

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Judge

Unpublished Opinion No. 2019-UP-287 (S.C. Ct. App. filed August 7, 2019)

Rosemary Connelly,Respondent,

v.

Winsor Custom Homes, LLCPetitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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 b. The Petition should be denied because the Court of Appeals' Unpublished Decision complies with Rule 220(b) and S.C. Code Ann. §§ 14-8-250, 18-9-280, as interpreted by the Supreme Court in In re Memorandum Decisions by Ct. of App., 322 S.C. 53, 471 S.E.2d 456 (1993).7

 c. The Petition should be denied because the Petitioner's complaint about the manner in which the Court of Appeals issued its unpublished decision to uphold the trial court's judgment is not the kind of issue properly before this court on Writ of Certiorari because it is not a review of any decision by the lower court.7

 d. Petition should be denied because it appears to simply restates the arguments made in its Appellate Brief before the Court of Appeals, and therefore does not present questions without unnecessary detail or with concise argument as required in Rule 242(d). If the Court grants the Petition, the Respondent will respond to the briefing schedule issued by the Court, and elects not to simply reargue each and every issue raised before the Court of Appeals in its Briefs (App., pp. 1390-1419), herein.....9

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I. INTRODUCTION

Respondent Rosemary Connelly respectfully requests that the Court deny the Petition for Writ of Certiorari.

II. OPPOSITION TO QUESTIONS PRESENTED

- a. The Petition should be denied because it does not present special or important reasons for a review of the Court of Appeals decision by the Supreme Court, nor does it reference any of the five (5) common considerations for review set forth in Rule 242 (b).
- b. The Petition should be denied because the Court of Appeals' Unpublished Decision complies with Rule 220(b) and S.C. Code Ann. §§ 14-8-250, 18-9-280, as interpreted by the Supreme Court in In re Memorandum Decisions by Ct. of App., 322 S.C. 53, 471 S.E.2d 456 (1993).
- c. The Petition should be denied because the Petitioner's complaint about the manner in which the Court of Appeals issued its unpublished decision to uphold the trial court's judgment is not the kind of issue properly before this court on Writ of Certiorari because it is not a review of any decision by the lower court.
- d. Petition should be denied because it appears to simply restates the arguments made in its Appellate Brief before the Court of Appeals, and therefore does not present questions without unnecessary detail or with concise argument as required in Rule 242(d). If the Court grants the Petition, the Respondent will respond to the briefing schedule issued by the Court, and elects not to simply reargue each and every issue raised before the Court of Appeals in its Briefs (App., pp. 1390-1419), herein.

III. COUNTER-STATEMENT OF THE CASE

This case arises out of Connelly's fall in June of 2011, on the public sidewalk abutting a lot on which Winsor was building a home (hereinafter "Premises"). Winsor was acting as general contractor for the property owners Karen Nelson and John Edelen. As part of construction, Winsor had constructed a black plastic construction barrier fence on the Premises. The fence was in a state of disrepair on the day of the accident, became partially detached from its stakes, and blew into

the sidewalk causing Connelly to fall face-first onto the sidewalk. Connelly suffered a broken nose, concussion, and head trauma which severed the olfactory nerves in the nasal and brain cavity (the cribriform plate) resulting in the loss of her sense of smell (anosmia) and reduction or distortion in her sense of taste (dysgeusia).

Winsor's only corporate witness and the owner of Winsor Homes, Jeffrey Thomas (hereinafter "Thomas"), admitted: (1) the Fence was erected by Winsor, (2) Winsor was responsible for supervising and reviewing the subcontractor's work, (R. p. 399), (3) it was Winsor's sole duty to maintain the Fence, (R. p. 402), (4) he was aware that his own workers or subcontractors often walked across the Fence causing it to come down, (R. pp. 406-07); (5) it was foreseeable that the fence could become airborne in the wind if allowed to become detached from its stakes (R. p. 410); (6) he had received warning three (3) months prior to the accident that the fence at this site was in disrepair (R. p. 461), and (7) that the Fence was in a state of severe disrepair on the date of June 6, 2011 (R. pp. 409-10). Winsor brought no other witnesses to rebut any of these admissions. A photograph taken in March 2011 showed the fence intact, albeit drooping. (R. p. 1215). The Daniel Island ARB sent Appellant a Notice to Repair the Fence dated March 17, 2011 stating "the majority of the site fence is down, and there is no construction entrance on the job site. Please repair or fix as soon as possible." (R. p. 461). The accident happened on June 6, 2011. Both witnesses to the accident testified that the Fence looked approximately the same as the photo one of those witnesses took the day after the accident, June 7, 2011. (R. p. 1218). Thomas testified he had no memory of repairing the Fence between March and June 2011, and instead speculated "I had to have fixed the fence" or I would have been fined. (R. pp. 462-464). Winsor presented no other evidence regarding any repair of the fence between March 17, 2011 and the

date of the accident, nor did it present any evidence from the ARB to corroborate Thomas' testimony.

Two of Connelly's treating physicians testified by video. (R. pp. 838-1119). Dr. Funcik had seen Connelly the day after the accident, and performed surgery to repair her broken nose some months later. Dr. Funcik is a board-certified physician in Head and Neck Surgery and Facial Plastic and Reconstructive Surgery. He testified that he had over 2000 hours of experience as attending physician in emergency rooms and trauma centers. (R. p. 8). Dr. Ghegan, also an ENT, later diagnosed Connelly with anosmia (loss of sense of taste due to severing of the olfactory nerves in the nasal and brain cavity), and dysgeusia (reduction or distortion in sense of taste). Their professional qualifications are not in question. Both doctors testified that it was their opinion, to a reasonable degree of medical certainty, that the fall was the cause of Connelly's decreased sense of smell and decreased sense of taste, and that these conditions are permanent. (R. pp. 916-18, 927-28, 1070-71, 1073).

The case was tried against Winsor only; all other defendants, including the landowners, had settled or were dismissed. The jury's verdict resulted in judgment for Connelly in the amount of Three-Hundred Twenty-Five Thousand Dollars (\$325,000.00) (damages in the amount of Five-Hundred Thousand Dollars (\$500,000.00), reduced by a Thirty-Five Percent (35%) allocation to Connelly for comparative negligence. (R. pp. 3-5).

Prior to the trial, the court heard pre-trial motions by Winsor regarding the expert qualifications of Connelly's treating ENT physicians, and challenged their testimony that the fall caused Connelly's anosmia and dysgeusia. (R. pp. 111-18). The court ruled that both doctors were qualified to testify as to the cause of Connelly's injuries. (R. p. 118). Both doctors testified by

videotape, taken the week prior to trial. The parties exchanged edits to the video, no objections were lodged, and both edited depositions were played at trial.

During the trial, Winsor made two motions for mistrial due to word "insurance" being uttered in the presence of the jury. The first motion was made in response to Connelly's testimony on cross examination regarding written correspondence that was sent by her husband to Winsor immediately following the incident. (Ct's Ex. 3, R. pp. 1231-33).

The exchange at trial was as follows:

Q: And on the day after the accident, your husband contacted some folks to threaten legal action about this fall, right?

A: I don't think he was threatening legal action about this fall. I think he was just telling them what happened. I think it was like, this is what happened and do you guys have insurance and whatever -- I don't know. I haven't read -- I wasn't -- I didn't write the letter, so I don't know what he meant.

MR. BROWN: Your Honor --

A: I don't know. I haven't read -- I wasn't -- I didn't write the letter, so I don't know what he meant.

MR. HINES: Your Honor, I think we've got a matter of law to address. . . .

(R. p. 243). Winsor's counsel did not show the correspondence he was asking about to the witness; the correspondence, however, was made a court exhibit. (R. pp. 250-51). In response to this testimony, Winsor immediately moved for a mistrial. The Court denied Winsor's motion and ruled that the mention of insurance was merely inadvertent. The court asked if Winsor wanted a curative instruction, and Winsor declined. (R. pp. 249-50).

The second motion for mistrial was in the midst of a treating physician's video testimony, wherein he mentioned briefly the process of pre-certifying health insurance coverage. (R. pp. 320-21). The court excused the jury, and denied the motion for mistrial finding that Winsor had made

no objection prior to the video being played or during the video and that the reference was only to health insurance. (R. pp. 321-22). Thereafter the judge gave the jury a curative charge to disregard any statement regarding the doctor getting prior authorization as to insurance, and struck reference from the record. (R. p. 323).

At the close of the evidence, Winsor moved for a directed verdict. The court denied the motion. Connelly moved for a directed verdict on the subject of negligence. The trial court granted partial directed verdict, finding that Winsor had a tort duty to maintain the Fence as a matter of law under the particular circumstances of this case, and that Winsor had breached that duty, allowing only the questions of causation, damages, and comparative negligence to go to the jury. (R. p. 566). The Court elected to charge the negligence standard which applies in the case of evidence that an abutting landowner or “occupier” is instrumental in creating or maintaining an unsafe condition on a sidewalk.

On August 28, 2015, a jury returned a verdict for Connelly in the amount of Three-Hundred Twenty-Five Thousand Dollars (\$325,000.00) (damages in the amount of Five-Hundred Thousand Dollars (\$500,000.00), reduced by a Thirty-Five Percent (35%) allocation to Connelly for comparative negligence. (R. pp. 3-5).

Petitioner filed its appeal on February 26, 2016. After three (3) extensions, Petitioner filed its Initial Brief on September 29, 2016. After final briefing was completed on February 16, 2017, the Court of Appeals heard oral argument on September 10, 2018. On August 7, 2019, the Court of Appeals affirmed the trial court with an unpublished memorandum opinion, addressing all eight (8) issues raised by Petitioner. (App., pp. 1435-38). Petitioner then sought two (2) extensions to file for Motion for Rehearing, and said motion was denied on November 15, 2019. Petitioner then

sought two (2) extensions to file this Petition for Certiorari. Just short of four (4) years after the jury verdict in favor of the Respondent, Petitioner filed this Petition for Writ of Certiorari.

IV. ARGUMENT

- a. The Petition should be denied because it does not present special or important reasons for a review of the Court of Appeals decision by the Supreme Court, nor does it reference any of the five (5) common considerations for review set forth in Rule 242 (b).

Rule 242 provides guidance for seeking the extraordinary review by way of Writ of Certiorari to review a Court of Appeals decision. Within that guidance, subsection (b) sets forth “the character of reasons which will be considered” when writ of certiorari is sought:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Recognizing that the five (5) grounds to consider are neither binding nor exclusive, meaning the Court may decide any Petition for Writ of Certiorari, in its discretion, their complete absence in a request of such an extraordinary remedy should weigh against granting this Petition.

In this case, the Petitioner fails to make citation to Rule 242(b) or any of its accepted grounds. Petitioner does not argue the appeal addressed novel questions of law. There was no dissenting opinion. There is no allegation that the decision to uphold the jury verdict in a trip and fall case is in conflict with a prior decision of this Court. It is indisputable that no constitutional issues are at play in this matter. Lastly, there is no claim that any federal question even exists.

The Petition should be denied because it simply restates all eight (8) of its arguments made in briefing the underlying appeal, which make no mention of any specific grounds in support of the Supreme Court granting extraordinary review under Rule 242.

- b. The Petition should be denied because the Court of Appeals' Unpublished Decision complies with Rule 220(b) and S.C. Code Ann. §§ 14-8-250, 18-9-280, as interpreted by the Supreme Court in In re Memorandum Decisions by Ct. of App., 322 S.C. 53, 471 S.E.2d 456 (1993).

Petitioner asserts that the Court of Appeals unpublished memorandum decision does not comply with Rule 220(b) because it did not contain detailed analysis and explanation. This issue has been previously raised and ruled upon by this Court in In Re Memorandum Decisions by the Court of Appeals, 322 S.C. 53, 471 S.E.2d 456 (1993), wherein it specifically approved of the format where the appellate court sets forth each issue and gives cases which support its decision, which normally takes the following form:

Per Curiam. Affirmed pursuant to Rule 220(b)(1), SCACR and the following authorities: Issue 1: State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989) (a party cannot argue one ground at trial and another on appeal); Issue 2: S.C.Code Ann. § 19-5-510 (1985); Kershaw County DSS v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981); Peagler v. Atlantic Coast Line Railway Co., 234 S.C. 140, 107 S.E.2d 15 (1959).

Id. And, the Court held that “the Court of Appeals may use a similar format. . . .” Id. In this case, the Court of Appeals' decision follows that approved format, and addressed all eight (8) of the Petitioner's grounds for appeal. (App., pp. 1435-38). See also Toal, Jean Hoefler, Walker, Amelia Waring & Baker, Margaret E., APPELLATE PRACTICE IN SOUTH CAROLINA, at pp. 382-84 (SC Bar 3rd ed., 2016) (explaining the approval of similar decision forms).

- c. The Petition should be denied because the Petitioner's complaint about the manner in which the Court of Appeals issued its unpublished decision to uphold the trial court's judgment is not the kind of issue properly before this court on Writ of

Certiorari in this appeal because it is not a review of any decision by the lower court.

For the first time, in its Petition for Rehearing, Petitioner objected to the manner in which the court wrote its Unpublished Memorandum Opinion, and asserted that the Court of Appeals does not have the rule-based authority to decide the case in the brief and truncated fashion of referring to certain relevant and well-established principles of law at issue in the case. The Respondent does not take the position that the Petitioner could have alleged this particular issue prior to the issuance of the Opinion. Nevertheless, the Court of Appeals reviewed this complaint, and denied the Petition for Rehearing without taking any action to further explain its prior decision.

Appeals are of the purpose of seeking review of a “decision made by the lower court or administrative tribunal.” Toal, Jean Hoefler et. al., APPELLATE PRACTICE IN SOUTH CAROLINA, at p. 221. This question does not seek any such review of a decision. Instead, it demands that the Supreme Court order the Court of Appeals to perform the act of explaining its decision. This Petition for Writ of Certiorari should be denied because it is not the vehicle with which to seek such relief. A Petition for Writ of Mandamus against the Court of Appeals panel that issued its Memorandum opinion would appear to be the appropriate vehicle, and would not require Respondent Rosemary Connelly to participate in the Petitioner’s desire to challenge the way that the Court of Appeals decided to write its unpublished opinions. The Supreme Court’s power to issue writs of mandamus can be found in the South Carolina Constitution. See Edwards v. State, 383 S.C. 82, 678 S.E.2d 412 (2009) (citing S.C. Const. art. V, § 5 and S.C. Code Ann. § 14-3-310 (1976)). Its principle purpose is to command a lower tribunal, not to inquire and rule, but to enforce some well-established ministerial duty. See Willimon v. City of Greenville, 242 S.C. 82, 86-87, 132 S.E.2d 169, 170-71 (1963). The applicant must establish (1) a duty of the Respondent

[Court of Appeals] to perform an act; (2) the ministerial nature of the act; (3) the Petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other remedy.

Edwards, 383 S.C. at 97, 678 S.E.2d at 420.

- d. Petition should be denied because it appears to restate all of the arguments made in its Appellate Brief before the Court of Appeals, and therefore does not present questions without unnecessary detail or with concise argument as required in Rule 242(d). If the Court grants the Petition, the Respondent will respond to the briefing schedule issued by the Court, and elects not to simply reargue each and every issue raised before the Court of Appeals and in the briefs (App., pp. 1390-1419), herein.

The Petition should be denied because it appears to restate all of the arguments made in its oral argument and appellate briefs before the Court of Appeals, and therefore does not present questions without unnecessary detail or with concise argument as required in Rule 242(d). If the Court grants the Petition, the Respondent will respond to the briefing schedule issued by the Court, and elects not to simply reargue each and every issue raised before the Court of Appeals (App., pp. 1390-1419), herein.

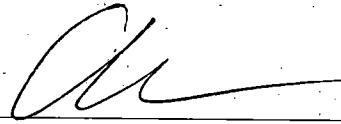
In conclusion and based on the arguments made in the lower court,

1. The ruling that Winsor owed Connelly a duty of due care with regard to the plastic fencing it controlled, installed, and maintained, and which abutted the sidewalk was not an error of law;
2. The court's failure to charge the open and obvious rule does not warrant reversal, nor was Winsor entitled to judgment as a matter of law on the basis of the open and obvious rule because such is not the applicable standard under these facts;
3. Connelly's comparative negligence was not established to be more than 50% as a matter of law;
4. The court did not abuse its discretion regarding the admission of the treating doctors' opinions;
5. There was no prejudice resulting from the mention of insurance at the trial; and
6. The jury's verdict was not grossly excessive.

V. CONCLUSION

Based on the foregoing, the Writ of Certiorari should be denied, and the Court of Appeals' memorandum opinion affirming the trial court allowed to stand.

Respectfully submitted,



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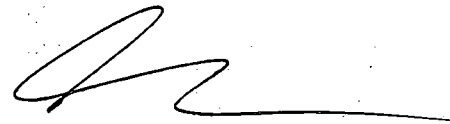
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PROOF OF SERVICE

I certify that Respondent's Return to Petition for Writ of Certiorari was served upon the following by hand delivery and electronic mail on February 4, 2020:

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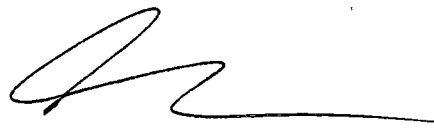
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