THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002270

Richard Ciampanella,.....Respondent,

v.

City of Myrtle Beach, ...Appellant.

APPELLANT'S INITIAL BRIEF

COLLINS & LACY, P.C.

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CITY OF MYRTLE BEACH

Murrells Inlet, South Carolina
May 9, 2019

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STATEMENT OF ISSUES OF APPEAL

I. Did the Circuit Court err by granting a new trial on negligent design and construction when Respondent failed to present evidence of the design and construction standard of care in effect at the time of original construction?

II. Did the Circuit Court err by granting a new trial on negligent design and construction when Respondent failed to present evidence of a violation of the applicable design and/or construction standard of care?

III. Is an order granting or denying a motion for new trial appealable?

STATEMENT OF THE CASE

Respondent Richard Ciampanella filed suit against the City of Myrtle Beach (hereinafter "Appellant" or "City") on November 20, 2014 ("Complaint"). Respondent asserted a single negligence cause of action against the City. The Appellant filed a timely Answer denying liability and raising affirmative defenses. Specifically, the Appellant asserted Respondent's claims were subject to the provisions of the South Carolina Tort Claims Act (hereinafter "Tort Claims Act"), including specifically S.C. Code Ann. § 15-78-60(15), as well as the South Carolina Recreational Use Statute ("RUS"), codified at S.C. Code Ann.§§ 27-3-10, 27-3-70. ("Answer".)

The case proceeded to jury trial before the Honorable Thomas Russo the week of January 23, 2017. At the close of Respondent's case, the City moved for a directed verdict. (Tr. p. 343, l. 7 – p. 348, l. 18; p. 356, ll. 8 – 17; p. 357, ll. 4 – 20) . The trial court granted the City's motion and directed a verdict on several grounds including a lack of evidence establishing liability under S.C. Code Ann. § 15-78-60(15) and under the South Carolina Recreational Use Statute ("RUS") (Tr. p. 366, l. 6 – p. 368, l. 22). The Order granting directed verdict to the City was entered on January 25, 2017. (Order Granting Directed Verdict)

On February 3, 2017, Respondent filed a Rule 59 Motion for New Trial and to Alter or Amend Judgment. (Respondent's Motion for New Trial and to Alter or Amend Judgment.) The trial court granted a new trial on causes of action related to negligent design and/or construction. The trial court denied Respondent's motion for new trial on causes of action related to maintenance, security, or supervision on the grounds that such claims are barred by the Tort Claims Act. The new trial order also references the trial court's previous ruling during trial whereby the trial court recognized the application of the RUS and granted partial summary judgment on simple

negligence – thus requiring Respondent to show gross negligence to prevail. (Order Granting New Trial; Tr. P. 362, ll. 24 – 25).

Appellant filed a Motion for Reconsideration on October 5, 2018. (Appellant's Motion for Reconsideration.) Appellant's Motion for Reconsideration was denied by Order entered November 21, 2018. (Order Denying Reconsideration)

Appellant served a Notice of Appeal on December 17, 2018. Appellant appeals the September 25, 2018, Order granting new trial on design and construction and the November 21, 2018, Order denying reconsideration.

STANDARD OF REVIEW

The grant or denial of a new trial motion rests within the discretion of the trial court and its decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Brinkley vs. S.C. Dept. of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009); Norton v. Norfolk S. Ry., 350 S.C. 473, 567 S.E.2d 851 (2002). Even under an abuse of discretion standard, the appellate court can reverse an order granting or denying a new trial when the decision is without evidentiary support. S.C. State Highway Dep't. v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976).

STATEMENT OF FACTS

Respondent Richard Ciampanella brought a negligence action against Appellant based on injuries he allegedly suffered after falling off a City-owned beach walkover when a portion of the handrail gave way.

Plaintiff, along with his family, was vacationing in Myrtle Beach in August 2014. (Tr. p. 37, ll. 3 – 4). On the day of Plaintiff's incident, Mr. Ciampanella and his fiancée used a public access walkover at 77th Avenue North to get to and from the beach. (Tr. p. 41, l. 23 – p. 42, l. 2;

Tr. p. 50, ll. 20 – 23; Tr. p. 75, ll. 7 – 18). The walkover at 77th Avenue North is a public access available for use at no charge. (Tr. p. 75, ll. 2 – 9). After watching the sun set, Respondent and his fiancé stopped on the walkover as they were walking back to their hotel. Respondent claims he fell when he leaned against the walkover railing and it gave way. (Tr. p. 50, ll. 20 – 25).

ARGUMENTS

To prevail in a negligence action, Plaintiff must show (1) the defendant owed a duty of care to plaintiff; (2) defendant breached the duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Nelson v Piggy Wiggly, Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct.App. 2010); Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). Here, because of the trial court's ruling on the Recreational Use Statute, Respondent has the heightened burden of showing gross negligence which has been defined as "the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do." Kimsey v. City of Myrtle Beach, 109 F.3d 194, 197 (4th Cir. 1997). Gross negligence has been further defined as the want of even slight care and diligence. Brooks v. Northwood Little League, Inc., 327 S.C. 400, 489 S.E. 2d 647 (Ct. App. 1997). If there is no evidence on any one of the negligence elements, the order granting new trial should be reversed. Likewise, if there is no evidence of gross negligence in Appellant's design and/or construction, the new trial order should be reversed.

I. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING A NEW TRIAL WHERE RESPONDENT FAILED TO PRESENT EVIDENCE OF THE STANDARD OF CARE.

The trial court granted a new trial on claims relating to negligent design and/or construction. (Order Granting New Trial.) Because of the rulings at trial and referenced again in the Order granting new trial, the record must therefore contain some evidence of Appellant's duty

towards Plaintiff as it relates to design and construction. Duty is defined generally "as the obligation to conform to a particular standard of conduct toward another." Nelson v. Piggy Wiggly, Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 781 (Ct. App. 2010). Respondent, however, failed to present evidence of the standard of care applicable at the time the beach walkover was built. Respondent did not identify the particular design or building code in effect at the time of construction. In fact, Respondent's expert witness, Alan Campbell, P.E., did not know when the walkover was built. Mr. Campbell relied upon a City employee's best guess that the walkover was built after Hurricane Hugo in 1990. (Tr. p. 320, l. 18 – p. 321, l. 1). Without more, Mr. Campbell's opinions relating to construction/design standards are based on guesswork and do not support a finding of negligence.

Even if the walkover was built in 1990 after Hurricane Hugo, Respondent offered no evidence of the design or building code(s) in effect in 1990. Mr. Campbell made reference to the 1994 Edition of the Standard Building Code (Exhibit 34) and the International Building Code of 2000 (Exhibit 35). (Tr. p. 284, l. 19 – p. 285, l. 10). Mr. Campbell made a similarly deficient reference to the 2012 International Property Maintenance Code (Exhibit 26) which does not govern design or construction. (Tr. p. 270, ll. 9 – 14). Respondent offered no evidence of the design code or building code applicable in 1990. Without evidence of the design code or building code applicable at the time of construction, there is no evidence of Appellant's duty or the standard to which Appellant must conform. Without evidence of the applicable standard, Plaintiff cannot show a breach. Granting Respondent's Motion for New Trial on negligent design and/or construction without evidence of the applicable standard of care was an abuse of discretion.

The Court of Appeals, in Tommy L. Griffin Plumbing & Heating v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002), affirmed the trial court's dismissal

of Plaintiff's claims based on the absence of testimony establishing the standard of care. Without it, the Court reasoned "a jury cannot determine whether [defendant] was negligent ... because there is no way for a jury to compare [defendant's] actions with the actions other similarly situated engineering firms would have taken when confronted with the situation [defendant] faced." Id. at 474, 570 S.E.2d at 203.

In Nelson v Piggly Wiggly, Inc., 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010), the Court of Appeals affirmed an order granting summary judgment where Plaintiff failed to establish the standard of care. The Court of Appeals noted Plaintiff's failure to present testimony or evidence of the requirements of any law, ordinance, or recognized industry safety standard governing the design or construction of the parking lot in 1972. Plaintiff's principal proof of negligence was supplied by Plaintiff's expert witness who simply offered his own preferences which were inadequate to establish defendant's standard of care.

In Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990), the Supreme Court upheld summary judgment on Defendant's counterclaim for negligent design because Defendant failed to establish the standard of care. The Supreme Court explained:

> The well known rule still exists that generally, in a malpractice case, "there can be no finding of negligence in the absence of expert testimony to support it." The claimant in a malpractice claim must, through expert testimony, establish both the standard of care and the deviation by the defendant from such standard. Here, Elmwood presented no evidence from an expert that Gilliland had committed malpractice. Thus, summary judgment was, in this respect, proper.

The failure to establish the standard of care existing at the time of the walkover's construction is fatal to Respondent's negligence action just as it was in Tommy L. Griffin Plumbing, Nelson, and in Gilliland. Without testimony of the controlling standard of care at the

time of construction, Respondent's negligence action fails as a matter of law. Granting a new trial under these circumstances is an abuse of discretion.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING A NEW TRIAL WHERE RESPONDENT FAILED TO PRESENT EVIDENCE OF A BREACH OF THE STANDARD OF CARE.

Even if Respondent established the standard of care controlling in 1990, a new trial was not warranted because Respondent failed to present evidence that Appellant breached the standard of care. Respondent's expert, Alan Campbell, advanced two theories, but ultimately acknowledged the walkover's design and construction was adequate.

First, Respondent took exception to the use of size 9 screws in the walkover's railing. (Tr. p. 264, ll. 7 – 13). However, Mr. Campbell ultimately acknowledged Appellant's use of screws was appropriate for the application. The following exchange reveals Mr. Campbell's actual position concerning the Appellant's use of screws:

> Q. ...But the use of 10 or 12 wood screws, that's an appropriate application; do you agree or not?
>
> A. In some circumstances, it could be.
>
> Q. I'm talking about 77th Avenue North. If the City used size #10 – number 9, 10, or 12 screws, is that an appropriate size screw for that application?
>
> A. As long as – yes, as long as they inspect and maintain it properly, which they absolutely did not.

(Tr. p. 322, ll. 9 – 16).[1]

Respondent also challenged the construction based on the railing's alleged failure to withstand 200 pounds of concentrated force. (Tr. p. 282, l. 13 – p. 283, l. 1). Notwithstanding the fact that the 200-pound concentrated force requirement was not taken from a building code

[1] Mr. Campbell's critique of Appellant's inspection routine is irrelevant here as the trial court's order expressly limits the new trial to design and construction issues. (Order Granting New Trial.)

controlling at the time of construction, Respondent's expert eventually acknowledged the construction of the railing was sufficient to withstand 200 pounds of concentrated force. (Tr. p. 328, ll. 3 – 25).

Mr. Campbell's original opinion finding a violation was based on his mistaken belief as to the number of screws in the railing. An exemplar prepared by Mr. Campbell was excluded because it did not include all fasteners connecting the components of the railing. (Tr. p. 257, l. 15 – p. 269, l. 25). Once Mr. Campbell considered the actual number of screws and nails, he testified repeatedly that Appellant's original construction would satisfy the 200-pound concentrated force requirement:

Q. Now, this screw is resting up against this board –

A. Yes, sir.

Q. - which is embedded in this post with two more screws.

A. Right.

Q. You agree that's – this board provides support for this board (indicating)? You're leaning up against it?

A. That way, absolutely, yes, sir.

Q. Yeah, if you're leaning up against it. So that this nail this board is also going to be – this board is also going to be supported by these two screws. So tell me what's going to be the strength of these two screws (indicating).

A. Probably around a hundred and – if I'm not mistaken, around 150 or so.

Q. **So with those three screws together, the original construction meets your 200 pounds of concentrated force requirement; yes?**

A. **On day one?**

Q. **Yeah.**

A. **Yes, sir.**

(Tr. p. 328, ll. 3 – 25 (emphasis added)).

Mr. Campbell later testified that the railing was further fortified by nails fastening the horizontal and vertical boards together:

Q. …But also something that I picked up on earlier, these boards at the walkover actually have nails – I'm not sure if they're coming from this direction or that direction (indicating), but these are nailed in all the way down the line.

A. Yeah. And I was looking at that probably two to three feet down.

Q. Okay.

A. But not right at the post.

Q. But that gives it –

A. Two to three feet down.

Q. And that gives it additional strength?

A. Probably every two to three feet on center.

Q. All right. How much more additional strength is that going to give the entire structure?

A. Well, that just allows all those screws to work together as opposed to individually. So you could add the two, based on that direction of load, you may get up to two or three hundred pounds or maybe even 400 pounds.

Q. **So we far exceed the building code's 200 concentrated pound requirement?**

A. **Yeah. It's not going to fail on day one.**

(Tr. p. 329, l. 9 – p. 330, l. 7 (emphasis added)).

When Mr. Campbell considered all of the fastening devices included in the construction, he admitted the railing's construction was more than adequate to withstand 200 pounds of

concentrated force. While Mr. Campbell continued to challenge the sufficiency of Appellant's inspection and maintenance routine, he acknowledged the walkover/railing construction satisfied building standards. (Tr. p. 330, l. 16 – p. 331, l. 11). Mr. Campbell's testimony falls short of proving Appellant's simple negligence and falls even further short of proving Respondent's actual burden of showing gross negligence. In light of the wholly inadequate testimony of Respondent's expert witness, it was an abuse of discretion to grant Respondent's motion for new trial.

III. THE GRANT OR DENIAL OF A MOTION FOR A NEW TRIAL IS IMMEDIATELY APPEALABLE.

Respondent previously filed a motion to dismiss the present appeal. That motion was denied by Order filed March 21, 2019. The court's order, however, allows the parties to argue the issue of appealability in their briefs. Therefore, in an abundance of caution, Appellant provides the following discussion supporting the appealability of the trial court's Order granting a new trial.

A party's right to appeal is governed by S.C. Code Ann. § 14-3-330, which provides in relevant part: The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases and shall review upon appeal . . . . An order affecting a substantial right made in an action when such order . . . grants or refuses a new trial . . . . S.C. Code Ann. § 14-3-330(2)(b). In South Carolina, it is well-established that an order that grants or refuses a new trial affects a substantial right and is immediately appealable. Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993); see also S.C. State Highway Dep't v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976).

In Clarkson, the trial court granted the landowner's motion for new trial following a verdict in a condemnation action awarding no damages. The State appealed the Order granting a new trial. The Supreme Court rejected the argument advanced by the landowner, like the Respondent's argument here, that an order granting a new trial is not appealable. In reaching this decision, the

Supreme Court recognized an earlier line of cases suggesting the appealability of an order granting or denying a new trial depended upon the type of error committed by the trial court. The Clarkson Court clarified that the previous cases were not addressing the appealability of the new trial order but were instead speaking of the Court's scope of review. 267 S.C. at 126-27, 226 S.E.2d at 676 ("While the statement in our decisions, that an order granting a new trial upon the facts is not appealable, is not correct in the sense that the appeal will not lie, it is correct in the sense that such an order based upon conflicting testimony will not be disturbed on appeal.").

The Court of Appeals has since acknowledged the holding in Clarkson permitting appeals from an order granting or denying a new trial. Pinckney v. Winn-Dixie Stores, Inc., 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992).

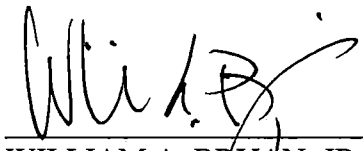
Respondent relies on cases that predate Clarkson. However, in light of the Supreme Court's clarifying decision in Clarkson, which was re-affirmed in Pinckney, the Order of Judge Russo granting a new trial is immediately appealable.

CONCLUSION

For the reasons stated, this Court should reverse the trial court's order granting new trial.

[SIGNATURE PAGE TO FOLLOW]

COLLINS & LACY, P.C.



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Murrells Inlet, South Carolina
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Richard Ciampanella, ... Respondent,

v.

City of Myrtle Beach, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Appellant's Designation of Matter by depositing a copy in the United States Mail, first class postage prepaid, on May 9, 2019, addressed to the attorneys of record as follows:

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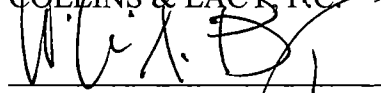

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May 9, 2019

The Honorable Jenny A. Kitchings
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Re: Richard Ciampanella v. City of Myrtle Beach
Appellate Case No. 2018-002270
Lower Court No. 2014-CP-26-7790
C&L No. 000456-01017

Dear Madam Clerk:

Enclosed for filing is the original and one (1) copy of the Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal. I have also enclosed a Proof of Service of same upon counsel for Respondent.

I am providing a copy of the enclosed to opposing counsel by copy of this letter via U.S. Mail. Thank you for your attention to this matter. If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards,

Sincerely,

William A. Bryan, Jr.

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