THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2015-CP-10-00955
Appellate Case No. 2019-001520

Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., and Jack Love, individually, and on behalf of all others similarly situated, Appellants,

v.

Island Pointe, LLC, Complete Building Corporation, Tri-County Roofing, Inc., WC Services, Inc., Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC, Eloy Alonzo Vasquez, JMC Construction, Inc., and JMC Construction, LLC, Defendants,

Of whom WC Services, Inc., is the Respondent.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. A. Was it error to deny a motion for a directed verdict and motion for judgment notwithstanding a verdict ("JNOV") against WC Services, Inc. ("WCS") when the evidence at trial was uncontroverted that WCS failed to install fire sprinklers in the attics of the Palmetto Pointe buildings, in violation of the applicable law and building code?

B. Was it error to deny a motion for directed verdict and motion for JNOV against WCS when the evidence at trial was uncontroverted that WCS penetrated and damaged the interior firewalls at Palmetto Pointe, in violation of the project's plans and the building code?

II. Did the trial court err in refusing to charge the jury on the validity of more stringent, local building regulations (Plaintiffs' requested charge no. 38) and the Folly Beach ordinance requiring attic fire sprinklers in two family dwellings (Plaintiffs' requested charge no. 39) when the requested charges correctly stated the law applicable to the case; when the requested charges were not otherwise covered in the trial court's charges; and when the requested charges were necessary to enable the jury to understand fully the law of the case and issues involved?

III. Assuming, *arguendo*, this point is material to Issue/Argument I.A, did the trial court err in allowing (and not striking) inadmissible hearsay testimony from defense expert Alan Schweickhardt (and permitting subsequent, similar references)?[1]

[1] Plaintiffs raise this issue out of an abundance of caution, to guard against any potential for this testimony to be found material to the Court's review of the denial of their directed verdict and JNOV/new trial motions. Plaintiffs' primary contention (which is presented in the context of Issue/Argument I.A) is that, regardless of its admissibility, the substance of this testimony is of no moment. The evidentiary point (Issue/Argument III) is relevant only to the extent that the substance of the testimony could provide a basis for affirming the trial court.

STATEMENT OF THE CASE

This construction defect lawsuit was commenced in Charleston County on February 13, 2015, in the Court of Common Pleas. (R. pp. 9-26.) It involves the construction of twenty (20) townhouse-style duplexes totaling forty (40) individual condominium units and common elements in Folly Beach, South Carolina known as Palmetto Pointe.[2]

Development of Palmetto Pointe began in or about 2005. (*See* R. pp. 431-465.) Certificates of occupancy were issued for all buildings involved in this suit by the end of 2007. (*See* R. pp. 492-540.) The construction work was done by general/prime contractor Complete Building Corporation ("CBC") and various lower-tier contractors, among them, WCS. WCS was the subcontractor responsible for supplying and installing fire sprinkler systems. (R. pp. 431-465; R. pp. 467-473.)

Plaintiffs' operative Complaint asserts causes of action against WCS for negligence and breach of the implied warranty of workmanlike service. (R. pp. 27-45.) The claims are founded on allegations that WCS violated the applicable

[2] To ensure that it covered the common and individual interests of all owners, this case was brought by the POA (who is responsible for maintaining Palmetto Pointe's common elements, per the Horizontal Property Act, S.C. Code Ann. §§ 27-31-10 to -440, and the regime's governing documents) and a unit owner, individually, and as putative class representative for all other owners. (R. pp. 11-45.) Ultimately, however, the POA received claim assignments from all owners,

building code in two ways, each consistent throughout all condominiums involved in this case, each by itself providing a basis of liability under both Plaintiffs' negligence and warranty theories: (A) WCS did not install fire sprinklers in the attics, thus failing to comply with an applicable local law that required it to do so, and (B) WCS failed to install the fire sprinkler systems according to the correct plans and improperly installed components (piping) within the fire-suppression walls separating each of the twenty (20) pairs of adjoining units (the "Firewalls"), and damaged the firewall assemblies.

The case came on for a jury trial from May 6–16, 2019, the Honorable Jennifer B. McCoy presiding. The following pertinent—and incontrovertible—evidence was presented at trial:

- The applicable building code was the 2003 International Residential Code (the "Building Code"). (R. p. 204, line 13 – p. 245, line 11.)

- The Building Code did *not* nullify any applicable provisions of local, state or federal law. (R. p. 209, line 15 – p. 210, line 11.) The violation of any such law constituted a violation of the Building Code.

- WCS's contract with CBC required it to "[f]urnish all material, labor, and equipment necessary to complete all FIRE SPRINKLER SYSTEM AND RELATED work in accordance with **the City of Folly Beach's fire sprinkler system requirements**…". (R. pp. 467-473 (emphasis in original).)

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mooting any issue relating to the class device. (R. pp. 541-661; *see also* R. p. 72, lines 11-22.)

- Section 90.08 of the Folly Beach Code of Ordinances (the "Folly Beach Sprinkler Ordinance") was in effect during the construction of Palmetto Pointe. (*See* R. pp. 429-430; R. pp. 662-663; R. p. 89, line 23 – p. 98, line 1.)

- *With only one exception* (explained below), the Folly Beach Sprinkler Ordinance required fire sprinklers to be installed in the attics of all two-family dwellings (the "Attic Sprinkler Requirement"). (R. pp. 429-430; *see also* R. pp. 662-663.)

- All twenty (20) of the duplexes involved in this suit are two-family dwellings.

- *The only way* to avoid the Attic Sprinkler Requirement was to obtain a *variance* under Subsection (D) of the Folly Beach Sprinkler Ordinance, which provides, "Variances . . . may [(only)] be granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council." (R. pp. 429-430; R. pp. 662-663.)

- There is no evidence that a variance from the Attic Sprinkler Requirement was granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council.

- Attached to WCS's contract with CBC was a copy of a letter from Folly Beach Building Official Tommy Hall to Tommy Browne, a representative of Palmetto Pointe's developer, dated March 6, 2006, "**RE: The fire suppression systems at the 'Peas Island Development'**" (the "Hall Letter"). (R. pp. 474-475 (emphasis in original); *see also* R. pp. 467-473).)

- The body of the Hall Letter reads as follows:

> This letter is to recap our meeting February 14, 2016. That meeting was scheduled by you and was for clarification of The City of Folly Beach's fire sprinkler system requirements. Present at that meeting was [Fire] Chief George Tittle, Tommy Hall, Building, Chris Union, and yourself.
>
> [The Folly Beach Sprinkler Ordinance] covers the City's requirements for fire sprinkler systems. Your project requires the following:
>
> 1. Each unit will be equipped with an NFPA 13D fire sprinkler system.
> 2. Per [Subsection (C) of the Folly Beach Sprinkler Ordinance], you may omit the garage area where there is a 1 hr. fire construction separating the dwelling from the garage.
> 3. The "Club House" must also be sprinkled in accordance with its primary occupancy.
> 4. The area around the entrance gate must be widened to accommodate a fire truck.
>
> I am enclosing a copy of [the Folly Beach Sprinkler Ordinance] for your reference. If I can [b]e of further assistance call me ….

(R. pp. 474-475.)

- WCS did not install sprinklers in any of the attics of the forty (40) condominium units at Palmetto Pointe.

- Only one set of engineer-certified fire sprinkler plans (the "Sprinkler Plans") is known to exist. (R. pp. 476-483.)

- The Sprinkler Plans were designed by WCS employee Chad Christopher ("Christopher") and certified by outside engineer Chris Constantine ("Constantine").

- Neither Christopher nor Constantine was ever provided a copy of WCS's contract with CBC, the Folly Beach Sprinkler Ordinance, or the Hall Letter. Had they known of these documents, the Sprinkler Plans would not have designed/certified as they were.

- The Sprinkler Plans did not call for any penetrations within the Firewalls (which are, of course, *interior* walls shared by adjoining units), but rather called for piping to be installed only within *exterior* walls. (*See* R. p. 466; R. pp. 476-483.)

- Contrary to the Sprinkler Plans, WCS installed piping within the Firewalls, penetrating them at multiple levels within every condominium. Each penetration caused damage and is an uncontested Building Code violation. This condition negates the fire rating of every one of the Firewalls. (*See* R. p. 90, line 18 – p. 106, line 19; p. 109, line 23 – p. 111, line 5; p. 116, line 17 – p. 119, line 23.)

At the close of all evidence, Plaintiffs timely moved for a directed verdict as to WCS's liability on both causes of action, arguing that the only remaining question for the jury was the amount of damages caused by WCS's wrongful acts/omissions. (R. p. 271, line 8 – p. 284, line 11.) Despite describing it as "probably as close a call of a directed verdict I've seen in a while…", the trial court denied Plaintiffs' motion. (R. p. 284, line 8 – p. 285, line 1.)

Before submitting the case to the jury, the trial court denied Plaintiffs' timely request that it give their proposed charges No. 38 and 39.[3] Number 38 instructed that the Building Code did not nullify any provisions of local, state or federal law. (R. p. 678.) Number 39 was the substance of the Folly Beach Sprinkler Ordinance. (R. p. 679.)

The jury returned a verdict in favor of WCS on both claims. (R. pp. 1-4; *see also* R. pp. 5-6.)[4]

Plaintiffs timely moved for JNOV or a new trial. (*See* R. pp. 680-687; R. pp. 699-708; *see also* R. p. 397, lines 20–22.) The trial court denied the motion by order filed July 15, 2019. (R. p. 7.) It denied Plaintiffs' timely motion for reconsideration by order filed August 6, 2019. (R. pp. 709-715; R. p. 8.)

This appeal follows. Plaintiffs' notice of appeal was timely served and filed September 6, 2019. (R. pp. 723-740.)

STANDARD OF REVIEW

Motions for Directed Verdict and JNOV

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn

[3] Via email during trial, on May 13, 2019, the Court asked the parties to submit proposed jury charges. Counsel emailed Plaintiffs' proposed jury charges No. 38 and 39 on May 14, 2019. (*See* R. pp. 677-679.)

[4] The jury also returned a verdict in favor of Plaintiffs on their claims against other defendants who are not parties to this appeal.

therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Public Transp.*, 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). When considering such motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Creech v. South Carolina Wildlife & Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Essentially, the job of the reviewing court is the same as the trial court: to determine whether a verdict for a party opposing the motion is reasonably possible under the facts as liberally construed in his favor. *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). In doing so, the court must determine whether any evidence existed on each element of the cause of action. *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989).[5] "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998). This rule, however, does not authorize submission of speculative,

[5] The elements of a negligence claim are (1) a duty of care owed by the defendant to the plaintiff, (2) the defendant's breach of that duty by a negligent act or omission, and (3) damages to the plaintiff proximately resulting from the defendant's breach of duty. *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). To prevail on a claim for breach of the implied warranty of workmanlike service, the plaintiff must show that the builder failed to perform its

theoretical, or hypothetical views to the jury. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997).

New Trial Motions, Jury Charges, and Evidentiary Issues

Motions for a new trial, requests for jury charges, and the admission or exclusion of evidence are all within the discretion of the trial court and subject to an abuse-of-discretion standard of review. *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (new trial motions); *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (jury charge requests); *State v. Winkler*, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010) (evidentiary issues). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole*, 378 S.C. at 404, 663 S.E.2d at 33.

Questions of Law

The appellate court "is free to decide questions of law . . . with no particular deference to the trial court." *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014).

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work in a careful, diligent, and workmanlike manner. *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008).

ARGUMENT

I. The trial court erred in denying Plaintiffs' motion for a directed verdict and motion for JNOV or a new trial against WCS.

The evidence at trial unequivocally showed that WCS violated the Building Code (A) by failing to comply with the Attic Sprinkler Requirement and (B) by failing to follow the Sprinkler Plans and installing piping components within the Firewalls, thereby damaging the firewalls. The trial court should have granted judgment as a matter of law as to WCS's liability[6] on either or both of these grounds.

Further, Plaintiffs are entitled to judgment against WCS for at least nominal damages, which warranted the jury's assessment of an award for punitive damages, on account of WCS's violation or invasion of Plaintiffs' right by violating the Building Code. *See Kincaid v. Landing Development Corp.*, 289 S.C. 89, 92–93, 344 S.E.2d 869, 872 (Ct. App. 1989) (supporting the proposition that violation of an applicable building code is negligence *per se*); *Gordon v. Rothberg*, 213 S.C.

[6] Plaintiffs recognize that, because of the "partial" nature of their directed verdict and JNOV motions (arguing, as they did, for judgment as a matter of law as to liability only), correction of the trial court's error in denying these motions would take the form of a new trial on damages. *See* S.C. Code Ann. § 15-33-125 ("A new trial may be granted to the plaintiff on the issue of damages only and not liability when the only reasonable inference to be drawn from all the evidence, viewed in the light most favorable to the defendant, is that the plaintiff is entitled to a verdict in his favor on the issue of liability as a matter of law. Unless the plaintiff is entitled to a directed verdict on the issue of liability, any new trial must include both issues of liability and damages.").

492, 504, 50 S.E.2d 202, 208 (1948) ("Where, as in this case, the legal rights of the [plaintiff] had been invaded, the law presumes that he suffered some actual damages, and it was therefore not improper for the trial judge to direct a verdict for such form of damages against the appellants, leaving the amount thereof to be determined by the jury.").

A. The trial court erred in not recognizing that the only reasonable conclusion to draw from the evidence is that WCS violated the Building Code by failing to comply with the Attic Sprinkler Requirement.

Violation of an applicable building code is negligence *per se*. *See Kincaid*, 289 S.C. at 92–93, 344 S.E.2d at 872. There is no reasonable way in which WCS's failure to comply with the applicable law and the terms of its contract with CBC (requiring its compliance with the applicable law) can be deemed anything other than negligent conduct and a breach the implied warranty of workmanlike service.

The only potential route for WCS to try to escape this result is by arguing that the Attic Sprinkler Requirement (though undoubtedly in effect at the relevant time) somehow did not apply to Palmetto Pointe. On this record, however, that route is a dead end.

There are only two places in the record to which WCS might conceivably point to try to suggest its work at Palmetto Pointe was exempted from the Attic Sprinkler Requirement. One is the Hall letter, which is quoted in full above. The

other comes from the testimony of defense expert Alan Schweickhardt during a certain line of questioning by WCS's counsel.

Mr. Schweickhardt was retained to develop a defense scope of work for repairing defects in various areas at Palmetto Pointe. (R. p. 158, line 20 – p. 159, line 8; p. 161, lines 15-23.)

WCS's counsel asked Mr. Schweickhardt a series of questions aimed at pointing out the fact that the installation of attic sprinklers was not among the repairs he identified as being needed in any of his reporting. (R. p. 158, line 20 – p. 162, line 14.) WCS's counsel elicited testimony from Mr. Schweickhardt that some two (2) years before trial, ten (10) years after Palmetto Pointe was built, in 2017, Mr. Schweickhardt had spoken with now-deceased former Folly Beach Fire Chief George Tittle on the phone.[7] WCS's counsel continued his line of questioning, focused on the fact that, despite having spoken with Mr. Tittle years ago, Mr. Schweickhardt had still not included the installation of attic sprinklers in his repair scope. (R. p. 159, line 21 – p. 161, line 15.) Critically, Mr. Schweickhardt explained that "the intent of [his] scope [wa]s not to cover the fire sprinklers because [he] knew [WCS's retained expert] Mark Lazo…was *the* expert in the fire sprinklers," to whom Mr. Schweickhardt expressly "defer[red]…on the

[7] About what, we do not know. (*See* R. p. 160, lines 13-14 ([WCS's counsel:] "Your Honor, I'm not asking him to tell us what George Tittle said").)

fire sprinkler installation in the attic." (R. p. 161, lines 15-23 (emphasis added).) However, WCS's counsel inquired, nevertheless.

Plaintiff counsel objected to this testimony, as impermissible hearsay and lacking in foundation. However, the testimony was heard by the jury, without limiting instruction by the trial court.

Setting aside the trial court's error in allowing this testimony from Mr. Schweickhardt (which error is addressed in Argument III below), neither it nor the Hall Letter is any use to WCS here. Neither provides evidence of the only thing that could possibly matter: a variance granted after a hearing by the Fire Chief, Building Official and member of the building industry appointed by the City Council. Neither Mr. Schweickhardt's testimony nor the Hall Letter constitutes direct *evidence* of the required variance; nor can they reasonably be said to constitute *evidence* from which a reasonable inference can be drawn that would allow a jury to conclude the required variance was granted. At best, they are mere springboards for impermissible speculation, plainly insufficient to create a jury question. *The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.")

B. The trial court erred in not recognizing that the only reasonable conclusion to draw from the evidence is that WCS violated the Building Code by failing to install the fire sprinkler systems in accordance with the Sprinkler Plans and by damaging the Firewalls.

Similar to I.A above, the only potential route for WCS to try to escape liability (under both negligence and warranty theories) for installing a sprinkler system contrary to the Sprinkler Plans, is for WCS to argue that the Sprinkler Plans might have been superseded by some other, later set of plans it did follow—a purely theoretical set of plans, of which there is no evidence on which to even reasonably conclude their existence, much less their substance and whether they were followed. Here again, WCS is armed with no more than impermissible conjecture and speculation, plainly insufficient to create a jury question. *Huffines*, 365 S.C. at 188, 617 S.E.2d at 130.

II. The trial court erred in refusing to give Plaintiffs' requested jury charges No. 38 and 39.

The trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence. *Wall v. Suits*, 318 S.C. 377, 458 S.E.2d 43 (Ct. App. 1995). If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. *Sanders v. Western Auto Supply Co.*, 256 S.C. 490, 183 S.E.2d 321 (1971). Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and

issues involved, a refusal to give a requested charge is reversible error. *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991).

Plaintiffs' requested jury charges No. 38 and 39 accurately stated the correct law and should have been charged to the jury. Furthermore, there was ample evidence to support the charges to the jury; indeed, it was beyond dispute that WCS did not install attic sprinklers. Plaintiffs were clearly prejudiced by the trial court's erroneous refusal to give their requested jury charges No. 38 and 39, as they were the only controlling law applicable to the Attic Sprinkler Requirement.

The trial court erred in refusing to give these charges, then again in denying Plaintiffs a new trial in response to their post-trial motion raising this error, which error plainly prejudicial and eversible. Plaintiffs were, and are, entitled to a new trial against WCS, which, as noted above, should be as to damages only, because Plaintiffs are entitled to judgment as a matter of law against WCS as to liability.

III. Assuming, *arguendo*, this point is material to Issue/Argument I.A, the trial court erred in allowing (and not striking) inadmissible hearsay testimony from defense expert Alan Schweickhardt.

As explained above, the aforementioned testimony by Mr. Schweickhardt provides no basis to support affirmance of the trial court. But out of an abundance of caution, Plaintiffs also maintain it was error for the trial court to allow it.

To the extent there is any way a jury could infer from Mr. Schweickhardt's testimony that a variance had been granted, it would have to derive from the idea

(which itself is unfounded speculation, incapable of supporting a jury verdict, *see* *Huffines*, 365 S.C. at 188, 617 S.E.2d at 130) that Mr. Tittle told Mr. Schweickhardt that a variance had been granted, unquestionably an out of court statement (by Mr. Tittle) offered in evidence to prove the truth of the matter asserted and therefore inadmissible hearsay. *See* Rule 801, SCRE; Rule 802, SCRE. This, and similar hearsay and innuendos permitted after the door had been opened with Mr. Schweickhardt, should not have been permitted to occur.

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the trial court and remand this case for a new trial on damages only or, as a lesser alternative, a new trial absolute.

(Signature on next page)

Respectfully submitted,

By: /s/ Edward D. Buckley, Jr.

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Dated: October 19, 2020
Charleston, South Carolina

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Of whom WC Services, Inc., is the Respondent.

CERTIFICATION FOR FINAL BRIEF OF APPELLANTS

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I, Russell G. Hines, of Young Clement Rivers, LLP, do hereby certify that the Final Brief of Appellants complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

By: /s/ Russell G. Hines

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