

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED

FEB 19 2020

S.C. SUPREME COURT

Unpublished Opinion No. 2019-UP-287 (S.C. Ct.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

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Winsor¹ would make the following points in reply to Mrs. Connelly's return (the "Return") to its petition for a writ of certiorari.

POINTS IN REPLY

1. **Besides the patently conclusory "in conclusion" paragraph at the end, the Return never meaningfully addresses, much less rebuts, Winsor's arguments on the merits.**

Mrs. Connelly makes four arguments in opposition to Winsor's petition. None of them even attempts to challenge Winsor on the merits. The Court need not take Winsor's word for this; Mrs. Connelly admits it. (*See* Reply p. 9 ("If the Court grants the Petition, [Mrs. Connelly] 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 . . . herein.")) In other words, in response to a petition the only purpose of which is to ask this Court "to review a final decision of the Court of Appeals"² Mrs. Connelly made the conscious choice not to actually discuss the decision of the Court of Appeals. Why?

Is it simply a matter of efficiency, something like, "That petition of theirs is hopeless. Don't they know the merits of this case could never be of interest to the Supreme Court. Why waste the effort it would take to address them?" Is it benevolence, something like, "That petition of theirs is hopeless, bless their hearts. Let's hold off on the heavy analytical artillery for now. Don't want to embarrass them unless we have to?" Of course, not. It is the legal version of whistling past the graveyard. The reason why the *first* (and indeed only) thing Mrs. Connelly wants is for the Court to ignore the merits is just this simple: The *last* thing she wants is for the

¹ Shorthand references already defined in Winsor's petition for a writ of certiorari (e.g., referring to Petitioner, Winsor Custom Homes, LLC, as "Winsor") are continued in this reply.

² Rule 242(a), SCACR.

Court to reach them.

- 2. In any event, Mrs. Connelly’s arguments against the Court’s consideration of this case on the merits are themselves without merit.**

Re: Mrs. Connelly’s arguments “a,” “b,” and “d”

To begin with, these are more like suggestions than an arguments. They are akin to saying, “You know you don’t *have* to take this case,” which is a good point as far as it goes (i.e., it is legally correct)—it just does not go very far.

As Rule 242(b), SCACR, makes expressly clear, “A writ of certiorari is not a matter of right, but of sound judicial discretion” To be sure, the Court is empowered to deny this or any other cert petition for no reason at all, merits be darned. In practice, however, it does not appear as though the Court is in the habit of turning a blind eye to unjust results for no better reason than because it can. To the contrary, it appears that, where prejudicial error is duly shown, the Court will not hesitate to correct it, even when no precedential value is to be gained by doing so. *See, e.g., Sheep Island Plantation, LLC v. Bar-Pen Investments, LLC*, Memorandum Op. No. 2012-MO-055, 2012 WL 10907981 (S.C. Sup. Ct. filed Dec. 19, 2012) (reversing, via unpublished memorandum opinion, error in the Court of Appeals’ Unpublished Op. No. 2010-UP-382, 2010 WL 10080192 (S.C. Ct. App. filed Aug. 4, 2010)). The fact that the Court regularly issues unpublished memorandum opinions,³ which, of course, have no precedential value, and indeed the

³ *See, e.g., Fisher v. Huckabee*, Memorandum Op. No. 2018-MO-039 (S.C. Sup. Ct. re-filed January 16, 2019); *DiMarco v. DiMarco*, Memorandum Op. No. 2019-MO-009 (S.C. Sup. Ct. filed February 27, 2019); *Kennedy v. Richland County Sch. Dist. Two*, Memorandum Op. No. 2019-MO-014 (S.C. Sup. Ct. filed March 20, 2019); *King v. King*, Memorandum Op. No. 2019-MO-023 (S.C. Sup. Ct. filed May 8, 2019); *Green v. Bauerle*, Memorandum Op. No. 2019-MO-026 (S.C. Sup. Ct. filed May 29, 2019); *Montgomery v. Montgomery*, Memorandum Op. No. 2019-MO-027 (S.C. Sup. Ct. filed May 29, 2019); *3109 Hwy. 25 S., L.L.C. v. Duke Energy Carolinas*, Memorandum Op. No. 2019-MO-034 (S.C. Sup. Ct. filed August 21, 2019); *Tedder v. Darlington County Cmty. Action Agency*, Memorandum Op. No. 2019-MO-040 (S.C. Sup. Ct. filed November 20, 2019); *Conits v. Conits*, Memorandum Op. No. 2019-MO-042 (S.C. Sup. Ct. filed November

very existence of Rule 220(b)(1), SCACR (restricting unpublished memorandum opinions to circumstances where a published opinion would have no precedential value), shows that, as the ultimate custodian of our state’s judicial system, the Court’s interests are not confined solely to the development of our law-giving jurisprudence, but in fact encompass a broader concern for the quality of justice that system produces. The lack of reference to—or even the existence of—a reason(s) set forth in Rule 242(b)(1)–(5) does not doom a cert petition. Indeed, Rule 242(b) itself makes clear that these reasons are by no means exhaustive, as they “neither control[] nor fully measure[] the Supreme Court’s discretion or power to grant review”

That said, Winsor’s petition does, however, raise a novel issue(s) of law. In Question I, specifically, which asks whether the Subject Decision (by the Court of Appeals) complies with Rule 220. (*See* Pet. pp. 8–9.) There is a clear conflict between the plain language of Rule 220 and the Court of Appeals’ issuance of the Subject Decision as an unpublished opinion and/or its reliance on Rule 220 to reject all of Winsor’s appellate arguments (all of which were undoubtedly preserved for review and not “manifestly without merit”) without providing any meaningful explanation why.⁴

Mrs. Connelly contends that Winsor’s complaints about the Court of Appeals’

20, 2019); *Paschal v. Lott*, Memorandum Op. No. 2019-MO-045 (S.C. Sup. Ct. filed December 18, 2019).

⁴ Besides this, this case touches upon a whole host of other broadly important subjects in respect to which the Court might clarify or further develop the state’s case law: the relationship between premises liability and “ordinary” negligence; the nature and extent of a contractor’s liability for dangerous conditions associated with a construction site; the applicability of Restatement (Second) of Torts § 343A, regarding “Known or Obvious Dangers;” the standard for granting a mistrial; whether a plaintiff, as opposed to a non-party witness, can avoid a mistrial on the ground that their reference to liability insurance before the jury was “inadvertent;” the trial court’s gatekeeping function when a party proposes to offer expert testimony from an expert from whom material documents/information have been consciously withheld by the proponent of the expert’s testimony. (*See generally* Pet.)

noncompliance with Rule 220 were already put to rest by this Court's order *In re Memorandum Decisions by the Court of Appeals*, 323 S.C. 53, 471 S.E.2d 456 (1993). Respectfully, this is not so.

To begin with, *In re Memorandum Decisions* says nothing about whether the Court of Appeals can issue an *unpublished* opinion, and thus strip it of precedential value. It is critically important to the integrity of our judicial system that there are safeguards as to when an opinion may be set aside as non-precedential. This goes directly to the fundamental principle of equal justice under the law.

By its plain terms, Rule 220(b)(1) and the safeguards set forth therein apply only to this Court, not the Court of Appeals. Nothing in *In re Memorandum Decisions* says otherwise. Indeed, *In re Memorandum Decisions* recognizes the different treatment of this Court and the Court of Appeals under Rule 220(b)(1) and (2), respectively. *Id.* at 54, 471 S.E.2d at 457 (“The authority of the appellate courts to issue an opinion without giving a reason for each issue is, however, *different*. The Supreme Court can do so whenever any of the conditions of the second part of § 18-9-280 are met; the Court of Appeals may only do so when an issue is manifestly without merit. Rule 220(b)(1) and (2), SCACR.”). In fact, despite its title, *In re Memorandum Decisions* does not actually say that the Court of Appeals can issue a “memorandum” opinion per se; rather, it says the Court of Appeals may use a “similar format” to that which this Court uses for memorandum opinions to meet S.C. Code Ann. § 14-8-250’s⁵ requirement that the Court of

⁵ Section 14-8-250 states,

In every decision rendered by the Court [of Appeals], every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the Court must be stated in writing and must, with the reason for the Court's decision, be

Appeals give a reason for deciding each issue raised in the appeal.⁶

Moreover, *In re Memorandum Decisions* did not do away with, nor could it have, the “essential” requirement that the Court of Appeals’ opinions “make[] *clear* what disposition has been made of the case, and the *reasons* for its action.” *See Id.* at 55, 471 S.E.2d at 457 n. 1 (“If the Court makes it *clear* what disposition has been made of the case, and the *reasons* for its action, nothing more is *essential*.”) (emphasis added) (quoting *Miller v. Atlantic Coast Line Railroad Co.*, 140 S.C. 123, 224, 138 S.E. 675, 708 (1926), *cert. denied*, 275 U.S. 556, 48 S.Ct. 117, 72 L.Ed. 424 (1927)). The Subject Decision is simply a mass of string-cited legal propositions with, quite literally, no reason given as to how they apply to this particular case. In no reasonable way can it be said that the Subject Decision met the essential requirement of making *clear* the *reason* for the Court of Appeals’ decision on each issue/argument raised in the appeal. Indeed, not even Mrs. Connelly herself actually suggests it did so; the most she says is that the Subject Decision “followed the approved format.” (Reply p. 7.)⁷ Unless form is literally to be elevated over substance, that is not good enough here.

preserved in the record of the case; provided, that the Court need not address a point which is manifestly without merit.

The language of Rule 220(b) and (b)(2) is substantively identical.

⁶ It should also be noted that *In re Memorandum Decisions* did not actually address the fact that, unlike Rule 220(b)(1) and § 18-9-280, both of which expressly authorize this Court, and only this Court, to issue unpublished “memorandum” *opinions*, Rule 220(b)(2) and § 14-8-250 speak only to the Court of Appeals’ authority to decline to “address a *point* which is manifestly without merit.” (emphasis added).

⁷ Mrs. Connelly dilutes even this weak defense of the Subject Decision when (in her Argument “c,” addressed more fully below), she suggests Winsor’s complaints about the Subject Decision are not properly addressed via petition for a writ of certiorari but rather a petition for a writ of mandamus. While, as explained below, Winsor disagrees with Mrs. Connelly’s contention that this issue is not properly raised via the instant petition, Mrs. Connelly’s very suggestion that a writ of mandamus is the proper vehicle for relief betrays her own view that the Subject Order is so fundamentally lacking in substance, so clearly noncompliance with Rule 220, that the Court of Appeals has duty to issue a proper decision as a *ministerial* act. (*See* Reply pp. 8–9.)

In a single, conclusory sentence, Mrs. Connelly “argues” that Winsor’s petition “should be denied because it appears to restate all of the arguments made in its Appellate Brief, and therefore does not present questions without unnecessary detail or with concise argument as required in Rule 242(d).” (Reply p. 9.) First off, Mrs. Connelly’s conclusion that Winsor has not presented questions without unnecessary detail or with concise argument is a non sequitur, there being no apparent causal connection between this conclusion and the only premise she offers to support it (i.e., that Winsor’s petition “appear to restate all of the arguments made in its Appellate Brief”). Moreover, it makes no sense why Mrs. Connelly would find fault with Winsor’s cert petition for tracking its appellate brief. Indeed, it is “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing [that can] be included in [a] petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(2), SCACR; *see also* Order re: Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals, Order No. 2014-07-16-01 (S.C. Sup. Ct. filed July 16, 2014) (“Under Rule 242(d)(2), SCACR, ‘[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.’ Therefore, in most cases, the preparation of the petition and return will involve no more than taking the arguments already made in the briefs before the Court of Appeals, putting in the additional case history information, and updating and checking the citations.”). To the extent Mrs. Connelly contends that the supposed unnecessary detail and/or lack of concise argument is somehow reflected in the length of Winsor’s petition, Winsor submits the length of its petition is entirely appropriate given the size of the record and the number of material issues Winsor has, in good faith, duly raised on appeal. And, of course, this Court granted Winsor’s motion to exceed the page limit in Rule 242(d)(4) by order dated January 8, 2020.

Re: Mrs. Connelly's argument "c"

According to Mrs. Connelly, "The Petition should be denied because [Winsor'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." (Reply pp. 7–8.) Here, Mrs. Connelly does not merely argue that the Court does not *have* to grant Winsor's petition but, essentially, that it *cannot* do so. Respectfully, she is mistaken.

First off, even were Mrs. Connelly correct about Winsor's "complaint about the manner in which the Court of Appeals issued its unpublished decision" not being reviewable by this Court on cert, it would not require denial of Winsor's petition in its entirety; that "complaint" (*see* Pet. pp. 8–10) is but one of many (*see* Pet. pp. 10–29) Winsor has properly raised. Moreover, the fact that Mrs. Connelly is wrong on the merits is proved by the plain language of Rule 242(a), which provides, "The Supreme Court, or any two (2) justices thereof, may in its discretion, on motion of any party to the case or on its own motion, issue a writ of certiorari *to review a final decision of the Court of Appeals.*" (emphasis added). Of course, it is proper for this Court to review the decision of the Court of Appeals on writ of certiorari to the Court of Appeals. *See, e.g., Johnson v. Lloyd*, 407 S.C. 610, 757 S.E.2d 705 (2014) (reversing the decision of the Court of Appeals on the basis that it erred in addressing the merits of the case because the issue on which it had ruled was not preserved for review); *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (reversing the Court of Appeals' conclusion that a particular issue was not preserved for review).

3. About Mrs. Connelly's Statement of the Case

Though not an argument per se, Mrs. Connelly's Statement of the Case reflects a view of

the evidence that is at best heavily biased. Winsor would call particular attention to the following.

What Mrs. Connelly refers to as “a black plastic construction barrier fence,”⁸ is in fact a “silt fence,” not a “construction barrier fence.” (See R. pp. 402:4–404:20, pp. 1211–1216, 1218.)

On the day of the Subject Accident, the silt fence did not “become partially detached from its stakes . . . and bl[o]w into the sidewalk causing [Mrs.] Connelly to fall” (Reply pp. 1–2.) According to Mrs. Connelly herself, the silt fence was already in the Claimed Accident Condition at the time of the Subject Accident, and Mrs. Connelly saw the Claimed Accident Condition beforehand, recognized it as a hazard, and chose to try to run around it but was unsuccessful in doing so because the wind blew already-downed fence material into contact with her foot. (See R. p. 164:4–10, p. 165:9–20, p. 166:4–18; *see also* [from Smith’s testimony] R. p. 337:1–6, pp. 337:12–338:2; [from Mrs. Connelly’s counsel’s opening statement] R. pp. 137:10–138:9; [from Mrs. Connelly’s counsel’s closing argument] R. pp. 577:21–578:1.)

Mrs. Connelly represents to the Court that Winsor’s principal, Jeff Thomas (“Thomas”), “admitted . . . he was aware that his own workers or subcontractors often walked across the [silt fence] causing it to come down.” (Reply p. 2.) While it is true that, when asked about workers sometimes damaging a silt fence, Thomas agreed “[t]hat is *one* of the ways that the fences can come down,” Mrs. Connelly neglects to mention his testimony that *workers do not do this when he is onsite*, which is almost daily; that he himself carries a staple gun in his truck for silt fence repair; and that he had never seen the silt fence in the Claimed Accident Condition. (R. p. 392:10–21, p. 394:13–24, p. 404:17–25, pp. 406:11–407:13 (emphasis added), pp. 430:11–436:4, pp. 1217–1218.) And, of course, that the Subject Accident happened on a *Monday* morning.

⁸ (Reply p. 1.)

Mentioning the ARB warning that Thomas received some three months before the Subject Accident, on March 17, 2011, Mrs. Connelly wrongfully refers to Thomas as having “speculated” that he “had to have fixed the fence” or he would have been fined. (Reply p. 2.) Thomas testified as follows, without objection:

[F]or me to try to remember whether or not, if I have three or four jobs going on, that I’ve fixed the silt fence at 1376 Smythe Street between March 17, 2011, and June 6, 2011. I’m not going to remember that. *I will tell you this though, once I got this notification on March 17th, we repaired the silt fence, or would have been fined.*

(R. pp. 462:21–463:2 (emphasis added).) This is not *speculation*; this is *evidence*, competent as any other.

Mrs. Connelly also neglects to mention the only evidence in the record about the ARB’s enforcement procedure: first comes a warning, then, “if you do not correct the situation,” a fine. (R. pp. 403:25–404:9.) Mrs. Connelly also wrongfully suggests that Winsor had some duty to present evidence from the ARB to corroborate Thomas’s testimony. Not so. Consistent with the only evidence in the record, Winsor, the defendant, testified (via Thomas) that it would have been fined by the ARB had it not properly addressed the March 17th warning about the silt fence being in disrepair. It is Mrs. Connelly who did not present any evidence whatsoever to contradict Winsor on this point. Further still, Mrs. Connelly does not mention that the testimony from her own witness, Smith, about her observation of the condition of the silt fence in the week before the Subject Accident was called into serious question when she was impeached with her contradictory deposition testimony. (R. pp. 345:11–348:10, pp. 350:4–351:16.)

CONCLUSION

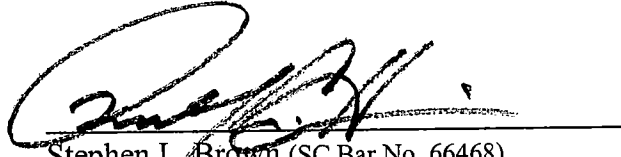
For the reasons set forth in its petition for a writ of certiorari and also herein, Winsor asks the Court to grant its petition, reverse the Subject Decision, and render its own decision, reversing

the trial court and determining that Winsor is entitled to judgment in its favor as a matter of law or, as a lesser alternative, determining that Winsor is entitled to a new trial or, as a lesser alternative, determining that the Subject Decision fails to comply with Rule 220 and remanding the case to the Court of Appeals for it to render a decision that complies with Rule 220 and properly rules on every material point Winsor raised to it on appeal.

Respectfully submitted,

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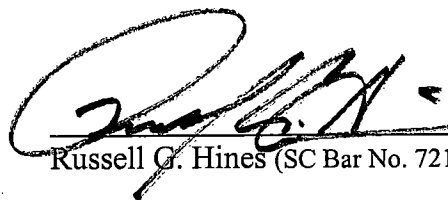
Counsel for Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioner, Winsor Custom Homes, LLC, certify that the foregoing **Petition for a Writ of Certiorari** was served on Respondent, Rosemary Connelly, on February 14, 2020, by depositing a copy of it in the U.S. Mail, with sufficient postage, addressed as follows to her counsel of record:

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Respectfully submitted,
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Dated: 2/14/20