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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  
Case No. 2014-CP-26-07790

**RECEIVED**  
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SC Court of Appeals

Richard Ciampanella, .....Respondent,

v.

City of Myrtle Beach, .....Appellant.

**APPELLANT'S MOTION TO STRIKE AND HOLD DEADLINES IN ABEYANCE**

To: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rule 209(b) and Rule 210(c), SCACR, Appellant City of Myrtle Beach ("City") respectfully moves this Court for an Order striking certain portions of Respondent's Initial Brief and Designation of Matter. The City additionally requests that all deadlines, including the deadline for Appellant's Initial Reply Brief, be held in abeyance until the Court issues its ruling on this motion to strike.

Respondent Richard Ciampanella brought this negligence action against the City seeking to recover for personal injuries he sustained when he fell from a dune walkover. At the close of Respondent's case, the trial judge granted the City's motion for directed verdict on several grounds, including a lack of evidence establishing liability under the South Carolina Tort Claims

Act, S.C. Code Ann. §15-78-60(16), and the South Carolina Recreational Use Statute ("RUS").

Respondent subsequently filed a Motion for New Trial and to Alter or Amend Judgment. (Ex. A; Motion for New Trial). The trial court granted Respondent's motion in part, granting a new trial only on the causes of action related to negligent design and/or construction. The trial court specifically denied Respondent's motion for a new trial as to any causes of action related to maintenance, security, or supervision of the walkover and reaffirmed its prior ruling that such claims are precluded by §15-78-60(16) due to lack of evidence of actual notice. The trial court further reaffirmed its prior ruling finding the RUS applies and granting a directed verdict on Appellant's simple negligence cause of action pursuant to the RUS, leaving only Respondent's claim for gross negligence to survive. (Ex. B; New Trial Order).

The City has appealed the trial court's partial grant of a new trial on the issues of negligent construction and design. Accordingly, the issue before this Court is whether the trial judge properly granted a new trial on Respondent's claims for grossly negligent construction and/or design of the walkover, i.e. whether the trial court's decision was unsupported by the evidence or ~~was~~ controlled by an error of law. Norton v. Norfolk S. Ry., 350 S.C. 473, 567 S.E.2d 851 (2002); Brinkley v. S.C. Dept. of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009).

In support of his argument that a new trial was properly granted on this issue, Respondent relies almost exclusively on the testimony of his expert, Alan O. Campbell, P.E. (Initial Brief of Respondent). Respondent also cites to an Affidavit of Alan O. Campbell in his initial brief. Specifically, Respondent's Initial Brief quotes Mr. Campbell's affidavit regarding a conclusory opinion that the manner of construction was grossly negligent. (Resp. Initial Br., p. 17). Respondent again cites to Mr. Campbell's affidavit for the assertion that the walkover design was inadequate. (Resp. Initial Br., p. 19). However, Mr. Campbell's affidavit was not considered by

the trial court in ruling on the City's motion for directed verdict or in ruling on Respondent's motion for a new trial.

The South Carolina Appellate Court Rules contain limitations on matter to be included in the Record on Appeal and referenced in the parties' briefs. First, "the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may properly be included in the Record on Appeal [See Rule 210(c)]." Rule 209(b), SCACR. In addition, a party may not include any matters which are not relevant to the appeal. Id. Rule 210(c) further provides that the Record on Appeal shall not include matters which were not presented to the lower court. Rule 210(c), SCACR. The brief shall contain references only to materials properly included in the Record on Appeal. Rule 208(b)(4), SCACR.

Here, Mr. Campbell's affidavit was not considered by the trial court at any point in the trial or during the directed verdict motion. (Ex. C, Tr. p. 343, line 2- p. 380, line 14). It was never brought to the court's attention or referenced during trial and formed no basis for the court's entry of a directed verdict.<sup>1</sup> The record does not indicate the trial judge even knew the affidavit existed.

Likewise, this affidavit was not presented or considered by the trial court in ruling on Respondent's motion for a new trial. (Ex. B, New Trial Order; Ex. D, New Trial Hearing Trans.). Rather, as is clear from Respondent's brief, Mr. Campbell testified extensively at trial. It appears Respondent

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<sup>1</sup> Respondent has not separately designated Mr. Campbell's affidavit for inclusion in the Record on Appeal. He did, however, wholesale designate the trial transcript and "all exhibits listed in the transcript." (Resp. DOM). Court's Exhibit 1 for identification to the trial transcript is the Deposition of Alan Campbell, to which his affidavit was attached. It is unclear from the trial record why this deposition transcript was marked as a Court's Exhibit, but presumably it was because it was used to impeach Mr. Campbell's testimony. (Ex. G, Tr. pp. 1-4; Ex. H, Tr. p. 384). However, Mr. Campbell's affidavit was never offered into evidence or discussed during the trial. Its incidental attachment to a deposition made a Court's Exhibit was superfluous and does not render it material presented to the trial court within the meaning of Rule 210, SCACR. Regardless, it was indisputably not considered by the trial court at any point during trial or as part of the motion for a new trial and is therefore irrelevant to the appeal under Rule 209(b), SCACR.

desires to discuss Mr. Campbell's affidavit in his brief in order to mitigate unfavorable testimony by his own expert.

At trial, Respondent advanced two theories regarding the existence of evidence concerning negligent construction and/or design of the walkover: 1) that the walkover was constructed with screws rather than lag bolts and 2) that the walkover did not withstand the allegedly required 200 lbs. of concentrated force. (See Appellant's Initial Brief, pp. 7-10; Respondent's Initial Brief, pp. 17-20). As discussed in Appellant's initial brief, Mr. Campbell ultimately acknowledged Appellant's use of screws rather than lag bolts was appropriate:

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 77<sup>th</sup> 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.

(Ex. E; Tr. p. 322, lines 9 – 16).<sup>2</sup>

Likewise, upon review of the actual numbers of screws and nails used to construct the walkover railing, Mr. Campbell conceded the original construction would satisfy the 200-pound concentrated force requirement he testified was applicable. (Ex. F; Tr. p. 328, lines 3-25; p. 329, line 9-p. 330, line 7). Such testimony bears directly on this appeal in that it demonstrates the absence of evidence concerning the central issue in this appeal—whether there was evidence presented at trial that the City constructed or designed the walkover in a grossly negligent manner.

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<sup>2</sup> Mr. Campbell's critique of the City's inspection routine is irrelevant here as the trial court's order expressly limits the new trial to design and construction issues. (Ex B; New Trial Order).

Respondent is now effectively attempting to alleviate the effect of Mr. Campbell's detrimental trial testimony with his affidavit opining that the walkover was constructed and designed incorrectly. Because this affidavit was not presented to or considered by the trial court during trial or the subsequent motion for new trial, the portions of the Initial Brief of Respondent referencing Mr. Campbell's affidavit should be stricken and an amended brief submitted. In addition, to the extent Respondent's Designation of Matter can be construed as designating Mr. Campbell's affidavit for inclusion in the Record on Appeal, the City requests that it be stricken from the Designation of Matter.

In addition, Respondent's Initial Brief contains a discussion of documents entitled "Myrtle Beach Walkover Inspection Report" and "Culture and Leisure Work Orders." (Resp. Initial Br. p. 20). Respondent's brief cites to these documents as "Exhibit 1" and "Exhibit 4," respectively. However, these documents are not exhibits to the trial transcript. Rather, they are in fact exhibits 1 and 4 to the deposition of City employee Richard Kirby. (Ex. I, Kirby Dep. exhibit list). These documents were not presented to the trial court in any fashion, nor are they included in Respondent's Designation of Matter. Accordingly, the City requests Respondent be ordered to revise his initial brief to omit all references to these documents and that they not be included in the Record on Appeal.

Finally, the City requests the Court strike several additional trial exhibits from the Record on Appeal, as they were not referenced or cited to in Respondent's Initial Brief. Respondent has designated the trial transcript and "all exhibits listed in the transcript" for inclusion in the Record on Appeal. However, many of these exhibits are irrelevant to the appeal and would serve only to unnecessarily enlarge the Record on Appeal. In her treatise, Justice Toal cautions:

In addition, the record must only include matters relevant to the appeal. *See* Rule 209(b), SCACR (providing, in pertinent part, that no party "shall ... include any

matter in his Designation which is not relevant to the appeal.”). This simple requirement is clearly set forth in the Rules, yet lawyers often take the so-called “kitchen sink” approach, wherein they include every piece of information from the case below when they compile the record.

Aside from violating the Rules, the “kitchen sink” approach requires the reader to sort through items that have nothing to do with the appeal. An effective appellate advocate will deliberately and thoughtfully undertake the designation process to ensure only the relevant documents are included in the record. When the parties honor Rule 209(b)’s requirement to limit the record to that which is absolutely essential, the readers-appellate court judges as well as their law clerks—are able to quickly ascertain the facts the parties view as critical to their respective positions.

Jean Hoefer Toal, Appellate Practice in South Carolina 407 (3d ed. 2016).

Specifically, the following trial exhibits are not referenced or cited to in Respondent’s

Initial Brief:

- Plaintiff’s Ex. 1—EMS Report
- Plaintiff’s Ex. 15—Loss Report
- Plaintiff’s Ex. 16—Packet of Medical Expenses
- Plaintiff’s Ex. 20—CD of MRI
- Plaintiff’s Ex. 21—Piedmont Healthcare Records
- Plaintiff’s Ex. 22—Southeastern Spine Records
- Plaintiff’s Ex. 23—Dr. Poletti’s Original File
- Plaintiff’s Ex. 25—DHEC Plan
- Plaintiff’s Ex. 27—Coastal Dunes Manual
- Plaintiff’s Ex. 31—Steven Poletti, MD deposition
- Plaintiff’s Ex. 33—Screw
- Defendant’s Ex. 1—Body Diagram/Questionnaire
- Defendant’s Ex. 2—Piedmont Healthcare Records
- Court’s Ex. 1—Alan Campbell’s Deposition Transcript
- Court’s Ex. 2—Mockup of Railing
- Court’s Ex. 3—Richard Ciampanella’s Deposition Transcript

Because these matters are not cited to or referenced in Respondent’s brief, they are not relevant to the appeal and must be stricken from the Record on Appeal pursuant to Rule 209(b), SCACR.

## CONCLUSION

The City respectfully requests that the matters be stricken from Respondent's Initial Brief and Designation of Matter as outlined above. The City further requests that all deadlines be held in abeyance pending a decision on this motion, as it will impact the City's reply brief.

Respectfully submitted,  
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STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
C/A NO. 2014-CP- 26-7790

Richard Ciampanella,

Plaintiff,

vs.

City of Myrtle Beach,

Defendant.

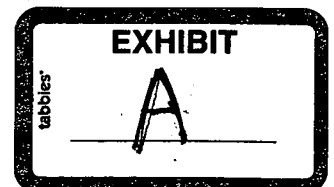
PLAINTIFF'S NOTICE OF MOTION  
AND MOTION FOR NEW TRIAL AND  
TO ALTER OR AMEND A JUDGMENT  
PURSUANT TO SCRCP 59

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Plaintiff, moves the Court for a new trial pursuant to South Carolina Rule of Civil Procedure 59(a) and (e) which provides in pertinent part: "A new trial may be granted to all or any of the parties on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State."

Plaintiff respectfully requests that the Court grant a new trial and that the Court amend and/or alter its oral order of January 25, 2017 wherein the court directed a verdict for the Defendant finding that Plaintiff had not proven actual notice of the defect in the beach walkover access. The basis of Plaintiff's motion requesting the Court grant a reversal of the directed verdict is as follows:

1. **The Standard of Review favors the Plaintiff.**

It is settled law in South Carolina that a motion for directed verdict requires the Court to view the evidence and all inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. If the evidence yields more than one inference or its inferences are in doubt, the court should deny such motion. *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 452 S.E.2d 622 (Ct. App. 1994).



If there is any evidence that supports the party opposing the directed verdict request, this Court may not grant such a request. See *Graves v. Horry-Georgetown Technical College*, 391 S.C. 1, 704 S.E.2d 350 (Ct. App. 2010). Finally, when considering a directed verdict motion the trial court does not have the authority to decide credibility issues or to resolve conflicts in the testimony or evidence.

Plaintiff respectfully suggest that based on all the evidence presented which will be discuss, this Court erred in granting the motion to direct a verdict for the Defendant.

**2. Notice is not required if the Defendant creates the hazard.**

In support of Plaintiff's request that the Court deny Defendant's motion for a directed verdict on actual notice, Plaintiff pointed out to the Court that the beach walkover access was built, maintained, inspected and constructed by the Defendant City of Myrtle Beach. It is well settled law in South Carolina that notice is never required if the condition was created by a defendant's employees. See *Cook v. Food Lion*, 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997), *cert. denied* (1998) (a customer is not required to show the store had notice of danger created by the mats because the store employees created the allegedly dangerous condition by placing the mats in the exit doors). See *Smith v. Walmart Stores*, 314 S.C. 248, 442 S.E.2d 606 (1998). See also *Wooten v. SCDOT*, 326 S.C. 516, 485 S.E.2d 119 (Ct.App. 1997); *affirmed* 333 S.C. 464, 511 S.E.2d (1999) (concluding that whether DOT complied with its design guidelines or any other appropriate professional standard is at best a jury issue).

Alan Campbell, Plaintiff's expert, offered significant testimony that the Defendant created the hazards by using #9 screws in the deck and beach walkover access.<sup>1</sup> He further testified to evidence of violations of building codes or industry standards which are admissible to

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<sup>1</sup> See Exhibit 19, Work Order #1719 which was work performed by City employee Edsel on 8/20/2014. In his report he noted "screws had rusted into to cause them to break when leaned on."

prove notice. See *Elledge v. Richland/Lexington School District 5*, 341 S.C. 473, 534 S.E.2d 289 (Ct.App. 2000).

There is also evidence in the record of ownership and control of the beach walkover accesses by the City of Myrtle Beach. Exhibit No. 17, the Beach Management Act, specifically describes that the City owns the beach walkover access, built them, constructed them, inspected them, repaired them and maintained them. Because the City is a landowner in this situation, they are liable to third persons for defective conditions on their premises when such are due to defective construction. *Binnicker v. Adden*, 204 S.C. 487, 30 S.E.2d 142 (1942).

Thus, because the City of Myrtle Beach was the owner and created the condition, S.C. Code §15-78-60(16) is not applicable.

**3. Plaintiff's expert's testimony showed defective construction and actual notice of the defects by the Defendant.**

Plaintiff offered and qualified as an expert, Alan Campbell, a professional engineer from Charleston, South Carolina, who had significant experience in constructing and building beach walkover accesses in the coastal area of South Carolina. Campbell's testimony is significant on both notice and the creation of the defect. He testified as follows:

- Defendant's employees installed the wrong screws in construction of the deck. A #9 screw is not to be used because it corrodes easily and after seven years corrodes by a factor of 50 each year thereafter.<sup>2</sup>
- The Beach Management Act (Exhibit No. 32) recommends a bolt-through style construction and not the use of screws. See Exhibit 18 (Dune Walkover Guidelines) and Exhibit 17 (Beach Management Act).

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<sup>2</sup> See Exhibit 19, *supra*.

- The Defendant's employees did not replace rusted screws which caused the beach walkover access to collapse injuring the Plaintiff.<sup>3</sup> Rusted screws and the failure to replace them violate the 2012 International Property Maintenance Code, the 1994 Standard Building Code and the 2000 International Building Code which had all been adopted by the City of Myrtle Beach. Plaintiff refers the Court to Exhibits 34 (Standard Building Code), Exhibit 35 (International Building Code and Exhibit 26 (International Property Maintenance Code).<sup>4</sup>
- The Defendant's employees knew of the problems with the screws because many of the beach walkover accesses had rusted screws and there were failures throughout the system.
- According to the City's own internal documents including Exhibit 17 (Beach Management Act) the beach walkover accesses in questions had a 15 year lifespan and the one where the Plaintiff fell was built in 1990. The accident happened on August 19, 2014 long after the expected life span of the beach walkover access at 77<sup>th</sup> Avenue North.
- The method of construction by City employees was not in compliance with the Dune Walkover Guidelines (Exhibit 18) which required all beach walkover accesses to be built in accordance with the International Building Code. Further, Exhibit 24 had a drawing of the proper detail of the Beach Management Act and how beach walkovers were to be constructed. See also Exhibit 32 which described in detail how the railing was to be built with bolts. The pictures offered into evidence, Plaintiff's Exhibits 3-14) show severely rusted and corroded screws which were not of the correct diameter when

<sup>3</sup> See Exhibit 19, *supra*

<sup>4</sup> See also pictures (Ex. 7, 8, 9) showing the rusted screws in the beach walkover access railing where Plaintiff fell.

installed. The same photographs show not enough screws were used on the side railing. The City employees' method of testing the railings for strength did not meet the Standard Building Code and City employees simply pushed on the railing as they walked through during their inspections which were done in seconds.

- Rusted screws are a sign that they should be replaced and were easily available on inspection.
- The City employees would have seen these rusty screws during their inspection.
- The #9 screws were not appropriate for use and as a result fastener failure occurred.
- The City's Walkover Inspection Reports showed numerous defects in the beach walkover accesses including the one where the Plaintiff fell at 77<sup>th</sup> Avenue North.
- Defendant's employees had actual knowledge of failures on other beach walkover accesses due to the rusty screws.
- The City employees did not build the beach walkover access in compliance with the 200 lb. concentrated force requirement as is required for any railings.
- The City employees failed to use proper corrective methods for railings and beach walkover accesses.
- The City employees did not construct guardrails consistent with industry standards.
- The City of Myrtle Beach did not follow its own replacement policy of beach walkover accesses.
- City inspections were totally inadequate because they were performed in seconds.
- City employees failed to correct a known problem (corroding screws that were much smaller than which should have been used).

- City employees failed to adopt representative testing of the railings to make sure they would withstand a 200 lb. concentrated force.
- Plaintiff's injury was a result of corrosion failure along with withdrawal failure -- all of which City employees had knowledge of prior to Plaintiff's injury.
- On cross-examination by Defendant's counsel, Alan Campbell reiterated that the City was aware of and had knowledge of the condition after creating it by constructing the beach walkover access in violation of Standard Building Code, International Building Code and the International Property Maintenance Code.

**4. If notice was required pursuant to § 15-78-60(16) evidence offered was sufficient.**

In granting the City's motion this Court stated actual notice was required pursuant to § 15-78-60(16). The decisions of the Court of Appeals and the Supreme Court have reiterated that the Plaintiff has the option of proving actual notice by the factual circumstances of the case. (Circumstantial evidence is allowed.) See *Strother v. Lexington County Recreation Commission*, 332 S.C. 54, 504 S.E.2d 117 (1998) and *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (Ct. App. 1991).

~~While Plaintiff submits that actual notice was not required because the City built the~~ walkover access, Plaintiff's expert and his testimony more than met the standard. As stated above, Campbell testified that the rusty screws were obvious, they were the wrong size and they were seen by City employees. Further evidence of actual knowledge notice is found in the Beach Management Act (Exhibit 17)<sup>5</sup>, the Dune Walkover Guidelines (Exhibit 18), South Carolina Guide to Beachfront Property (Exhibit 30), the Coastal Construction Manual (Exhibit

<sup>5</sup> The City adopted by resolution the South Carolina Beachfront Management Act on October 23, 2012. In that document the City acknowledged it was responsible for the beach walkover access (Exhibit 17, p. 13); the life of a beach walkover access is 15 years, and 40 beach walkovers including the one that failed in this case needed to be replaced as of 2010 study. (Exhibit 17, p. 62).

28) and in the violation of the Building Code committed by the City in the construction of the beach walkover access (see Exhibit 26, International Property Maintenance Code; Exhibit 34, Standard Building Code; and Exhibit 35 International Building Code.

In sum, Campbell's testimony during the trial was "...you would be able to see that the heads are corroded, which in turn would be an indication of the remaining concealed section of the fastener also having some degree of corrosion." (Deposition of Campbell, p. 47, Court's Exhibit 1); and "...everybody knows that, which goes back to maintenance issues of properly inspecting, properly maintaining, properly repairing." (Deposition of Campbell, p. 49).

**5. S.C. Code Ann. § 15-78-60(16) does not apply.**

The Court in granting Defendant's motion for a directed verdict also stated that S.C. Code Ann. § 15-78-60(16) applied. It provides in pertinent part: "maintenance, security or supervision of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the defect or condition causing a loss is not corrected by the particular governmental entity responsible for maintenance, security or supervision within a reasonable time after actual notice of the defect or condition."

~~Plaintiff refers the Court to Exhibit 17 offered into evidence entitled A RESOLUTION TO ADOPT THE 2012 BEACH MANAGEMENT PLAN FOR THE CITY OF MYRTLE BEACH.~~ This plan approved by City Council discusses each of the beach walkover accesses in the City of Myrtle Beach. Exhibit 17 shows "...the City enforces the International Property Maintenance Code..." (Exhibit 17, p. 62) and that the beach walkover at 77<sup>th</sup> Avenue North is built on private property. (Exhibit 17, p. 107; Tax Map No. 1651607157-1651607296). Finally, Exhibit 17 indicates that the City does not own all the beach accesses. See Exhibit 17, p. 33,

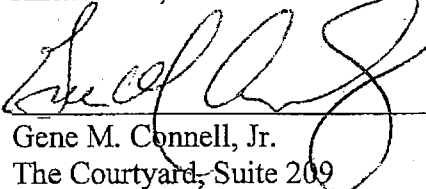
"There are 395 beach access points in the City with 145 being publicly maintained and accessible to the general public."

Plaintiff asserts that in this case, S.C. Code Ann. § 15-78-60(16) does not apply because Plaintiff's Exhibit 17 clearly shows that the beach walkover access at 77<sup>th</sup> Avenue North is not owned by the public. Accordingly, actual notice of a defect would not be required. Further, as has been stated above, the City had actual notice of the defect by using improper screws and corroded screws not being replaced.

Accordingly, Plaintiff moves the court for an Order reversing this Court's decision to direct a verdict to the Defendant and granting the Plaintiff a new trial pursuant to South Carolina Rule of Civil Procedure 59.

Respectfully submitted,

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February 3, 2017

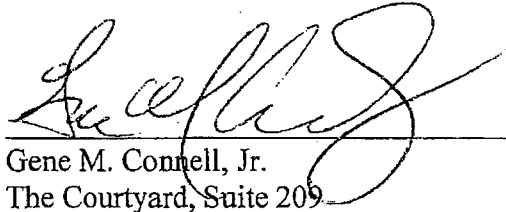
Attorneys for Plaintiff

### RULE 11 CERTIFICATION

The attorney(s) below hereby certifies that either:

- ☐ A. He/She has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion; or
- ☐ B. Such consultation would serve no useful purpose, or could not be timely held; or
- ☐ C. Due to the nature of the motion, there is no duty to consult opposing counsel in that this is a motion:
- ☐ a. To Dismiss
- ☐ b. For Summary Judgment
- ☒ c. For New Trial
- ☐ d. For Judgment NOV

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February 3, 2017

**Attorneys for Plaintiff**

STATE OF SOUTH CAROLINA  
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
C/A NO. 2014-CP-26-7790

Richard Ciampanella, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 City of Myrtle Beach, )  
 )  
 Defendant. )  
 )

**ORDER GRANTING NEW TRIAL  
PURSUANT TO SCRPC 59**

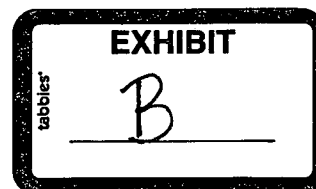
THIS MATTER is before the Court based on Plaintiff's Motion for a New Trial. This case was previously heard by the Court, and, at the close of the evidence, the Court granted Defendant's motion for a directed verdict. The Plaintiff then timely moved for a new trial pursuant to South Carolina Rule of Civil Procedure 59(a), which provides in pertinent part:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State[.]

~~The grant or denial of a new trial motion rests within the sound discretion of the trial court.~~

~~See~~ Brinkley v. S.C. Dept. of Corrections, 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009).

~~After reviewing of the transcript and briefs of the parties and hearing arguments from~~  
counsel, this Court finds that a new trial is necessary as to any and all causes of action related to negligent design and/or construction. See Creech v. S.C. Wildlife & Marine Resources Dept., 328 S.C. 24, 491 S.E.2d 571 (1997) (allowing a claim against the S.C. Wildlife & Marine Resources Department for negligent design and construction of a public dock/fishing pier to survive directed verdict where enough evidence was presented for a jury to infer negligence). The Court denies Plaintiff's motion for a new trial as to any causes of action related to maintenance, security, or



supervision of the walkover, as such claims are precluded by the South Carolina Tort Claims Act. Nothing in this ruling conflicts with the Court's previous ruling during trial, whereby partial summary judgment as to simple negligence was granted pursuant to the South Carolina Recreational Use Statute.

Accordingly, it is ORDERED that a new trial be granted pursuant to SCRCP 59(a) and (b) as to the causes of action related to negligent design and construction only; issues related to the City's inspection schedule, inspection methodology, and claims related to the adequacy of the City's preventative and corrective maintenance subsequent to original construction shall not be addressed during the new trial. It is further ORDERED that this matter be returned to the Horry County Court of Common Pleas for a new trial. The Clerk of Court is directed to place this matter on the docket for trial.

AND IT IS SO ORDERED.

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The Honorable Thomas A. Russo  
Presiding Judge, Fifteenth Judicial Circuit



Horry Common Pleas

**Case Caption:** Richard Ciampanella VS Myrtle Beach City Of

**Case Number:** 2014CP2607790

**Type:** Order/Other

So Ordered

s/Thomas A. Russo

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State of South Carolina ) Court of Common Pleas  
) 2014-CP-26-07790

County of Horry )

Richard Ciampanella )

vs. )

City of Myrtle Beach )

) Transcript of Record  
)

January 23, 2017  
Conway, South Carolina

BEFORE:

Honorable Thomas A. Russo, Judge.

APPEARANCES:

Gene M. Connell, Jr., Esq.

Julian Z. Hanna, Esq.

Attorney for the Plaintiff

William A. Bryan, Jr., Esq.

Amy L. Neuschafer, Esq.

Attorney for the Defendant

Teresa J. F. Bautz, RPR  
Official Court Reporter

EXHIBIT

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Monday, January 23rd, 2017

Andrew Brown

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1 10:02 a.m.)

2 THE COURT: All right. At this time, I'll take up  
3 any motions at the close of the Plaintiff's case.

4 MS. NEUSCHAFER: Your Honor, I'm going to give  
5 Mr. Bryan a break from talking today.

6 THE COURT: Okay, all right.

7 MS. NEUSCHAFER: At this point, the Defense would  
8 move for a directed verdict in its favor. We've got a  
9 few different grounds, and I'll try to go through them  
10 as fast as I can.

11 The first one you are familiar with already is the  
12 operation of the Recreational Use Statute. We believe  
13 that the case presented thus far has established the  
14 applicability of the statute, and I believe you have a  
15 copy of that already. There's not been any testimony  
16 that anybody but the City of Myrtle Beach owns,  
17 controls the subject walkover. It's undisputed that  
18 it's open to the public. There was no charge for  
19 Plaintiff to enter. And he was -- Mr. Ciampanella was  
20 there for recreation. I believe he and his wife both  
21 testified they were out on the beach enjoying the  
22 sunset.

23 So under the Recreational Use Statute at this  
24 point, it would be the Plaintiff's burden to prove  
25 gross negligence under the exception. And, again, we

1 believe that testimony presented thus far only shows  
2 one reasonable inference, and that is that the City has  
3 exercised at least slight care which, of course, is the  
4 definition of gross negligence.

5 We would rely on the Kinsey case which Your Honor  
6 has already read and seen. That's very similar to this  
7 case. And the evidence we would point to here of  
8 exercising at least slight care, number one, the City  
9 did have a walkover replacement plan which would show  
10 that they did exercise care to identify and keep up  
11 with these walkovers.

12 There was testimony about the inspections being  
13 done, some of which we just heard by deposition, some  
14 of which Mr. Alan Campbell discussed in his deposition.  
15 The Building Maintenance Department did their annual  
16 inspections. There was one done in each of the four  
17 years preceding the subject accident. Mr. Tom Anderson  
18 did one every three years.

19 And then, on top of that, the third level of  
20 inspections done would be those done by the employees  
21 just in the course of their employment, and they're  
22 instructed to be on the lookout, report, repair,  
23 whatever needs to be fixed.

24 Mr. Campbell also testified yesterday that he was  
25 aware and saw evidence that this boardwalk had, in

1 fact, in spots been repaired and replaced, which shows  
2 there was exercise of at least slight care in the  
3 maintenance of the boardwalk. And that was what was at  
4 issue in the Kinsey case. Again, the Court found that  
5 the evidence of inspections in that case demonstrated  
6 at least slight care.

7 The next ground we have would be the exception to  
8 the waiver of immunity under the Tort Claims Act that's  
9 at subsection 16. And I have a copy of that if you  
10 would like to see it.

11 THE COURT: Thank you.

12 MS. NEUSCHAFER: So the exception to the waiver of  
13 immunity in this section states that a governmental  
14 entity is not liable for a loss resulting from  
15 maintenance, security, or supervision of any public  
16 ~~property intended, permitted -- or permitted to be used~~  
17 ~~as a park, playground, or open area for recreational~~  
18 ~~purposes, unless the defect or condition causing the~~  
19 loss is not corrected by the particular governmental  
20 entity responsible for the maintenance, security or  
21 supervision within a reasonable time after actual  
22 notice of the defect or condition.

23 And the case law, of course, is Legion that says  
24 these exemptions to liability must be liberally  
25 construed in favor of limiting the liability of the

1 government. So, here again, you're dealing --  
2 Plaintiff's case was -- yesterday, we heard  
3 Mr. Campbell talk about maintenance. That seems to be  
4 the issue.

5 This is a recreational area. Again, I think that  
6 ties in with the Recreational Use Statute. So the  
7 question then becomes whether the City had actual  
8 notice of this broken railing prior to the Plaintiff's  
9 accident. And we have not heard any evidence of actual  
10 notice that the board was weakened or that the cap rail  
11 had previously broken off.

12 There are a couple cases that discuss this  
13 statute. One of them is Struthers versus the Lexington  
14 County Recreation Commission. I've got copies of that  
15 if Your Honor would like to see them. Again,  
16 ~~the important~~ Struthers, I think, is important because it does  
17 ~~address the actual~~ address the actual notice issue, and it defines actual  
18 ~~notice as all~~ notice as all the facts being known. And that's  
19 certainly not what we have here. So, again, that would  
20 be our second ground, would be the exemption to the  
21 waiver of immunity.

22 And the third ground, it's kind of a two-parter,  
23 assuming neither of the statutory immunities would  
24 apply, I think we're left with kind of the common law  
25 premises liability analysis here. And it's our

1 position that Plaintiff would be categorized as a  
2 licensee as a matter of law. That's important because  
3 the duty to a licensee, obviously, is different than to  
4 an invitee.

5 A licensee enters the property with consent but  
6 not an invitation. A licensee is on property for the  
7 primary benefit of the licensee and not the landowner.  
8 The licensee enters for his own purpose. The duty to a  
9 licensee is only to warn of hidden dangers of which the  
10 owner has actual knowledge. -- so you get back, again,  
11 to the actual knowledge requirement -- and of which the  
12 licensee would not reasonably be expected to discover.

13 There is no duty to search out and discover  
14 dangers or otherwise make the premises safe for a  
15 licensee. We believe, again, there is no evidence of  
16 actual knowledge. So if the City did not have actual  
17 knowledge of the defect that is alleged here, there is  
18 no duty to warn, no duty to make the premises safe for  
19 the Plaintiff.

20 The second part of the premises liability analysis  
21 would be the requirement in a premises case -- there  
22 are many cases I could cite to you, but one is Anderson  
23 versus Racetrac Petroleum, which is found at 296 S.C.  
24 204, and that discusses the two-part test that a  
25 Plaintiff has to prove in addition to the elements of

1 negligence. That would be that the Plaintiff has to  
2 prove that the injury was either caused by a specific  
3 act of the City that created the dangerous condition at  
4 issue, or that the City had actual or constructive  
5 knowledge of the dangerous condition and failed to  
6 remedy it.

7 And, again, here we have not yet heard any  
8 evidence that a specific act of the City created the  
9 dangerous condition. No one knows how the cap rail  
10 fell off or when. So there would be, again, actual  
11 notice, I've said it twice already, but same thing, no  
12 evidence of actual notice that the board was weakened  
13 or that the cap rail was broken.

14 On the constructive notice side, you look at  
15 things like how long the rail had been broken. And the  
16 testimony, again, was no one knows when that happened,  
17 how long before it happened. For all we know, it  
18 happened an hour before Plaintiff's accident.

19 Will, do you have anything to add?

20 MR. BRYAN: You covered it.

21 MS. NEUSCHAFER: I think that is it, in a  
22 nutshell.

23 THE COURT: All right. Mr. Connell?

24 MR. CONNELL: Your Honor, our position is that, as  
25 to the actual notice, there were actual notice of the

1 defects. Mr. Campbell testified that they -- the  
2 depositions he had reviewed of the City employees knew  
3 that screws were rusted, they knew that boards were  
4 falling, and they knew that other boards had failed on  
5 the beach walkover area.

6 He also said that they failed to inspect the  
7 railing when they knew there were rusty screws. He  
8 said they ran a mode of run to fail, that this  
9 particular beach walkover was built in 1990. By their  
10 own documents and by the resolutions that's been put  
11 into evidence, the beach walkover had a 15-year life,  
12 and this was the 27-year -- or 24 -- 20 some years  
13 afterwards.

14 They also said that those screws were going to  
15 fail after seven years and that that was a known fact,  
16 and that you would have a 50 percent factor of failure  
17 every year after the seventh year. This thing was  
18 built in 1990. By 1997, it was certainly going to  
19 start -- it was known that it was going to fail from  
20 there on.

21 He said the City also had -- and it's in evidence  
22 -- that there was a schedule to be replaced, and that's  
23 -- I think that's No. 18 -- Plaintiff's Exhibit No. 18.  
24 He further indicated that the calculations indicate  
25 that a slight lean of less than 40 pounds would cause

1 the railing to fall.

2 He also indicated that the maintenance plan and  
3 the decision to maintain and construct was not in  
4 accordance with the Beach Management Act, and that if  
5 bolts had been used instead of rusty screws, that it  
6 would have made a world of difference as to the railing  
7 system. He also says there's a difference between  
8 preventative maintenance and how it was maintained and  
9 that preventative maintenance was not used and that  
10 they had actual notice of the problems throughout the  
11 system and throughout the 105 beach walkover areas.

12 He further indicated that he did not do any  
13 adequate testing, that one person came out and over the  
14 course of three years would walk through and had to do  
15 105 within four days. And he figured that was about  
16 ~~five to six seconds~~ testing, not including drive time  
17 and report time.

18 ~~He also indicated~~ He also indicated that they failed to have a plan  
19 to replace rusty screws when they knew screws were  
20 going to rust, and they knew from other incidents that  
21 it happened, that boards were falling off. He further  
22 indicated that failure to maintain and build properly  
23 was a violation of the OCRM regs and that failure to  
24 maintain, per the Coastal Construction Manual, was a  
25 violation.

1           Importantly, he recognized that they were not  
2 built according to the Standard Building Code. He  
3 further indicated that the City council failed to abide  
4 by its own resolution. Again, that's Plaintiff's-18.  
5 And that was an idea that they were going to replace  
6 all these railings within so many years -- all these  
7 walkovers within so many years.

8           He said they failed to address corrosive failure  
9 and corrosion failure when they knew about it; that all  
10 these violated the Standard Building Code of 1994, the  
11 International Property Management Code of 2012, and the  
12 International Building Code of 2001.

13           As Your Honor, talking about the Limitation of  
14 Liability of Landowners Act, the only case that's  
15 applicable that we think is the Harris versus US -- or  
16 Harris versus USC -- It says that the Defendants have to  
17 prove the Recreational Use Act, and that's an  
18 affirmative defense for them.

19           And they have not proved that in this case yet.  
20 There's been no evidence that they own this property.  
21 There's been no evidence that they leased this  
22 property. There's -- the only evidence that's in the  
23 record right now is that they have maintained the  
24 property and that they've been maintaining for a number  
25 -- or maintaining it -- they've done the construction

1 and the repairs for a number of years.

2       There is -- they cited this Kinsey case. I know  
3 Your Honor has read that. I'll just briefly talk about  
4 that. The Plaintiff in that case fell when they were  
5 stepping down from the last step onto the beach, and  
6 there was some sand erosion. And the Court in that  
7 case, the Fourth Circuit, said the Plaintiff failed to  
8 adduce any evidence that the City was grossly  
9 negligent. In fact, the Court noted in the one-page  
10 opinion that the City had no knowledge of any erosion  
11 hazards.

12       There was testimony that City engineers were not  
13 aware, and there was also testimony from the City  
14 maintenance person that they would go around and fill  
15 the erosion in every couple of days. And the Fourth  
16 Circuit said this evidence was not refuted by the  
17 Plaintiff. And since we have no evidence that there  
18 might be a jury question of gross negligence, that we  
19 find that we -- we affirm the grant summary judgment.

20       A couple of cases that have not been cited, in  
21 Creech versus Wildlife Department, I don't know if  
22 you've looked at that one. I think it's attached to  
23 some of the documents. That case is interesting and  
24 that involves a railing system somewhere down in  
25 Berkeley County where there was one rail on one side

1 and not a rail on the other side, and the Plaintiff  
2 goes down and the railing falls -- or goes down the  
3 walkway and falls off on the area where there's not a  
4 railing. In that case, there's a jury verdict for the  
5 Plaintiff. It was appealed, as the Court said that was  
6 an issue of fact for the jury.

7       There are a number of cases that talk about -- I  
8 assume Your Honor is going to want to hear about gross  
9 negligence, even though we think that's an issue that's  
10 not yet been proven. There's a number of cases in  
11 South Carolina -- we're going to give you some of these  
12 in the jury charge -- that say gross negligence is for  
13 the jury to decide when there's evidence that could go  
14 either way.

15       And, Your Honor, we argue in this case that  
16 there's more than evidence that can go either way.  
17 There's specific evidence about the City's knowledge,  
18 actual knowledge, of what was happening when they --

19       THE COURT: Let me stop you there, because you  
20 keep referring to the actual knowledge. As far as I  
21 can tell, there was no testimony that the City had  
22 actual knowledge that this walkover was defective.

23       There was testimony that they knew that they had  
24 problems with walkovers throughout the area, and they  
25 were making efforts to repair those. But there's no

1 actual -- there's no evidence of actual knowledge of  
2 this walkover being --

3 MR. CONNELL: Your Honor, there -- you're correct.  
4 But there is evidence that the City was aware of these  
5 problems with the walkovers. And that is actual  
6 knowledge such that a jury could decide that that --  
7 that the Plaintiff could prevail in that situation.  
8 And that's -- Mr. Campbell testified to that  
9 extensively based on the depositions he had read and  
10 what had happened during the proposed maintenance  
11 program.

12 So, Your Honor, I think we've got to all the  
13 issues that they have argued. Except I would point out  
14 one thing, Your Honor, that is interesting in this  
15 case. The problem was created by them. I mean, the  
16 beach walkover access was maintained, and there's been  
17 some evidence that those were built by them.

18 THE COURT: You're completely missing the whole  
19 purpose of the Recreation Use Statute when you make  
20 those comments. Because, if you read the statute, if  
21 it applies, it says that under 27-340, that except as  
22 specifically recognized or provided in 60, an owner of  
23 land who permits, without charge, any person having  
24 sought such permission to use such property for  
25 recreational purposes does not thereby extend any

1 assurance that the premises are safe for any purpose,  
2 confer upon any person the legal status of an invitee  
3 or a licensee to whom the duty of care is owed, or  
4 assume responsibility or incur liability for injury to  
5 any person or property caused by any act or omission of  
6 such persons.

7 And it says that, in 27-330, that the owner owes  
8 no duty of care to keep the premises safe for injury or  
9 use by persons who have sought and obtained permission  
10 to use for recreational purposes or to give any warning  
11 of any dangerous condition, use, structure or activity  
12 on such premises to such persons entering or using the  
13 property.

14 MR. CONNELL: Well, Your Honor, here's my response  
15 to that, if I may.

16 THE COURT: Yeah.

17 MR. CONNELL: 27-320, owner means the possessor of  
18 fee interest. There's no evidence that they had a fee  
19 interest in this property. Number two, there's a  
20 tenant. There's no evidence they had a tenant  
21 agreement. Number three, there's no evidence they had  
22 a lessee agreement. And number four, there's no  
23 evidence that they were a person in control.

24 The only argument is they maintained or built it.  
25 There was no evidence that's been put in the record yet

1 that they had any of these things. In fact, there's no  
2 evidence otherwise -- under the Harris case, the burden  
3 of proof of proving that Recreational Use Statute would  
4 be on them. And so they haven't presented that yet.  
5 So I don't know that Your Honor could make that ruling  
6 at this point, respectfully.

7 THE COURT: Okay.

8 MS. NEUSCHAFER: With regard to the owner  
9 definition, if the Plaintiff does not believe that the  
10 City is a, quote, "person in control of the premises,"  
11 then I'm not sure how we got to this point. And we  
12 could move to dismiss if that's what Your Honor would  
13 like on those grounds.

14 But the hallmark -- the first hurdle to get over  
15 in any premises liability case is that the Defendant  
16 has sufficient control of the property to be held  
17 responsible for what happened to it.

18 ~~THE COURT:~~ If they don't have that, Mr. Connell,  
19 why are you suing the City?

20 MR. CONNELL: Because they maintained it, they  
21 built it, they constructed it, and they inspected it,  
22 and all the things that Mr. Campbell has said.

23 MS. NEUSCHAFER: Sounds a lot like control to me.

24 MR. CONNELL: And, Your Honor, that issue has not  
25 yet been -- has not been presented by the Defendants.

1 And Harris says that the burden of proof under the RUS  
2 is on them. So they have to establish that.

3 THE COURT: All right. Anything further?

4 MS. NEUSCHAFER: The only other thing, Your Honor,  
5 I think you've kind of addressed the actual notice  
6 issue already. Our position would be that there was no  
7 -- there wasn't any testimony of other failures,  
8 Mr. Campbell said he was not aware of any other  
9 failures with regards to the railings. Actual notice  
10 is -- the way that the definition is, is actual notice  
11 of this defect, not some other defect. I think that  
12 would be it, Will. Anything else?

13 (Discussion off the record.)

14 MS. NEUSCHAFER: And the last thing would be, just  
15 to piggyback on what we said already, the hallmark of  
16 premises liability is that the Defendant has control.  
17 And if the Plaintiff's position is that the City does  
18 not control, then we would move for a directed verdict  
19 on the grounds that we are not, as a matter of law,  
20 responsible for the defects, the alleged defects.

21 MR. CONNELL: Your Honor, not true. I mean, how  
22 many cases have you had where you go to a store and  
23 somebody slips on the mat, and the mat was placed there  
24 by someone who did contracting work, and the store is  
25 the owner of the property?

1 I mean, there are cases in Legion about that where  
2 someone else has been doing the work, the maintenance,  
3 the repair, the construction, and the owner is just the  
4 owner of the property. So, I mean, that's the same  
5 type -- that's all --

6 THE COURT: Yeah, but in that case, you just -- in  
7 that example you just gave me, you'd sue the store.

8 MR. CONNELL: No. I'd probably sue both.

9 THE COURT: You wouldn't sue the mat guy.

10 MR. CONNELL: I'd sue both. I have actually had  
11 that before.

12 THE COURT: How can you sue the store?

13 MR. CONNELL: You can sue the store under agency  
14 theory. You know, they had an agreement together.

15 What usually happens is the store argues that the

16 person who placed the mat -- I see this all the time in

17 convenience stores where they have these heavy-weighted

18 mats they put out in front. They're usually bleached

19 and they change them out every so many months, and then

20 someone falls on them because it ripples up. So I

21 don't think that that's, you know, that's a big issue

22 at this point.

23 And, also, I point out to Your Honor, under the

24 rules of evidence, actual notice can be proven by a

25 scheme or a common habit or any of those particular

1 things. And, I mean, the actual notice in this case is  
2 across the board, it's a systematic problem, the rusted  
3 screws, and then having to produce things like that.  
4 So I think that's a jury issue.

5 THE COURT: Okay.

6 MS. NEUSCHAFER: If you need to hear any more on  
7 the control issue or the ownership issue, we would  
8 point out that the Beach Management Plan -- and was it  
9 the resolution?

10 MR. BRYAN: The City Council resolution --

11 MS. NEUSCHAFER: Right.

12 MR. BRYAN: -- adopting the Beach Management Plan,  
13 which is in evidence.

14 THE COURT: One person argues at a time.

15 MS. NEUSCHAFER: That's right. The resolution and  
16 the Beach Management Plan that Plaintiff has put in  
17 evidence that identifies the properties, the City  
18 properties, the list to be replaced or worked on in the  
19 future, it clearly includes this walkover, and clearly  
20 that is a City document identifying City property.

21 THE COURT: What exhibit is that?

22 MR. CONNELL: It's No. 18, I think, Your Honor.  
23 If you want to see it, I'll be happy to --

24 THE COURT: Yeah, please.

25 MR. CONNELL: 17.

1 THE COURT: Mr. Connell, Exhibit 17, which was  
2 introduced by you --

3 MR. CONNELL: Yes, sir.

4 THE COURT: -- states that, whereas, the beach is  
5 the dominant physical feature of the City and is the  
6 major factor in the City's economy -- and then it goes  
7 further and further and further. And then it says,  
8 there's now here -- therefore, be it resolved that the  
9 City Council hereby reaffirm its commitment to preserve  
10 the beach as the City's most precious natural asset.

11 How does that not -- how is that not evidence that  
12 the City is the owner of this property?

13 MR. CONNELL: Your Honor, could I see the document  
14 a second? Thank you. I was looking for that section  
15 that he cited about the maintenance. I wanted to see  
16 if I can --

17 THE COURT: Well, I mean, does that section refute  
18 what --

19 MR. CONNELL: Your Honor, this -- again, this did  
20 not happen on the beach. I mean, this happened on the  
21 walkover back behind the dunes.

22 THE COURT: Okay.

23 MR. CONNELL: So, I mean, at high water.

24 THE COURT: All right.

25 MR. CONNELL: So...

1 MS. NEUSCHAFER: And the...

2 MR. CONNELL: But, Your Honor, I will say this to  
3 you. I'm not trying to be argumentative, but if the  
4 Court were to find that that is the case, then the  
5 standard would be gross negligence. I think that's  
6 kind of where I see you going. But I don't think -- my  
7 point is, I think you've got to have more than what  
8 we've got on the record at this point, on a motion for  
9 involuntary nonsuit with prejudice because the standard  
10 is all the inferences --

11 THE COURT: Here's what's going to happen, I'm  
12 just going to tell y'all. You made a good point about  
13 the ownership, and so that was a concern that I had.  
14 But I'm not -- with all due respect, I'm not going to  
15 grant your motion for a directed verdict because I  
16 think that there's that issue in this case, which I think  
17 this jury question, would be whether or not the City  
18 acted in gross negligence and whether or not the  
19 remedial things that you mentioned would rise to the  
20 level of slight care, which would take you out of that  
21 liability.

22 So I'm not directing a verdict, but I'm telling  
23 you now, there's no question, it's not even remote in  
24 my mind, that the Recreation Use Statute applies. It's  
25 not even -- I mean, I wish I had another term, because

1 there's no question in my mind it applies.

2 MR. CONNELL: All right, sir.

3 THE COURT: You had some interesting theories.

4 This theory that that refers to the beach, this isn't  
5 the beach. This is the area that goes over the dunes  
6 to the beach, you know, I --

7 MR. CONNELL: I understand.

8 THE COURT: -- I don't buy that.

9 MR. CONNELL: All right.

10 THE COURT: So I'm going to respectfully deny the  
11 motion for a directed verdict. But as we go forward, I  
12 feel that the Recreational Use Statute and that its  
13 applicability in this case has been established.

14 MS. NEUSCHAFER: Your Honor, if I could, what has  
15 happened in some of the cases I've seen is that either  
16 summary judgment or a directed verdict has been granted  
17 where the Court finds that the Recreational Use Statute  
18 applies as a matter of law. Directed verdict or  
19 summary judgment has been granted on the simple  
20 negligence claims, so that all that's left is gross  
21 negligence.

22 THE COURT: That -- I haven't seen the complaint,  
23 so I don't even know what's alleged in the complaint.  
24 But if they're alleging simple negligence, then I would  
25 grant a directed verdict as to those causes of action.

1 MS. NEUSCHAFER: The second question I would have  
2 would be as to our motion on the actual knowledge  
3 element and the Tort Claims Act exception to the waiver  
4 of immunity.

5 MR. CONNELL: I'm sorry. I didn't catch that, I'm  
6 sorry.

7 MS. NEUSCHAFER: Sorry. I was just asking Your  
8 Honor's ruling or decision on the -- our argument  
9 pertaining to the Tort Claims Act exception to the  
10 waiver of immunity, which requires actual notice of the  
11 defect.

12 THE COURT: You want to address that?

13 MR. CONNELL: Your Honor, I think --

14 THE COURT: You already did.

15 MR. CONNELL: Yes. I don't want to belabor the  
16 point.

17 THE COURT: Okay. I'm going to take a few minutes  
18 to look at that.

19 MS. NEUSCHAFER: Sure. And, again, I think that  
20 actual notice is kind of woven into our third ground to  
21 the traditional premises liability that was --

22 THE COURT: I think that's out with the Recreation  
23 Use Statute being in effect, as far as --

24 MS. NEUSCHAFER: Okay. Well, I think -- wouldn't  
25 it just be a gross negligence standard, but he would

1 still have to prove all those elements of -- under a  
2 traditional premises liability analysis.

3 THE COURT: Right.

4 MS. NEUSCHAFER: Just gross negligence instead of  
5 negligence.

6 THE COURT: Right. Okay.

7 MR. BRYAN: She's smarter than I am, judge.

8 THE COURT: All right. I'm going to take just a  
9 few minutes. Did you have anything else, Mr. Connell?

10 MR. CONNELL: I want to show you, this is what I  
11 was looking for. This is their list. And the last  
12 page is 77th Avenue North, and it lists the owner of  
13 the property as private. The very last page.

14 MS. NEUSCHAFER: Of?

15 MR. CONNELL: 77th Avenue North.

16 THE COURT: Well, go through this. Does it list  
17 anything other than private throughout these 20 pages?

18 MR. CONNELL: Your Honor, the way I read that is  
19 that the ones that are not listed as private are  
20 public, by looking at that document.

21 THE COURT: Everything in there is private,  
22 everything.

23 MR. CONNELL: No. These are the ones I list, I  
24 think, that are private. There are others that are  
25 public beach accesses that they have title to.

1 THE COURT: There's no question in this case that  
2 that was a public beach access; right? That's been  
3 testified to.

4 MR. CONNELL: Well, look, it says, property owner,  
5 private.

6 THE COURT: I don't care what that says. It's  
7 been testified to that this was a public beach access;  
8 is that not correct?

9 MR. CONNELL: Your Honor, we didn't testify to  
10 that. We just said that we went across the --

11 MR. BRYAN: Yes.

12 THE COURT: Well, your clients did.

13 MR. CONNELL: I mean, he went across the deck. He  
14 didn't know whether it was public or private. That's a  
15 legal determination.

16 THE COURT: All right.

17 MS. NEUSCHAEER: I think the testimony was that  
18 there was -- it was publicly accessible next to a  
19 public parking lot.

20 THE COURT: All right.

21 MR. CONNELL: And, Your Honor, you have our  
22 argument on the actual notice.

23 THE COURT: Yeah.

24 MR. CONNELL: We think that there's -- we showed  
25 that.

1 THE COURT: All right. Just give me a few  
2 minutes.

3 MR. BRYAN: Yes, sir.

4 (WHEREUPON, a brief recess was taken at  
5 10:57 a.m.)

6 THE COURT: All right. I wrestle -- you know, I  
7 always -- any time you're considering motions that  
8 become dispositive of cases that obviously takes a lot  
9 of time and effort.

10 The issue with regards to the application of the  
11 Recreational Use Statute and all of that, you know,  
12 even with the evidence that's here, you know, I think  
13 it has been shown that the property in question was  
14 owned by the City and maintained by the City. But even  
15 if that's in question, even if that's an issue that  
16 hasn't been made clear, which I believe it has been, we  
17 have to look at the South Carolina Tort Claims Act.

18 And in that Act, under 15-78-60 where the  
19 exception is to the waiver of immunity, in Subsection  
20 16, there is no question at all that this structure was  
21 placed there by the City, built by the City, maintained  
22 by the City. And so, therefore, there's no argument  
23 that that's a City-owned structure maintained by the  
24 City.

25 And it would appear that, under 15-78-60,

1 Subsection 16, that the City would be -- would not be  
2 liable for any losses resulting from the maintenance,  
3 security or supervision of that structure. If they had  
4 actual notice of the defect or the condition and  
5 failed -- and failed to do it, at that point, then,  
6 they don't have immunity. If there's actual knowledge  
7 of the defect and the condition and they do not correct  
8 it within a reasonable time after having actual  
9 knowledge, then there is liability.

10 Here and in this case, I don't think there is any  
11 evidence in the record that would show that the City  
12 had actual knowledge that the walkover at 77th Avenue  
13 was damaged or in any way compromised. I know there's  
14 testimony and I realize that there is -- some testimony  
15 is that the City was aware that, of these 105 or 108,  
16 however many walkovers there were, that they were in  
17 charge of, that there were issues and there were  
18 problems and they were having to fix those. And they  
19 had a plan in place to every three years and the yearly  
20 inspection.

21 But having knowledge that you're having problems  
22 -- let me give an analogy. It's no different than if  
23 the government owns ten buildings in this area, and  
24 some of these buildings have some issues and some  
25 problems, others don't. And so they are having to

1 maintain ten buildings.

2       And then they have this one building where they're  
3 not aware of any issue with this building, but there  
4 becomes an issue and someone injures themselves. The  
5 fact that they had knowledge that they have issues in  
6 several of these buildings doesn't place actual  
7 knowledge on -- in other words, I believe, in that  
8 case, they'd have to have actual knowledge that that  
9 particular building had a defect and they didn't do  
10 anything with it.

11       I think that's the same here. They have a 105  
12 walkovers. They may have actual knowledge of certain  
13 defects, and they have to get to those defects and they  
14 have to repair them. But there's no testimony --  
15 there's nothing in this record that would indicate that  
16 the City had any actual knowledge of a problem or a  
17 defect with the walkover at 77th Avenue where this  
18 occurred.

19       And so I think the Tort Claims Act applies, and  
20 under that, I think the City is entitled to a directed  
21 verdict as to the liability for any injuries as a  
22 result of that 77th Avenue walkover.

23       MR. CONNELL: Your Honor, in light of your ruling,  
24 we would like you to put all the cases that were  
25 presented, including this Struthers versus Lexington

1 County case --

2 THE COURT: Yes, sir.

3 MR. CONNELL: -- and the last page. And we're  
4 going to need all that in the record for further  
5 review, Your Honor.

6 THE COURT: Was that submitted to the Court?

7 MR. CONNELL: That was submitted by the Defendants  
8 a little while ago, and it specifically talks about  
9 actual notice and about circumstantial evidence of that  
10 on the last page.

11 THE COURT: Okay.

12 MR. CONNELL: So we'd like to have that in Your  
13 Honor, also.

14 THE COURT: That absolutely will be in.

15 MR. CONNELL: And, Your Honor, we're going to need  
16 ~~a ruling on the exemplar that Your Honor -- yesterday,~~  
17 ~~this exemplar that we had an issue with yesterday.~~

18 THE COURT: Oh, right.

19 MR. CONNELL: I would like a ruling on that. You  
20 know, Your Honor had -- my intent was to try to prove  
21 -- try to show that as evidence yesterday as an  
22 exhibit. And Your Honor said I couldn't go back and  
23 try it another way because you had already ruled.

24 THE COURT: Well, I mean, I'll -- I think you  
25 tried to admit it in evidence, and I think there was an

1 objection to it. And I sustained the objection, so I  
2 didn't allow it into evidence. So I note your  
3 exception to that. And we can make that a Court's  
4 exhibit to make it a part of the record, although it  
5 was used extensively --

6 MR. CONNELL: Yes, sir.

7 THE COURT: -- throughout your arguments. But --  
8 however, we'll certainly mark that as a Court's  
9 exhibit, so it will be a part of the record.

10 MR. CONNELL: Your Honor, I think we need to -- I  
11 asked if we could put on the record our bench  
12 conference afterwards about that issue. Because, Your  
13 Honor, my intention was to try to get it in another way  
14 and you said, I've already ruled, on sustaining the  
15 objection. I thought there was another way to get it  
16 in with those photographs, and you indicated to me that  
17 you'd already made a ruling, so I wasn't going to  
18 obviously argue with you about that.

19 THE COURT: All right, sir. We'll certainly note  
20 that, that I do recall that there's a bench conference.  
21 I sustained the objection to it coming in as evidence,  
22 and you indicated at that point that you would like to  
23 try another way to have that to come in and with, I  
24 think, other photographs or something of that nature  
25 that you mentioned. And I had indicated to you that I

1 had already ruled on that admissibility and --

2 MR. CONNELL: Yes, sir.

3 THE COURT: -- and then you moved on. And  
4 obviously that precluded you from going into those  
5 other ways.

6 MR. CONNELL: Yes, sir.

7 THE COURT: So we'll certainly note that for the  
8 record, and then we'll make that a Court's exhibit so  
9 it will be a part of --

10 MR. CONNELL: And, Your Honor, could we get you  
11 to -- just for purposes of your ruling, could we get to  
12 you distinguish the Struthers versus Lexington County  
13 case that's been presented, and the last page that  
14 talks about what actual notice is and how you --

15 THE COURT: I don't find there's actual notice  
16 here. I don't find that you have shown constructive  
17 actual notice. Where is it? Let me hold the case.

18 MR. CONNELL: Your Honor, that would be on the  
19 last page where they talk about what actual notice  
20 means, Section 8 -- 17 and 18. If Your Honor please,  
21 we'd request that you --

22 THE COURT: On the last page?

23 MR. CONNELL: Yes, sir. The last page, 17 and 18,  
24 that the Supreme Court talks about what actual notice  
25 means.

1 MR. BRYAN: Gene, hang on..

2 MS. NEUSCHAFER: There's two -- are you looking at  
3 the Supreme Court or the Court of Appeals' decision?

4 MR. CONNELL: I'm looking at the Supreme Court  
5 opinion.

6 MS. NEUSCHAFER: Okay. Just making sure I got the  
7 right one.

8 THE COURT: All right. And, in that case, the  
9 Court indicated that, In our opinion, the Court's  
10 decision erroneously eliminates the option of proving  
11 actual notice by the factual circumstances of the case.  
12 We find, in the context of the Act, actual notice means  
13 all the facts are disclosed, and there's nothing left  
14 to investigate. Actual notice may be shown by direct  
15 evidence or inferred from factual circumstances.

16 And the Plaintiff in this case has rested. So  
17 that was all of the evidence that the Plaintiff was  
18 going to present. Everything that was presented, there  
19 was no evidence -- there was evidence that out of 105  
20 walkovers, over time there have been issues from time  
21 to time that the City had to repair, had to go to, had  
22 to take care of.

23 There was no evidence at all in this record of any  
24 previous issues with regards to 77th Avenue walkover.  
25 There was no evidence in the record at all -- no

1 circumstantial, no nothing -- of how -- there was  
2 evidence that the top rail had been either damaged or  
3 somehow removed prior to Mr. Ciampanella leaning on it.  
4 But there was no evidence of when that happened, how  
5 that happened, whether or not the City had been  
6 notified in any way, shape or form.

7       And so I don't think that because there's been  
8 evidence that throughout their existence of the 105  
9 walkovers that they've had some issues and had to  
10 repair certain walkovers at certain times, I don't  
11 think that is at all dispositive or supportive of  
12 actual notice or the totality of those facts that rises  
13 to the level of actual notice.

14       They had in place a maintenance plan, but I don't  
15 find that there's any evidence at all of actual notice  
16 with regards to this issue.

17       MR. CONNELL: And I'm not trying to argue --

18       THE COURT: I know that.

19       MR. CONNELL: -- but just make a record so that  
20 I --

21       THE COURT: Make a record. I have no problem with  
22 you doing that.

23       MR. CONNELL: Your Honor, I hate to do that, but I  
24 feel like I have to, you know, as Your Honor knows.

25 We've been here for two and a half days.

1 THE COURT: I'm with you all the way. I'm not  
2 upset, I'm not offended. I want you to make your  
3 record, and I think you should.

4 MR. CONNELL: Yes, sir.

5 THE COURT: I encourage you to.

6 MR. CONNELL: Thank you, Your Honor.

7 THE COURT: Yeah.

8 MR. CONNELL: Our position is that the deposition  
9 testimony or the witness testimony of Mr. Campbell is  
10 that the -- that this particular walkover had been  
11 built in 1990, the life of it was 15 years, and the  
12 City employees knew that there were rusted screws  
13 throughout all of them throughout the system, and that  
14 that was something any engineer would know needed to be  
15 replaced; that the number 9 screw was not an  
16 appropriate screw to use on it, and that, after seven  
17 years, ~~that was a~~ 50-percent failure rate per year. And  
18 that's how all of them were built, and that's how all  
19 of them were constructed.

20 And so, Your Honor, our position is, under the  
21 Struthers case, that circumstantial evidence can be  
22 evidence across a systemwide construction. Because as  
23 Your Honor said in the beginning --

24 THE COURT: So then, under that theory of those  
25 105 walkovers, none of them fall under the Tort Claims

1 Act, none of them?

2 MR. CONNELL: Under our theory, it's a question  
3 for the jury as to whether or not actual notice has  
4 been met. Your Honor, we charge that. The jury might  
5 -- the Defendants might argue, hey, we did what you  
6 said, we repaired, we maintained them, we tried to do  
7 what we could to fix it.

8 But to cut it off at this juncture, with the  
9 evidence that we have in the record, Your Honor, when  
10 it's supposed to be in the light most favorable to the  
11 nonmoving party, which is the Plaintiff, Your Honor, we  
12 would submit to Your Honor it is not -- is an error,  
13 respectfully, Your Honor.

14 THE COURT: Sure. I understand. All right.  
15 Anything further?

16 MS. NEUSCHAEFER: I think we're fine. Thank you.

17 THE COURT: All right. Thank you, ladies and  
18 gentlemen. Is the jury back?

19 I'm just looking again here at this Struthers  
20 versus Lexington County. And in that case, the lower  
21 court held that -- or held that the deposition  
22 submitted by the respondent failed to present any  
23 evidence creating a genuine issue of material fact;  
24 that it had proved no actual notice of the defect, and  
25 the Petitioners failed to present any evidence creating

1 a genuine issue of fact on the issue.

2 The Petitioners did not prove that the respondent  
3 knew that this R-70 system was defective or prove this  
4 system is so similar to the other troublesome systems  
5 that actual notice could have been inferred in the  
6 circumstantial evidence. And that's the case here.

7 MR. CONNELL: Your Honor, I disagree. I think we  
8 proved all the decks are built the same way.

9 THE COURT: You haven't.

10 MR. CONNELL: Yes, sir, we have. Mr. Campbell's  
11 testimony is that all the decks are built with the same  
12 screws, they're all built the same way. The fact that  
13 the screws are --

14 THE COURT: I don't believe that what is his  
15 testimony at all.

16 MR. CONNELL: Your Honor, he --

17 THE COURT: I believe he examined this walkover.

18 MR. CONNELL: No, sir. He examined the  
19 depositions of the Defendant's employees and all the  
20 maintenance records, too, and all the records that  
21 would show what they were doing in all the others and  
22 opined that, you know, this is a systemwide problem.

23 I mean, he said there were boards falling -- and  
24 that's the key difference between this case, the  
25 Struthers case, and what we have here. We've got

1 systemwide circumstantial evidence of rusted screws,  
2 number 9 screws being used throughout the --

3 THE COURT: Now, the testimony you read into  
4 evidence this morning, with regards to the actual City  
5 employee who did the inspections, indicated that they  
6 could not determine whether or not screws were rusted  
7 other than by looking at the screw heads because,  
8 obviously, the screws are embedded in the wood.

9 MR. CONNELL: True. But that's contrary to  
10 Mr. Campbell's testimony that you could tell,  
11 yesterday.

12 THE COURT: Okay.

13 MR. CONNELL: I mean, our point is that, if you  
14 look at the sprinkler system here, there's testimony  
15 that they weren't aware. Mr. Campbell's expert  
16 testimony, after reviewing the four depositions, is not  
17 only were they aware, but they knew about it and the  
18 boards had fallen before. And so our point is that's a  
19 circumstantial evidence case for the jury.

20 THE COURT: All right.

21 MS. NEUSCHAFER: I would just say that, having to  
22 do maintenance on one of the hundred walk -- you know,  
23 some of the hundred walkovers over the years does not  
24 equate to actual knowledge that there was a problem or  
25 even this kind of problem with the load-bearing

1 capacity of the railing.

2 THE COURT: Well, again, and I go back to what I  
3 said earlier, is that under this theory that you  
4 mentioned, Mr. Connell, then -- and who knows, maybe a  
5 higher court will agree with you -- but under your  
6 theory, there is no -- none of these fall under the  
7 Tort Claims Act, waiver of immunity, all 105. So  
8 that --

9 MR. CONNELL: Well, no, sir. My issue is, if you  
10 create the problem, you build it, you build it in such  
11 a way that the problem is created by you, that's a  
12 whole different situation than a premises liability  
13 situation.

14 THE COURT: There is no evidence here that you  
15 have a systemwide failure. There is evidence here that  
16 out of the 105, they have on occasion had to go back  
17 and make repairs, which, again, in his testimony is  
18 that in the coastal regions, dealing with wood and  
19 fasteners, you're going to have corrosion, you're going  
20 to have this, which is why you have to have  
21 maintenance.

22 And so he didn't testify that there's some  
23 systemwide failure here. He testified that throughout  
24 the years, they've had occasions where they've had to  
25 go back and found rusted screws and had to replace

1 those and repair those.

2 MR. CONNELL: Your Honor, I think he did testify  
3 that these screws are -- I mean, that's the whole issue  
4 in the case is the screws that were used were rusted,  
5 and they did not last the appropriate period of time.  
6 And that's what he's argued about or what he testified  
7 to during his deposition after reviewing what they had  
8 done and how they had done the maintenance. That's a  
9 different -- that's a whole different thing than --

10 THE COURT: All right. And I understand what  
11 you're saying. I don't find that to be enough to rise  
12 to the level of actual notice in this case. And under  
13 the Tort Claims Act, the City would not be liable even  
14 if those screws were used and were rusted.

15 And I don't want, in any way, don't want to cut  
16 you off. I understand, I appreciate needing to make a  
17 record. So you don't offend me at all.

18 MR. CONNELL: All right. Well, some people don't  
19 like that.

20 THE COURT: No. You know, I've got no problem.  
21 Listen, in the long run, I may -- a higher court may  
22 find that I'm wrong. And if I am, I'll learn from it,  
23 but --

24 MR. CONNELL: But, you know, it's kind of like --

25 THE COURT: -- obviously I take it very seriously.

1 I can't tell you that, there have been a handful of  
2 times in my 11 years on the bench that I've granted a  
3 directed verdict. I take it very seriously. So if I  
4 am mistaken, I do want to learn from it. I don't  
5 believe I am. But if I am, I certainly have no problem  
6 with it being pointed out and have no problem with you  
7 supporting your case. So --

8 MR. CONNELL: Thank you, Your Honor.

9 THE COURT: -- I don't ever have an issue with  
10 that.

11 MR. CONNELL: I appreciate you saying that.

12 THE COURT: Thank you for doing that. That's what  
13 a good lawyer does.

14 MR. CONNELL: Thank you, Your Honor.

15 THE COURT: Okay? All right. Now, does it matter  
16 how you talk? -- if you talk want to remain here while I bring  
17 the jury in and excuse them, or if you want to pack up,  
18 it's up to you.

19 MR. BRYAN: Just bring them in and let them go.

20 THE COURT: All right. Bring the jury in, please,  
21 sir.

22 (WHEREUPON, the jury came into open court at  
23 approximately 11:19 a.m.)

24 THE COURT: All right. Ladies and gentlemen, let  
25 me first begin by saying I realize that I have no

|                         |   |                           |
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| State of South Carolina | ) | Court of Common Pleas     |
|                         | ) | 15th Judicial Circuit     |
| County of Horry         | ) | Case No. 2014-CP-26-07790 |
|                         | ) |                           |
| Richard Ciampanella,    | ) |                           |
|                         | ) |                           |
| Plaintiff,              | ) |                           |
|                         | ) |                           |
| -vs-                    | ) | Transcript of Record      |
|                         | ) |                           |
| City of Myrtle Beach,   | ) |                           |
|                         | ) |                           |
| Defendant.              | ) |                           |

March 6, 2018  
 Florence, South Carolina

B E F O R E:

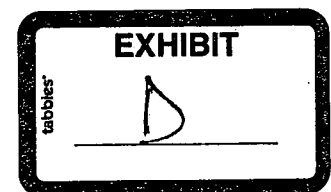
The Honorable Thomas A. Russo, Judge

A P P E A R A N C E S:

Gene M. Connell, Jr., Esquire  
 Attorney for the Plaintiff

William A. Bryan, Jr., Esquire  
 Attorney for the Defendant

Krystal J. Smith  
 Circuit Court Reporter



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I N D E X

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EXHIBITS

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>ID.</u> | <u>EV.</u> |
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(No Exhibits Presented)

COURT REPORTER LEGEND

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| dashes   | --    | intentional or purposeful interruption |
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1 MARCH 6, 2018

2 (WHEREUPON, the proceedings began at 9:32 a.m.)

3 THE COURT: All right. Well, this is Plaintiff's motion  
4 for a new trial, which was timely filed, and there were --  
5 some of the time that has elapsed is because we were awaiting  
6 transcripts and stuff.

7 MR. CONNELL: Yes, sir.

8 THE COURT: And, Mr. Connell, I think you have  
9 everything?

10 MR. CONNELL: Yes, I do. Yes, sir.

11 THE COURT: All right. Well, if we're ready to proceed,  
12 we'll hear from you, sir.

13 MR. CONNELL: Your Honor, it's cruel and unusual  
14 punishment to have to look at Judge Anderson up there after  
15 having spent two years with him and being in the Army before.  
16 It was worse being with him. It was two years in this  
17 building here. I feel like I'm going back to my youth or  
18 something.

19 MR. BRYAN: He's got PTSD, Judge.

20 THE COURT: He's having PTSD.

21 MR. CONNELL: I assume his picture is going to go across  
22 the street to the new courthouse somewhere, but --

23 THE COURT: You know what? I cannot -- I don't know. I  
24 assume they probably will, but I don't know what their  
25 intentions are.

1 MR. CONNELL: I'm sorry. I can turn around.  
2 Your Honor, you've got -- I think you have our brief.  
3 THE COURT: I do. Yes, sir.  
4 MR. CONNELL: It's probably 8 or 10 pages.  
5 THE COURT: Yes, sir.  
6 MR. CONNELL: And I know -- I'm sure you don't have the  
7 transcript.  
8 THE COURT: No.  
9 MR. CONNELL: And as I told you before, I hate having to  
10 argue a motion for reconsideration because it's almost like  
11 we're trying to tell you that you made an error, and I'm  
12 really not trying to do that. I'm just --  
13 THE COURT: Well, I'm not above making errors. So it's  
14 okay. I don't take it personally.  
15 MR. CONNELL: But I -- some people take that personally.  
16 As I told you before, I really don't --  
17 THE COURT: I don't.  
18 MR. CONNELL: It's an unusual rule because in the  
19 federal court you don't have to do this. You just file an  
20 appeal.  
21 THE COURT: Sure.  
22 MR. CONNELL: And so, Your Honor, I've really -- I've  
23 brought the transcript. I want to give it to you.  
24 THE COURT: Okay.  
25 MR. CONNELL: If you want to look at it. I know you're

1 moving and all, but I really think there are some significant  
2 issues that would prove that Your Honor should give us a new  
3 trial.

4 THE COURT: Okay.

5 MR. CONNELL: And I'd like to go through them, if I  
6 could.

7 MR. BRYAN: Gene, do you have another copy of your  
8 brief?

9 MR. CONNELL: I just have the one.

10 THE COURT: I can get you a copy.

11 MR. BRYAN: I've never seen it.

12 THE COURT: Emily -- Emily will --

13 MR. BRYAN: Okay.

14 THE COURT: -- run get us one real quick.

15 MR. BRYAN: Okay. Thank you.

16 THE COURT: We'll just -- we'll just take it easy while  
17 we get that.

18 ~~WHEREUPON~~ (WHEREUPON, there was a pause in the proceedings, after  
19 which the proceedings resumed as follows.)

20 THE COURT: All right. Mr. Connell?

21 MR. CONNELL: So, Your Honor, as you remember, you tried  
22 this case for three days I want to say down in Horry County  
23 --

24 THE COURT: Yes, sir.

25 MR. CONNELL: -- last year, and your ruling was

1 specifically about the issue of notice. You indicated in  
2 your ruling at the end of the trial that we had not proven  
3 notice that this specific walkover -- as you remember, Your  
4 Honor, there are over a hundred walkovers.

5 THE COURT: Yes.

6 MR. CONNELL: And your -- your statement at the end of  
7 the case was we had not proven sufficiently that that  
8 particular walkover had a defect in it.

9 And as Your Honor knows, the motion -- in a motion for a  
10 decision on whether to grant an involuntary nonsuit with  
11 prejudice or a directed verdict motion, all inferences are in  
12 favor of the plaintiff, as Your Honor knows. And so it's  
13 somewhat difficult to get that.

14 But Your Honor's position was that, hey, you can't prove  
15 this particular walkover has a particular problem which you  
16 can point to that caused this defect, and our position has  
17 always been that --- and I think Your Honor would agree --  
18 ~~this man was doing~~ nothing wrong. All he did was lean  
19 against the railing and he fell and was injured.

20 And, Your Honor, since that time, I've done a little  
21 extra research. I want to pass up this case to you. It's a  
22 2015. It's called Major v. The City of Hartsville. It was  
23 tried by Judge Burch.

24 THE COURT: Okay. Thank you, sir.

25 MR. CONNELL: Yes, sir.

1 And, Your Honor, in that case, the -- Judge Burch  
2 granted summary judgment on the specific issue that you did  
3 in this case. And what Judge Burch said -- there were some  
4 ruts in the highway in the city of Hartsville and they had  
5 been repairing them over the course of time.

6 And on page 2 of the opinion, if Your Honor -- page 3.  
7 Judge -- Judge Burch thought, well, you know, you can't prove  
8 this specific rut was the cause of this problem and since you  
9 can't prove this specific rut is the cause of this problem,  
10 then I'm going to grant summary judgment. And that was  
11 appealed to the Court of Appeals, and the Court of Appeals  
12 agreed with Judge Burch and said, yeah, you're right.

13 The Supreme Court took the matter up on the issue of  
14 actual and constructive notice and, in the opinion, the Court  
15 said constructive notice is a legal inference which  
16 substitutes for actual notice. And it goes on to say  
17 constructive notice arises when a condition has existed for  
18 such a period of time that a municipality in use of  
19 reasonable care should have discovered the condition. And  
20 then it goes on to say the recurring condition may be  
21 sufficient to create a jury issue as to constructive notice.

22 So, Your Honor, our argument at the outset is is that  
23 the term actual notice and constructive notice as inferred by  
24 the Supreme Court in this Hartsville case are one and the  
25 same. And if you can show a recurring condition, then that's

1 enough to get to the jury in the case.

2 And, Your Honor, what -- what the transcript would show  
3 to you and what our brief would show is that we had expert  
4 testimony that -- (a) that the City knew the hazard was  
5 something that was out there. There are actually exhibits in  
6 the record. I thought about bringing you all of the  
7 exhibits, but I couldn't get to the clerk to let me take them  
8 from Conway. She wanted to keep them.

9 But Al Campbell, the expert, indicated in Exhibit 17  
10 that they did not comply with their own maintenance schedule.  
11 That this walkover construction was defective. As Your Honor  
12 remembers, the question was whether or not you should use  
13 screws or bolts, and the OCRM documentation indicated that  
14 bolts should be used and screws should not be used.

15 And so Al Campbell went on to say that there were  
16 multiple failures on these decks, that they knew about it,  
17 that it was recurring, and that they had done the  
18 construction, and that's one of the most important parts of  
19 this case. The -- this was not a situation where they hadn't  
20 done the construction. Here, they actually performed the  
21 construction, did the repairs, and they were building things  
22 and they were building them in violation of the OCRM Rules  
23 and Regulations.

24 So Allen said that -- also indicated that they violated  
25 several codes. The International Property Maintenance Code,

1 as Your Honor probably doesn't remember, but the  
2 International Property Maintenance Code was adopted by the  
3 City of Myrtle Beach in the 1990s. The International  
4 Property Maintenance Code applies to the City in that they  
5 had to maintain their property in a certain condition.

6 And then Exhibit 26, which was in the record, requires  
7 that they do that, and then Exhibit 28, which is in the  
8 record, is the Coastal Construction Manual, and it addresses  
9 issues just like we have here, a recurring condition that  
10 they were aware of, just like in the case I presented to Your  
11 Honor, the Major case that you have in front of you.

12 Exhibit 25 and Exhibit 30 all talk about industry  
13 standards. Mr. Campbell said in great detail that the  
14 industry standards were not followed by the City of -- of --  
15 of Myrtle Beach and that they obviously knew that their --  
16 this was not going to last and it should have been, quote,  
17 salvaged or replaced years ago, and they had no maintenance  
18 schedule.

19 On cross-examination, he went on and on to say that,  
20 look, the standard in South Carolina for building  
21 construction is the OCRM requirements that you build it with  
22 bolts, and he said those standards were not used and, as a  
23 result, that's what caused this problem. He said OCRM  
24 recommends that you use the one-half-inch bolts, as opposed  
25 to the screws, and he said that they built the walkover and

1 the walkover was not built the way it was supposed to built  
2 -- be built.

3 So then he was asked on cross-examination do you have an  
4 opinion why the railing constructed by the City was  
5 consistent with OCRM Rules and Regulation? Do you have an  
6 opinion to a reasonable degree of certainty? And he said,  
7 no, it does not follow any of the rules. It does not  
8 qualify. They did not build it in a -- in a proper fashion.

9 And he goes on to talk about the lag bolts and the  
10 violation of the International Building Code and the  
11 International Property Management Code. He said they were  
12 not -- they violated the International Property Management  
13 Code because they were not firmly fastened and did not meet  
14 the requirements of the code.

15 He then talks about the FEMA Construction Manual. As  
16 Your Honor knows, FEMA requires certain things to be done in  
17 a coastal environment, and he said that they weren't -- they  
18 didn't -- they violated the FEMA Construction Manual in the  
19 way they constructed the dock and the way they finished it in  
20 the end.

21 And then he said the opinion -- his opinion is city  
22 inspection techniques were not correct. Employees would have  
23 seen this problem as they were inspecting the areas, and that  
24 they should have done something about it.

25 He then goes on to say that there's a 1994 Standard

1 Building Code, and they didn't even follow that. And he says  
2 that it's my opinion that improper construction and  
3 maintenance injured the plaintiff when he simply leaned on  
4 the railing and, as a result, it broke under very little  
5 pressure. That's in -- that's page 292 of the record on  
6 appeal -- or not the record on appeal, but the transcript.

7 He also then says you know what? The City knew that  
8 this walkover was clearly identified for replacement, kind of  
9 like what we have in this Major case I just handed to you.  
10 He said they knew that it had to be replaced. They just  
11 hadn't gotten to it.

12 They didn't follow industry standards. They had  
13 repetitive failures of these walkovers all up and down the  
14 beach, and they obviously knew about it and he says there  
15 was, quote, clear evidence of maintenance and good  
16 construction. That's page 311 of the transcript.

17 And then he goes that under the National Property  
18 Management Code, the rails must be safe and maintained in a  
19 safe manner, and the -- they must maintain them such that  
20 they will not collapse.

21 And Your Honor talked about the residential or the --  
22 there were some other statutes that were brought into -- into  
23 the -- into the case, but Your Honor didn't rule on those  
24 issues. You only ruled on the issue of constructive notice  
25 and whether there was constructive notice.

1 And, Your Honor, we take the position respectfully that  
2 the evidence of the expert and the other evidence that was  
3 offered in the trial clearly show that based upon this Major  
4 case that I just passed up to Your Honor that even though  
5 Your Honor -- and Your Honor made a good point. You said you  
6 can't prove this particular dock or deck is -- is defective.

7 And we argue to Your Honor that we don't actually have  
8 to do that:

9 (a) When you build it -- and they built it and they're  
10 supposed to maintain it, and

11 (b) When they know it's a recurring problem.

12 And that as a result, Your Honor should respectfully  
13 have let the jury decide the issue.

14 And, Your Honor, we'd like to -- if Your Honor wants to,  
15 I'd like to give you the transcript. If you don't want it, I  
16 understand, but I think that if you look at Mr. Campbell's  
17 testimony -- you know, it's over a day and a half, as Your  
18 Honor remembers -- you're going to find that he has tracked  
19 the Major case completely all the way down as to where we  
20 should be.

21 And so, Your Honor, we would ask that the Court  
22 respectfully grant our motion for a new trial and return it  
23 to Horry County.

24 THE COURT: All right.

25 MR. CONNELL: Thank you, Your Honor.

1 THE COURT: Thank you, sir.

2 MR. BRYAN: Judge, Will Bryan for the City of Myrtle  
3 Beach.

4 I don't have a copy of this Major case, Judge, but I  
5 believe Major deals with a different subsection under the  
6 Tort Claims Act. If I recall correctly, Major deals with  
7 Section 15-78-60, Subsection -- I believe just looking at the  
8 section myself, I believe it's Subsection 15.

9 THE COURT: Yeah. It was 15-78-16, Subsection 15.

10 MR. BRYAN: 15. Our case is Subsection 16, but 15 is  
11 relevant because Mr. Connell is talking about constructive  
12 notice and, in 15, constructive notice is relevant. In the  
13 case under Subsection 15, plaintiff can get around the City's  
14 statutory immunity by proving that the City had either  
15 constructive notice or actual notice.

16 That's not the case with the case that we're dealing  
17 with under Subsection 16. Under Subsection 16, Judge, the  
18 plaintiff can only get around the City's statutory immunity  
19 by proving that the City had actual notice that this railing  
20 was going to fail.

21 And Mr. Connell has talked -- has talked about statutes  
22 and building codes and it wasn't built properly, but the one  
23 thing he hasn't pointed the Court to and the one thing you  
24 can, I believe, rest your case on is that there is -- there  
25 is no evidence today, there was no evidence presented last

1 year that the City had actual notice that the railing at 77<sup>th</sup>  
2 Avenue North was going to fail.

3 And that's -- our case is as simple as that, Judge. I  
4 mean there's -- there was no evidence last year that week of  
5 trial, and Mr. Connell has pointed the Court to no evidence  
6 of the City's actual notice that that railing was going to  
7 fail.

8 I'll point out that another case to -- for the Court to  
9 look at is the case of Strother v. Lexington County  
10 Recreation Commission. I do have an extra copy. Mr.  
11 Connell, I'm sorry I only have one extra copy.

12 MR. CONNELL: I've got that.

13 MR. BRYAN: Yeah.

14 THE COURT: All right.

15 MR. BRYAN: May I approach?

16 THE COURT: Yes, sir.

17 MR. BRYAN: And, Judge, this case --

18 THE COURT: Thank you.

19 MR. BRYAN: -- was decided under our particular  
20 subsection, that is Subsection 16. And there is a good  
21 discussion in that case, Judge, about -- and this is a  
22 Supreme Court case, and there is a good discussion about the  
23 difference between actual notice and constructive or inquiry  
24 notice.

25 And this case went from the Circuit Court to the Court

1 of Appeals and then on to the Supreme Court, but at the -- at  
2 the -- at the Court of Appeals level, there was some language  
3 in the -- in that opinion that Courts in South Carolina had  
4 sort of blurred the line between actual and constructive  
5 notice.

6 However, when it got to Gervais Street, the Supreme  
7 Court said we disagree. There is a clear distinction between  
8 actual and constructive notice.

9 Let's see.

10 This is the Supreme Court referring to the Court of  
11 Appeals. According to the Court, our cases have altered the  
12 meaning of these terms to the point of equating inquiry  
13 notice with actual notice, and the Supreme Court says we  
14 disagree with this interpretation of our case law.

15 They say that inquiry notice and actual notice has at  
16 times -- excuse me. Inquiry notice can be a substitute for  
17 actual notice, but on the very next page it goes on to say  
18 that when the Courts have substituted inquiry notice, that  
19 simply means that it can accomplish the same thing, and that  
20 is by way of -- by way of example, under Subsection 15 of  
21 that Tort Claims Act, a plaintiff can accomplish the same  
22 thing. In that case, inquiry notice would substitute as  
23 actual notice because, of course, that's one of the things  
24 that the plaintiff can show.

25 That's not the case under Subsection 16, Judge. The

1 plaintiff has to show actual notice, and the Supreme Court in  
2 Strothers said that actual notice means that -- what do they  
3 say here?

4 Actual notice under the Tort Claims Act means all the  
5 facts are disclosed and there is nothing left to investigate,  
6 which means if there is any inquiry that needs to be done  
7 based on a failure at the walkover at 62<sup>nd</sup> Avenue North, if  
8 there's inquiry based on that, that's not actual notice.  
9 That may be constructive notice, but that's not actual  
10 notice. Actual notice, according to the Supreme Court, is  
11 all facts have been disclosed, nothing else to investigate.

12 And, Judge, we submit there has -- there was no evidence  
13 at trial presented to show the City had actual notice  
14 sufficient to overcome our immunity under the Tort Claims  
15 Act.

16 Thank you very much, Judge.

17 THE COURT: All right. Thank you, Mr. Bryan.

18 MR. CONNELL: Judge, just a couple things in reply.

19 THE COURT: Yes, sir.

20 MR. CONNELL: In the Major case, the Court says where a  
21 recurring condition is of such a nature as to amount to a  
22 continual condition, when coupled with other factors, the  
23 recurring condition may be sufficient to create a jury issue  
24 as to constructive notice.

25 And then they go on to talk about constructive notice

1 and actual notice and what those mean and, if you look at  
2 Section 60 of 15-78-60(15), it says responsible for the  
3 maintenance within a reasonable time after actual or  
4 constructive notice.

5 And, Your Honor, we would argue to you that the expert  
6 clearly laid out that this is not just a condition that  
7 existed. This is something they built, and they built it in  
8 violation of the OCRM Rules and Regulations by not using the  
9 proper bolts.

10 And so even if the Court were to decide that there was  
11 an actual notice issue in this case, which we don't think  
12 there is, they constructed it, Your Honor. There's no actual  
13 notice that's necessary. When you build something, you are  
14 liable for what you build, and you are required to build that  
15 according to the rules and regulations.

16 And they violated the International Property Management  
17 Code, the Standard Building Code, and the Coastal Rules and  
18 Regulations in the construction of this deck. And on top of  
19 that, they knew about these problems because they were  
20 continually having problems with all these others.

21 And so we would argue to Your Honor that that fits  
22 squarely in this Major case about a recurring condition that  
23 they had notice of, even though, as Your Honor said, they  
24 didn't have specific notice of that rut. That's what the  
25 case was -- that's what this Major case was about, specific

1 notice of a rut that the plaintiff fell on.

2 But the Court went further in the -- in the Major case  
3 and said you don't have to have specific notice of the rut if  
4 it's a continually recurring condition. In this case, it's  
5 obviously that and, Your Honor, we would ask that the Court  
6 remand it or grant us a new trial on that issue.

7 THE COURT: You're saying that because the City built  
8 the crossover that this doesn't apply?

9 MR. CONNELL: I'm saying that's one of our arguments is  
10 that if you built it, you have to build it according to the  
11 Standard Building Code, the International Property  
12 Maintenance Code, and the OCRM Rules and Regulations, and Mr.  
13 Campbell, our expert, said you didn't build it properly to  
14 begin with and that's what caused the failure.

15 But -- but beyond that issue, this issue of actual  
16 notice, there was a recurring condition they were aware about  
17 and they were continuing to try to fix that. So, Your Honor,  
18 we would argue to the Court that under the directed verdict  
19 standard, under the standard you have to consider this case,  
20 is all evidence must be in favor of the plaintiff.

21 THE COURT: The -- the codes you're referring to -- what  
22 year were they enacted?

23 MR. CONNELL: Your Honor, our expert said all the codes  
24 were enacted prior to the construction, and that's why I had  
25 the transcript. Prior to the construction of the walkovers.

1 So the IPM, Standard Building Code, and the OCRM Rules and  
2 Regulations were all in effect.

3 THE COURT: Because if I remember correctly from reading  
4 your -- your brief, these were constructed in 1990?

5 MR. CONNELL: They were constructed after Hurricane  
6 Hugo, and he said all the codes apply. That question was  
7 asked. Well, how do you know? He said all the codes that  
8 were in force and effect are similar to the previous ones.  
9 That was the question.

10 THE COURT: So --

11 MR. CONNELL: And so, Your Honor, we just argue to you  
12 that if it's a directed verdict, everything has to be in --  
13 you have to infer everything in favor of the plaintiff. In  
14 all the evidence that we presented, the 30 exhibits, Mr.  
15 Campbell's all-day cross-examination and direct examination,  
16 and the violation of these codes, which, Your Honor, clearly  
17 we think make it a jury issue.

18 THE COURT: All right.

19 MR. CONNELL: And the Major case.

20 Thank you, Your Honor.

21 THE COURT: Anything further, Mr. Bryan?

22 MR. BRYAN: Judge, as I recall looking at -- I don't  
23 have the Major case, and the Major case -- one major  
24 difference that I see in the Major case and our case is that  
25 in the Major case there was recurring problems that -- in

1 that case, it is one location. It is at one corner, as I  
2 recall. People were, like, cutting -- cutting the corner and  
3 creating a rut, and the City would repair it and then a week  
4 later it was the same, but it's the same area.

5 In our case, obviously, Judge, we've got 105, I believe,  
6 of these public walkovers. So the fact that there is repairs  
7 being done, you know, 60 blocks south or north of 77<sup>th</sup> Avenue  
8 North does not give the City actual notice that there's a  
9 problem with the 77<sup>th</sup> Avenue North railing.

10 And I would just get back to --

11 THE COURT: Well --

12 MR. BRYAN: And, Your Honor, do you have a copy of the  
13 -- of the Tort Claims -- the 15-78-60?

14 THE COURT: I don't have it in front of me. Do you have  
15 it in front of you?

16 THE LAW CLERK: Yes, sir.

17 THE COURT: Yeah. We've got it right here.

18 MR. BRYAN: Okay. Anyways -- but we would just fall  
19 back to, again, the -- the Major case is interpreted under  
20 Subsection 15. Our case is a -- is a Subsection 16 case,  
21 which requires actual notice.

22 A building code violation, we submit, Judge, is not  
23 going to get the plaintiff there. It is not -- it is not  
24 evidence of actual notice that the railing is going to fail.

25 MR. CONNELL: And, Your Honor, here's the thing about

1 that. When you built it wrong, you have actual notice  
2 because you built it wrong to begin with. And when they  
3 built it with the screws instead of the bolts, that is actual  
4 notice of a violation of the IPM, the Standard Building Code,  
5 and the OCRM Rules and Regulations, all of which are in the  
6 record as exhibits.

7 MR. BRYAN: Wait a second. May I respond to that?

8 THE COURT: Yes, sir.

9 MR. BRYAN: Actually, I did read Mr. Campbell's  
10 testimony. And on cross-examination, you probably don't  
11 recall, Judge, but the strength of the railing had a lot to  
12 do with how many screws it took, and there was a requirement  
13 under the code that the railing be able to withstand 200  
14 pounds of concentrated force.

15 THE COURT: Right.

16 MR. BRYAN: And Mr. Campbell -- his view of the  
17 construction was that it had, let's say, two screws, and we  
18 had photographs and I -- and Mr. Campbell actually presented  
19 as exemplar to the Court, and I -- and I showed Mr. Campbell  
20 photographs and I said don't you see these nail holes right  
21 here, and he says, oh. Finally, he says oh. Your Honor kept  
22 out the exemplar because Mr. Campbell wasn't giving the City  
23 essentially credit for these additional screws that were used  
24 in the construction.

25 And so when I went back to Mr. Campbell and said, okay,

1 so the two screws that we -- that you assumed had 150 -- or  
2 would withstand 150 pounds of concentrated force, you know,  
3 let's take into consideration the other screws that you  
4 didn't consider. And he says, well, I think it might hold up  
5 to 350, maybe 400 pounds of concentrated force.

6 So eventually -- and I'm looking, Judge. There are  
7 several pages of this dialogue on page 328 for sure. I know  
8 it's there. But Mr. Campbell finally admitted that -- that  
9 it met that 200 pounds of concentrated force required when it  
10 was constructed.

11 His big thing was that there was a standard that said it  
12 just has to be kept safe and keep the public safe. And  
13 because it had failed, Mr. Campbell said, therefore, it  
14 violated that -- what do you call it? I forget what term he  
15 used, but -- but as far as the building code and it  
16 withstanding 200 pounds of concentrated force, Mr. Campbell  
17 eventually says, yes, it satisfied that construction. Those  
18 screws would satisfy that construction requirement.

19 I just happened to recall that, Judge.

20 THE COURT: Okay.

21 MR. CONNELL: Your Honor, in his testimony -- and this  
22 is why -- this is why the directed verdict motion we think is  
23 sufficient in this case. He said that it's my opinion  
24 improper construction and maintenance clearly injured the  
25 plaintiff. And then on cross-examination, the same question

1 was asked and he -- this is page 311. There was clear  
2 evidence of absence -- of absence of maintenance and good  
3 construction. That's page 311 of his opinions.

4 And, Your Honor, all that goes to the fact that you have  
5 to build it according to the code and then afterwards you  
6 have to maintain it under the IPM, the International Property  
7 Management Code.

8 So, Your Honor, we would -- we would argue that all of  
9 that and every inference has to be taken in the light most  
10 favorable to the plaintiff. That as a result, Your Honor, we  
11 should be able to have that decided by a jury.

12 THE COURT: I'm trying to understand. Well, first of  
13 all, one of your positions is that because they built it,  
14 there's no notice requirement. They don't fall under any  
15 notice requirement.

16 MR. CONNELL: They had actual notice. They built it  
17 incorrectly. I mean when you build a building incorrectly,  
18 whether you're -- I mean the whole purpose of the Tort Claims  
19 Act is to hold the government to the same responsibility that  
20 you do with a regular builder.

21 So if I'm a builder and I build a roof wrong, it's no  
22 defense that I didn't have -- do not have notice of it  
23 because I knew I was building it wrong because I didn't built  
24 it according to the code. And I mean that -- that is really  
25 one of the big issues in this case is, is notice really

1 necessary when you build it incorrectly to start with?

2 And that's what we argue to Your Honor in our brief as  
3 -- as point number one. You don't even have to get to the  
4 actual notice. They knew about it. They had notice.

5 That's -- that's like in a -- in a slip and fall case,  
6 Your Honor. If I put -- if I mop the floor at the Bi-lo and  
7 I mop it and you come in and fall, I don't have to have  
8 notice of it. I just put the wet substance on the floor. I  
9 did exactly what -- and it's different if -- if I come along  
10 and I'm a customer and I spill something on the floor and  
11 then the cust -- the employee doesn't have notice of it, but  
12 when I actually do the work and I actually use the mop, then  
13 that's notice.

14 And we think that is really strong in this case that --  
15 that they had notice. Our expert clearly says they had  
16 notice of a violation of the code.

17 ~~THE COURT:~~ All right. Anything further, gentlemen?

18 ~~MR. BRYAN:~~ Judge, I just go back to Subsection 16.

19 That subsection speaks for itself.

20 And lastly, there are -- the cases are legion that hold  
21 that the Tort Claims Act is to be liberally construed in  
22 favor of limiting, in this case, the City's liability.

23 THE COURT: What about -- what about Mr. Connell's  
24 argument that if you -- if you built it wrong on the front  
25 end, then this notice requirement is not really necessary?

1 You didn't comply with the building codes on the front end,  
2 so you have notice that -- that you've got an issue?

3 MR. BRYAN: I don't know that that means you have notice  
4 that it's going to fail. I mean that's -- the City is only  
5 going to be liable as allowed under Subsection 16, Judge, and  
6 the plaintiff would have to prove that we had actual notice  
7 that this railing was going to fail.

8 And in this case, there is no evidence of -- there's no  
9 evidence of any other similar failure at 77<sup>th</sup> Avenue North.  
10 There's really no evidence of any similar failures anywhere  
11 else. I mean, of course, there are repairs made to every  
12 other walkover and there were repairs made to 77<sup>th</sup> Avenue  
13 North, but there's no evidence of actual notice that that  
14 particular railing was going to fail.

15 THE COURT: So if there's a building code in place and  
16 your construction doesn't comply with the building code and  
17 years later there's an issue, there's still -- in your  
18 position, ~~there's still~~ the actual need that they have notice  
19 that they've got an issue with that walkover?

20 MR. BRYAN: Sure. I guess if there's a violation of  
21 statute at the time of construction, I guess that might be  
22 evidence of, like, negligence or negligence per se, but I  
23 don't know that that's -- that doesn't equate to actual  
24 notice in my mind, Judge, at least not on the Tort Claims  
25 Act.

1       That's the distinction I would draw. They may have one  
2 thing, but I don't know that he's got liability against the  
3 City under the Tort Claims Act under Subsection 16, Your  
4 Honor.

5       MR. CONNELL: And, of course, that would be double  
6 notice. I built it wrong and then I had to be notified that  
7 it was built wrong 20 years later. That -- that makes  
8 absolutely no sense under the terms of the Tort Claims Act in  
9 which the government is supposed to have the same liability  
10 as a private person. I mean we're in a situation where we  
11 have evidence in the record that it was built wrong and built  
12 in violation of all these codes, and that's enough notice  
13 when you build it wrong to begin with.

14       THE COURT: So -- but then what you're saying is if you  
15 build it wrong, that's strict liability?

16       MR. CONNELL: No, sir.

17       THE COURT: If you build it wrong and something happens,  
18 it doesn't matter, you're liable?

19       MR. CONNELL: No, sir. I'm saying that's notice that  
20 you built it wrong, if you built it in violation of the  
21 codes. I mean all the construction cases that are at the  
22 beach are all about what codes have been violated when they  
23 built it and then years later they find out, hey, you've got  
24 a defect in the roof.

25       It's -- it's the same principle for this case. I mean

1 the deck was built improperly to begin with and in violation  
2 of the codes. So the issue of you having --

3 THE COURT: So 16 doesn't apply?

4 MR. CONNELL: Yes, sir. Right. Because you built it.

5 Now, it would be different if they didn't build it or  
6 there was some other situation about the maintenance, but I  
7 mean our expert clearly testified --

8 THE COURT: What do you mean if they didn't build it?

9 MR. CONNELL: Well, let's say, for instance, it's a  
10 park, you know, out there and you're talking about some  
11 problem in the land. You know, there's a bunch of case law  
12 about that. Somebody falls in a hole. Well, that's a  
13 maintenance issue. They didn't -- they didn't do anything to  
14 the natural condition of the land.

15 But I mean this is an artificial structure that was  
16 built, maintained, operated by the City of Myrtle Beach, and  
17 their expert -- I'm sure they'll have -- they had an expert  
18 at trial. He just didn't get to testify. And if they can  
19 convince the jury what they're arguing in this case, that's  
20 fine, but it's an issue for the jury is what we're saying.

21 We don't argue strict liability. I couldn't get strict  
22 liability in the case. Even in the Major case Your Honor  
23 just looked at, they just said it's a -- it's an issue for  
24 the jury to decide as to whether or not that's the case, and  
25 that's all we're asking for is the right to have the jury

1 decide.

2 Thank you, Your Honor.

3 THE COURT: All right. Do you have the copy of the  
4 transcript?

5 MR. CONNELL: Yes, sir.

6 THE COURT: If you can leave that with us, I'd  
7 appreciate it. I would like to look at it.

8 MR. CONNELL: Thank you, Your Honor. Can I get this  
9 back from you sometime?

10 THE COURT: Yes. Absolutely.

11 MR. CONNELL: Because I sent the copy that came.

12 THE COURT: Oh, yeah.

13 MR. BRYAN: Judge, I have a copy you can have.

14 MR. CONNELL: Oh, you have the transcript?

15 THE COURT: Okay. All right.

16 MR. CONNELL: All right.

17 MR. BRYAN: If you can just tell me the last page?

18 MR. CONNELL: It goes through --

19 MR. BRYAN: 385 or so? 384? 385?

20 MR. CONNELL: It goes to 385.

21 THE COURT: Okay. Thank you.

22 MR. CONNELL: You're welcome.

23 THE COURT: All right, folks. Thank you. I'll go  
24 through this and have a decision for you.

25 MR. CONNELL: Okay. Thank you, Judge.

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MR. BRYAN: Thank you, Judge.

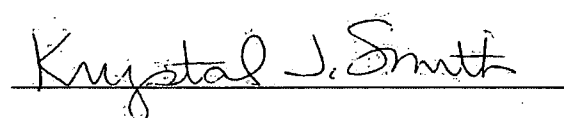
(WHEREUPON, the proceedings ended at 10:07 a.m.)

--- END REQUESTED TRANSCRIPT ---

1 State of South Carolina )  
2 ) Certificate  
3 County of Florence )  
4

5 I, the undersigned, Krystal J. Smith, Notary Public and  
6 Official Court Reporter for the Twelfth Judicial Circuit of  
7 the State of South Carolina, do hereby certify that the  
8 foregoing pages, numbered 1 through 30, constitute a true,  
9 accurate, and complete Transcript of Record of all the  
10 proceedings had and evidence introduced in the hearing of the  
11 above captioned case, relative to appeal, in the Court of  
12 Common Pleas for Horry County, South Carolina, held in  
13 Florence, South Carolina, on the 6<sup>th</sup> day of March, 2018.

14 I do further certify that I am neither of kin, counsel,  
15 nor interest to any party hereto.

16  
17   
18 Court Reporter

19  
20 Florence, South Carolina

21 October 2, 2018

**NOTE:** PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF \$.75 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO:  
KRYSTAL J. SMITH, COURT REPORTER  
12<sup>TH</sup> CIRCUIT AT LARGE  
P.O. BOX 13563  
FLORENCE SC 29504

1 make it last.

2 Q Mr. Campbell, but you said number 10 or even  
3 number 12 screws is also acceptable; yes?

4 A It can be.

5 Q You don't --

6 A It can be, absolutely. But as we said, you've got  
7 to install it properly, construct it properly and  
8 maintain it properly.

9 Q All right. But the use of 10 or 12 wood screws,  
10 that's an appropriate application; do you agree or not?

11 A In some circumstances, it could be.

12 Q I'm talking about 77th Avenue North. If the City  
13 used size #10 -- number 9, 10 or 12 screws, is that an  
14 appropriate size screw for that application?

15 A As long as -- yes, as long as they inspect and  
16 maintain it properly, which they absolutely did not.

17 Q You said yes; right?

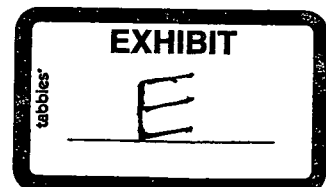
18 A Let's not take that out of context. I said yes,  
19 as long as.

20 Q Okay.

21 A That's a full sentence, not one word.

22 Q All right. So we're talking about, I think, like  
23 three-inch galvanized screws; correct?

24 A They're probably going to need to be three inches  
25 for some of it.



1 with some safety factor.

2 A Yes, sir.

3 Q Now, this screw is resting up against this  
4 board --

5 A Yes, sir.

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

8 A Right.

9 Q You agree that's -- this board provides support  
10 for this board (indicating)? You're leaning up against  
11 it?

12 A That way, absolutely, yes, sir.

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

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

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

23 A On day one?

24 Q Yeah.

25 A Yes, sir.

EXHIBIT

F

1 Q And then it's also going to --

2 A Well, based on that configuration with that  
3 sideways loading. Now, if you go back to,  
4 hypothetically, somebody were to put a concentrated  
5 load right there (indicating), that's probably going to  
6 fail.

7 Q If somebody sat on it?

8 A Yeah, on that edge, it could fail.

9 Q Could cause, I agree with you. But also something  
10 that I picked up on earlier, these boards at the  
11 walkover actually have nails -- I'm not sure if they're  
12 coming from this direction or that direction  
13 (indicating); but these are nailed in all the way down  
14 the line.

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

17 Q Okay.

18 A But not right at the post.

19 Q But that gives it --

20 A Two to three feet down.

21 Q And that gives it additional strength?

22 A Probably every two to three feet on center.

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

25 A Well, that just allows all those screws to work

1 together as opposed to individually. So you could add  
2 the two, based on that direction of load, you may get  
3 up to two or three hundred pounds or maybe even 400  
4 pounds.

5 Q So we far exceed the building code's 200  
6 concentrated pound requirement?

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

8 Q Okay. So you don't take exception to the design  
9 and construction of the 77th Avenue North walkover;  
10 correct?

11 A Well, actually, I do. But as we said, you've got  
12 to have maintenance that is appropriate to the method  
13 of construction.

14 Q Okay.

15 A And I don't think they're appropriate.

16 Q Okay. Construction is one thing. And we just  
17 established that, with all these nails, it's got way  
18 more than 200 pounds of -- it can withstand way more  
19 than 200 pounds of concentrated pressure; agreed?

20 A Sure, on day one.

21 Q Okay.

22 A But then we get, you know, downstream, and that's  
23 when we get into trouble.

24 Q Sure. Now, we're talking about inspection and --

25 A Inspection and maintenance.

1

2 State of South Carolina ) Court of Common Pleas  
3 County of Horry ) 2014-CP-26-07790

4

5

6 Richard Ciampanella )  
7 vs. )  
8 City of Myrtle Beach ) Transcript of Record  
9 )

8

9

10 January 23, 2017  
11 Conway, South Carolina

11

12 BEFORE:

13 Honorable Thomas A. Russo, Judge.

14

15 APPEARANCES:

16

17 Gene M. Connell, Jr., Esq.  
18 Julian Z. Hanna, Esq.  
19 Attorney for the Plaintiff

17

18

19 William A. Bryan, Jr., Esq.  
20 Amy L. Neuschafer, Esq.  
21 Attorney for the Defendant

20

21

22

23

24

25 Teresa J. F. Bautz, RPR  
Official Court Reporter

25

**EXHIBIT**

tabbles

G7

## I N D E X

WITNESS DIRECT CROSS REDIRECT RECROSS

Monday, January 23rd, 2017

Andrew Brown

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|-------------|----|----|----|----|
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Richard Ciampanella

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## E X H I B I T S

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| Plaintiff's-18 | Dune Walkover Guidelines    | 132 | 134 |
| Plaintiff's-19 | Work Order 77th Av Walkover | 132 | 134 |
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| Plaintiff's-21 | Piedmont Healthcare Records | 166 | 166 |
| Plaintiff's-22 | Southeastern Spine Records  | 166 | 166 |
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| 2  | Plaintiff's-25                       | DHEC Plan                   | 209 | --  |
| 3  | Plaintiff's-26                       | Int'l Property Maint Code   | 209 | --  |
| 4  | Plaintiff's-27                       | Coastal Dunes Imp Manual    | 209 | --  |
| 5  | Plaintiff's-28                       | Coastal Construction Manual | 209 | --  |
| 6  | Plaintiff's-29                       | Dune Walkover Guidance      | 209 | --  |
| 7  | Plaintiff's-30                       | SC Guide to Beachfront Prop | 209 | --  |
| 8  | Plaintiff's-31                       | Steven Poletti, MD depo     | 256 | --  |
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| 12 | Plaintiff's-35                       | Int'l Building Code         | 287 | 287 |
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| 19 |                                      |                             |     |     |
| 20 |                                      |                             |     |     |
| 21 |                                      |                             |     |     |
| 22 | Exhibits retained by Clerk of Court. |                             |     |     |
| 23 |                                      |                             |     |     |
| 24 |                                      |                             |     |     |
| 25 |                                      |                             |     |     |

1 duty once every three calendar years. So you've earned  
2 that exemption.

3 So if you get another summons for jury service  
4 here in circuit court for the balance of this year, all  
5 of 2018 and all of 2019, and you wish to be excused  
6 from that service, you can claim that exemption. Now,  
7 it is just an exemption. It doesn't mean you're not  
8 qualified to serve. So if you do get another jury  
9 summons in that timeframe and you would like to serve,  
10 I would encourage you to do so; okay?

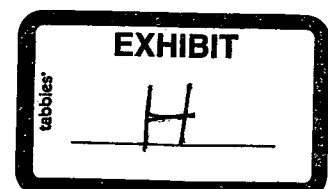
11 So, everyone else please remain seated. Folks,  
12 you're excused for the balance of the week. Thank you.

13 (WHEREUPON, the jury exited the courtroom at  
14 11:24 a.m.)

15 (WHEREUPON, Court's Exhibit Nos. 1 to 3 were  
16 marked for identification only.)

17 (WHEREUPON, the hearing concluded at approximately  
18 11:24 a.m.)

19 (End of Transcript of Record.)  
20  
21  
22  
23  
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25



## DEPOSITION OF RICHARD KIRBY

1

1 STATE OF SOUTH CAROLINA  
 2 COUNTY OF HORRY COURT OF COMMON PLEAS  
 3  
 4  
 5 Richard Ciamparella,  
 6 Plaintiff,  
 7 vs. CIVIL ACTION NO.  
 8 City of Myrtle Beach, 2014-CP-26-7790  
 9 Defendant.

10  
 11  
 12  
 13  
 14 DEPOSITION OF: RICHARD KIRBY  
 15 DATE: Tuesday, May 24, 2016  
 16 TIME: 9:38 a.m. - 10:47 a.m.  
 17 LOCATION: Collins & Lacy, PC  
 18 11943 Grandhaven Drive, #D  
 19 Murrells Inlet, South Carolina  
 20 TAKEN BY: Attorney for Plaintiff  
 21 COURT REPORTER: Michele E. Starkey  
 22 Certified Shorthand Reporter  
 23  
 24 STARKEY COURT REPORTING  
 25 (843) 293-8424  
 mstarkey@sc.rr.com

3

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| 13 | Plaintiff's 1, Walkover Inspection Report | 9  |
| 14 | Plaintiff's 2, 2014 Correction Actions    | 9  |
| 15 | Plaintiff's 3, Work Order dated 3/20/12   | 9  |
| 16 | Plaintiff's 4, Work Order dated 5/20/14   | 9  |
| 17 | Plaintiff's 5, Copy of Photograph         | 13 |
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EXHIBIT

I

tabbles

2

1 APPEARANCES:  
 2 ON BEHALF OF THE PLAINTIFF:  
 3 Kelaher, Connell & Connor, P.C.  
 4 BY: GENE M. CONNELL, JR., ESQ.  
 5 1500 U.S.-17 Business  
 6 The Courtyard, Suite 209  
 7 Surfside Beach, SC 29575  
 8 843-238-5648  
 9 gconnell@classactlaw.net

10 ON BEHALF OF THE DEFENDANT:  
 11 Collins & Lacy, PC  
 12 BY: WILLIAM A. BRYAN, JR., ESQ.  
 13 11943 Grandhaven Drive, #D  
 14 Murrells Inlet, SC 29576  
 15 (843) 477-0500  
 16 wbryan@collinsandlacy.com

4

## STIPULATIONS

1 It is stipulated between Counsel that  
 2 this deposition is being taken pursuant to the  
 3 South Carolina Rules of Civil Procedure.

4 It is also stipulated between counsel  
 5 for the respective parties and the deponent  
 6 that the deponent will not waive the right to  
 7 read and sign this transcript.

RICHARD KIRBY

8 being by me first duly sworn, was deposed and  
 9 said as follows:

## EXAMINATION

BY MR. CONNELL:

10 Q. Mr. Kirby, would you tell us your name,  
 11 please, sir?

A. Richard Kirby.

12 Q. And I see you must have driven a truck  
 13 outside that says risk management on it?

14 A. Actually, no, that's the guy I rode with, Tom  
 15 Anderson's truck. I'm the parks superintendent for  
 16 the city.

17 Q. And how long have you been the parks  
 18 superintendent?

19 A. Well, this time around, eight years. I was  
 20 the — I worked for the city for 36 years. I was the

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.

**PROOF OF SERVICE**

I certify that I have served Appellant's Motion to Strike and Hold Deadlines in Abeyance by mailing a copy of same to Respondent's attorneys of record in the United States mail, with sufficient postage affixed thereto on the date indicated below.

**COUNSEL SERVED:**

Gene M. Connell, Jr., Esquire  
Kelaher, Connell & Connor, P.C.  
Post Office Drawer 14547  
Surfside Beach, SC 29587

Julian Z. Hanna, Esquire  
Julian Z. Hanna and Associates, P.A.  
14323 Ocean Highway, Suite 4105  
Pawleys Island, SC 29585

**RECEIVED**  
JUL 01 2019  
SC Court of Appeals

[SIGNATURE PAGE TO FOLLOW]

COLLINS & LACY, P.C.

By: Amy L. Neuschafer  
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843.353.2350 (p)  
843.353.2351 (f)

ATTORNEYS FOR APPELLANT  
CITY OF MYRTLE BEACH

**PROOF OF SERVICE**

Murrells Inlet, South Carolina  
June 27, 2019



Amy L. Neuschafer | D: 843.353.2331 | E: aneuschafer@collinsandlacy.com

June 27, 2019

The Honorable Jenny A. Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

Re: Richard Ciampanella v. City of Myrtle Beach  
Appellate Case No. 2018-002270  
C&L File No. 000456-01017

**RECEIVED**  
JUL 01 2019  
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing is the original and six (6) copies of Appellant's Motion to Strike and Hold Deadlines in Abeyance together with Proof of Service. Also included is a check for the filing fee in the amount of \$50.00. Please return a filed copy to me in the self-addressed stamped envelope provided.

With kind regards,

Sincerely,

A handwritten signature in cursive script that reads "Amy Neuschafer".

Amy L. Neuschafer

/acg  
Enclosures

pc: Gene M. Connell, Jr., Esquire  
Julian Z. Hanna, Esquire