respondents ever managed to begin normal construction.

The matter was submitted to the jury with an instruction, not on mere negligence, but on gross negligence.

Gross negligence is defined as "the failure to exercise slight care." It has also been defined as "the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." (Citations omitted). Doe v. Greenville County School District, 375 S.C. 63, 651 S.E.2d 305 (2007); citing, Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999). The trial court instructed the jury as follows:

> Gross negligence essentially involves an intentional conscious failure to do something which it is incumbent upon one to do, or the doing of a thing intentionally that one ought not to do. This degree of negligence denotes the failure to exercise even a slight degree of care.

R. 453.

The foregoing recap of evidence overwhelmingly shows the efforts of the City to move Respondents to completion of their project, as well as the abject lack of progress toward completion by the Respondents. Moreover, it shows not only lack of gross negligence, but also lack of mere negligence.

CONCLUSION

Respondents have utterly failed to prove gross negligence by the City, which has clearly exercised at least slight care in its dealings with the Respondents, as evidenced by the latitude given Respondents who repeatedly failed to meet permit-related deadlines and were granted extensions in which to comply. Quite telling of the story of the project is the similarity of condition of the building in the summer 2004 photos and the June 2005 video. One is compelled to recognize that there has been either a cessation of normal construction of two years, or that there never was normal construction.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Reply Brief complies with Rule 211(b), SCACR.

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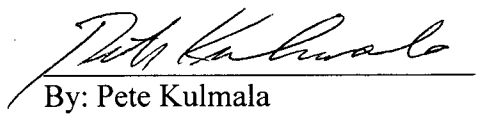

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