

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002270
Case No. 2014-CP-26-7790

RECEIVED
JUL 24 2019
SC Court of Appeals

Richard CiampanellaRespondent,

v.

City of Myrtle BeachAppellant.

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

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

Respondent, Richard Ciampanella, responds in opposition to Appellant's Motion to Strike and Hold Deadlines in Abeyance. Alan Campbell, Respondent's expert, is a professional engineer from Charleston, South Carolina. Campbell submitted an affidavit to the court on September 7, 2016, which is now the subject of Appellant's Motion to Strike. Respondent respectfully moves this court to deny Appellant's Motion because the trial court marked Alan Campbell's Deposition as Court's Exhibit 1, to which Campbell's affidavit was attached. Thus, the trial court found it necessary to include the affidavit in the trial record. Therefore, Campbell's Affidavit is proper for inclusion in the Record on Appeal. (Tr. p. 4, line 15).

PROCEDURAL BACKGROUND

Respondent filed this lawsuit against the City of Myrtle Beach (“Appellant” or “City”), on November 20, 2014, after the railing of a beach access walkover collapsed causing Respondent to fall to the ground. (Compl.). The case proceeded to a jury trial before The Honorable Thomas A. Russo the week of January 23, 2017. At the close of Respondent’s case, the City moved for a directed verdict. (Tr. p. 343, line 7). The trial court granted the City’s motion as to liability under the South Carolina Tort Claims Act and the South Carolina Recreational Use Statute. S.C. Code Ann. § 15-78-60(15); S.C. Code Ann. §§ 27-3-10, 27-3-70. (Order Granting Directed Verdict).

Respondent timely moved for New Trial and to Alter or Amend Judgment under South Carolina Rule of Civil Procedure 59(a). (Respondent’s Motion for New Trial and to Alter or Amend Judgment). After reviewing the transcript, briefs, and hearing oral arguments from counsel, the trial court granted Respondent’s motion for a new trial on all causes of action related to the negligent design and construction of the walkover. (Order Granting New Trial).¹ The trial court did not grant Respondent’s motion for new trial as to claims related to the maintenance, security, or supervision of the walkover, finding that the South Carolina Tort Claims Act precluded such claims. *Id.* The trial court also referenced its previous ruling, in which it granted partial summary judgment as to simple negligence under the South Carolina Recreational Use Statute. *Id.* The trial court did not, however, grant summary judgment as to the City’s gross negligence under the South Carolina Recreational Use Statute. *Id.* The City subsequently moved for reconsideration, which the trial court denied by Order entered on November 21, 2018. (Appellant’s Motion for Reconsideration; Order denying Reconsideration).

¹ The trial court, in granting an order for new trial, specifically relied on *Creech v. S.C. Wildlife and Marine Res. Dep’t.*, 328 S.C. 24, 491 S.E.2d 571 (1997), a case strikingly similar to the facts of this case. In *Creech*, the plaintiff fell off a public dock because of the failure to install a railing.

The City has appealed the trial court's September 25, 2018, Order granting Respondent's motion for a new trial as well as the November 21, 2018, Order denying Appellant's motion for reconsideration. Appellant now seeks to strike the Affidavit of Respondent's Expert, Alan Campbell, from the record. (Appellant's Mot. To Strike and Hold Deadlines in Abeyance).

As the Court is aware, the grant or denial of a new trial rests within the sound discretion of the trial court, and its decision should not be disturbed on appeal unless the findings are wholly unsupported by the evidence, or the conclusions reached are controlled by an error of law. *Brinkley v. S.C. Dep't. of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). Gross negligence is a factually controlled concept whose determination best rests with the jury. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 332, 566 S.E.2d 536, 545 (2002). Evidence of industry safety standards is relevant to establishing the standard of care in a negligence case. *Elledge v. Richland/Lexington Sch. Dist. Five*, 352 S.C. 179, 181, 573 S.E.2d 789, 790 (2002) citing *Stone v. United Eng'g*, 197 W. Va. 347, 475 S.E.2d 439, 453-55 (W. Va. 1996) (stating no error to admit evidence of safety standards for the design and guarding of conveyors even though the standards had not been imposed by statute and did not have "the force of law").

ARGUMENT

I. Campbell's Affidavit is Proper for Inclusion in the Record on Appeal.

Alan O. Campbell's Affidavit is proper for inclusion in the Record on Appeal and Respondent's Designation of Matter. Respondent filed Campbell's Affidavit on September 7, 2016. (Aff. of Campbell). During Campbell's deposition, Appellant marked Campbell's Affidavit as an exhibit and questioned Campbell extensively about his findings in the Affidavit. (Depo. of Campbell, p. 73, lines 5-9). At trial, Campbell's deposition was marked as Court's Exhibit 1 without objection, and the Affidavit of Alan O. Campbell was attached thereto.

The Affidavit also contains no additional matter that was not testified to during trial or in Campbell's deposition. The trial court considered all matters contained in the affidavit. The Affidavit states that Respondent's expert, Alan Campbell, is of the opinion that: (1) the walkover was not built in accordance with industry standards and building codes which is gross negligence; and (2) that the photographs taken of the railing show that the City did not construct the walkover properly. At trial, Campbell consistently testified that the City built the walkover in violation of building codes. Campbell also stated: "[b]ased on my review of [the City employees] testimony, my experience and evidence presented as a result of Mr. Ciampanella's fall and previous related conditions, [the City employees] work was inadequate." (Tr. p. 280, lines 6-9). Additionally, the photographs Campbell relied upon in his affidavit were submitted to the trial court for review. Thus, the trial court was presented with and considered the matters in the affidavit. The trial court found it necessary to attach Campbell's affidavit to Court's Exhibit 1. Therefore, the affidavit is proper for inclusion in the Record on Appeal.

The South Carolina Appellate Court Rules limit the matter to be included in the Record on Appeal and that which can be 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. Second, a party may not include any matters not relevant to the appeal. *Id.* Third, Rule 210(c) provides that the Record on Appeal shall not include matters which were not presented to the lower court. Rule 210(c), SCACR. Lastly, the brief shall contain references only to materials properly included in the Record on Appeal. Rule 208(b)(4).

"Matter" is defined as: "the substance in a thing, or the essence of a dispute. The matter is the substance of which anything is composed. The matter in law is the substance of any question or

dispute.” *Matter*, Bouvier Law Dictionary. As stated above, the trial court was presented with and considered all of the matter in the affidavit when granting Respondent’s motion for new trial.

Respondent’s Affidavit also meets the above requirements. First, the trial court marked Campbell’s deposition, which had his affidavit attached, as Court’s Exhibit 1. Thus, the trial court found it necessary to include Campbell’s affidavit in the record. Second, Campbell’s Affidavit is relevant to the appeal because the case centers on the gross negligence of Appellant. Campbell’s affidavit states that the walkover was not built in accordance with industry standards which shows the City’s gross negligence. Lastly, all the matters in the affidavit were presented to and considered by the trial court. Respondent referenced the affidavit of Campbell, which the trial court found necessary to include in Court’s Exhibit 1. Therefore, Campbell’s affidavit is proper for inclusion in the Record on Appeal. (Tr. p. 4, line 15).

Although Respondent believes Campbell’s affidavit was submitted to the lower court, under the current rules, “a respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (emphasis added). In *I’on, L.L.C.*, the court explained that “in raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court’s ruling for a reason other than one primarily relied upon by the lower court.” *Id.* at 417, 526 S.E.2d at 722. Here, Respondent believes the trial court considered all the matters in the affidavit. However, if the Court disagrees, Respondent submits that Campbell’s affidavit constitutes an additional sustaining ground and should not be stricken from the record.

Appellant also argues that the documents entitled “Myrtle Beach Walkover Inspection Report” and “Culture and Leisure Work Orders” are not in the Record. (Appellant’s Mot. To Strike,

p. 5). Respondent mislabeled The Culture and Leisure Report in his Initial Brief. The exhibit Respondent was referring to is Plaintiff's exhibit 19, entitled "Work Order 77th Ave. Walkover." (Tr. p. 3, line 21). The Myrtle Beach Walkover Inspection Report is an exhibit to the deposition of City employee Richard Kirby. Campbell testified that he reviewed the deposition of Richard Kirby to assist him in forming his opinion as to the construction of the walkover. (Tr. p. 201, lines 20-22). Accordingly, Respondent believes the "Culture and Leisure Work Orders" is proper for inclusion in the Record on Appeal, and the "Myrtle Beach Walkover Inspections Report," is properly before the Court because it was used by Respondent's expert to form his opinion.

II. Campbell's Affidavit is Relevant to the Appeal.

On cross-examination, Appellant also referred to Campbell's Affidavit, albeit indirectly. (Tr. p. 306, lines 15-22). During Campbell's deposition, Appellant asked Campbell about the Means Facility Maintenance Manual that Campbell relied on in forming his opinion when drafting his Affidavit:

Q. Is it fair to say that's not something you considered when you were drafting your affidavit earlier this year, is it?

A. Sure it is. Because it would have been the part that addresses improper maintenance.

Q. Okay. Can you identify the section within the Means Facility Manual that you relied upon?

(Depo. of Alan Campbell, p. 75-76, lines 23-5). During trial, Appellant again asked Campbell which manuals he relied on in forming his opinion in his affidavit:

Q. Okay. I was looking through your previous testimony, and I noticed that – let's see, turn to page 76, if you would.

A. All right.

Q. At line – starting at line 3, I asked, can you identify the section within the Means Facility Maintenance manual that you relied on. And your answer to me then was no.

A. Same answer.

Q. Okay. And you've relied upon, besides the Means Facilities Maintenance manual, you relied upon the International Property Maintenance Code in the Past?

(Tr. p. 306-307, lines 15-1). Appellant was asking Campbell what he relied on in forming his opinion in his Affidavit. Respondent believes the above exchange from trial references the Affidavit of Alan O. Campbell, which Appellant discussed during Campbell's deposition. Thus, Appellant's assertion that Campbell's Affidavit was never referenced at trial is not appropriate.

Appellant may argue that this issue is not relevant to the instant appeal because it is referencing the maintenance schedule of the City employees, rather than the design or construction of the walkover. However, Campbell later testified that “[t]he method of construction does not match with the . . . protocols and maintenance schedule that [the City] followed.” (Tr. p. 312, lines 23-25). As advanced in Respondent's Initial Brief, the design and construction of the walkover is directly related to the appropriate maintenance schedule.

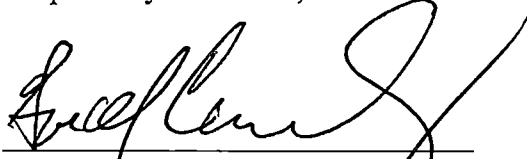
Finally, Respondent designated the trial transcript and “all exhibits listed in the transcript” for inclusion in the Record on Appeal. Respondent submits Plaintiff's Exhibits 15, 25, 27, 33, and Court's Exhibits 1, 2, and 3 are all relevant and were relied on by the expert, Alan Campbell, in reaching his opinion. Each of the referenced exhibits assisted the court in determining the issues in this case.

Respondent agrees to strike Plaintiff's Exhibits 16, 20, 21, 22, 23, and Defendant's Exhibits 1 and 2.

CONCLUSION

For the reasons stated herein, Respondent requests that this Court deny Appellant's Motion to Strike so that this appeal may move forward.

Respectfully Submitted,



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Attorneys for Respondent

July 22, 2019
Surfside Beach, South Carolina

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APPEAL FROM HORRY COUNTY
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CASE NO. 2014-CP-26-7790

Richard Ciampanella Respondent

vs.

City of Myrtle Beach Appellant

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of Respondent's Return to Appellant's Motion to Strike on the 22 day of July 2019, by depositing a copy of same in the United States Mail, postage prepaid, to:

Amy L. Neuschafer, Esquire
Fred H. Oliver, Esquire
COLLINS & LACY, P.C.
11945 Grandhaven Drive, Suite D
Murrells Inlet, SC 29576

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 22nd day of July, 2019.

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

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

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THE COURTYARD

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July 22, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Re: Appellate Case No. 2018-002270
Richard Ciampanella v. City of Myrtle Beach
C/A No. 2014-CP-26-7790
Our File No. 2014-0324C

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondent's Return in Opposition to Appellant's Motion to Strike and Proof of Service in the above-captioned case. Please return a filed copy to me in the self-addressed, stamped envelope enclosed for your convenience.

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

With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Amy L. Neuschafer, Esquire
Fred H. Oliver, Esquire
Julian Z. Hanna, Esquire



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