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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2018-002166

Kevin M. Granatino, ... Appellant,

vs.

Calvin Williams, Clemson University, South Carolina
Department of Transportation, and Thrift Development Corporation, ... Defendants,

Of which South Carolina Department of Transportation and
Thrift Development Corporation are . . . . Respondents.

APPELLANT'S PETITION FOR REHEARING, MEMORANDUM IN SUPPORT THEREOF, AND SUGGESTION FOR REHEARING EN BANC

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Attorneys for Appellant

Pursuant to Rule 221, SCACR, Appellant Kevin M. Granatino, by and through his undersigned counsel, respectfully petitions the Court of Appeals for rehearing of the matter decided by Opinion No. 2022-UP-003, which was filed by the Court of Appeals on January 5, 2022 (referred to hereinafter as "**the Opinion**"). To quote the Opinion, "[t]his is an appeal of a summary judgment against [Appellant] in a personal injury case. . . . The [circuit] court found . . . that the case could not proceed because [Appellant] had not retained an expert. We affirm based on our finding that the expert issue precludes the case from going forward." This, of course, places the focus of the present analysis on what is meant by "expert issue."

The "expert issue" to which the Court made reference is <u>not</u> the fact that Appellant failed to retain an expert. That is a merits-based conclusion which the Court did not reach. Instead, the Opinion makes clear that the trial court order from which appeal was taken was affirmed on issue-preservation grounds. To restate the Opinion, because of its conclusion that Appellant failed to preserve his arguments regarding the necessity of expert testimony for appellate review, the Court held that it was bound by the trial court's decision that expert testimony was, in fact, necessary in order to sustain any viable claim for relief to which Appellant may have been entitled. In arriving at this conclusion, and with all due respect to the Court of Appeals, this decision constitutes a misapprehension, or overlooking, of pertinent decisions regarding issue preservation, appellate review, and the necessity of expert testimony.

For the reasons set out below, Appellant respectfully requests that the Court of Appeals withdraw the Opinion, and that it grant a rehearing of the matters decided therein.

Also, pursuant to Rule 219(b), SCACR, this Petition is joined by a suggestion, offered by Appellant, for a rehearing en banc.

I. THE OPINION REPRESENTS A MISAPPREHENSION, OR OVERLOOKING, OF THE COURT'S AUTHORITY TO CONSIDER WHETHER SUMMARY JUDGMENT HAD BEEN PROPERLY GRANTED AGAINST THE ENTIRETY OF APPELLANT'S PERSONAL INJURY ACTION FOR LACK OF EXPERT TESTIMONY.

Rule 56(c), SCRCP, provides that summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Both conditions must be met.

With respect to these proceedings, and as to this specific issue, the only "material fact" is whether Appellant had engaged an expert, which he did not. This, however, leads directly to the question that is central to this appeal: *Under the facts and circumstances of this case, was it necessary for Appellant to have expert testimony in order to sustain the viability of each and every theory of recovery pursued against Respondents?*

The trial court order from which appeal was taken held that there was no viable cause of action through which Appellant could prevail in his personal injury action against either Respondent in the absence of expert testimony. In short, expert testimony was both necessary and essential. This resulted in the entry of summary judgment against the entirety of Appellant's claim. But this is contrary to law.

Consistent with the laws of this State and the decisions of the appellate courts, there are some negligence claims involving professionals where expert testimony is required, and some where it is not. The types of professional liability cases where expert testimony is required are those specifically addressed by statute, to the extent the claim against the professional arises from or relates to his or her professional services, see, e.g., S.C. Code § 15-36-100(G), or where expert testimony is necessary to aid the trier of fact's

determination of fault, particularly regarding the elements of "duty" or "causation," see, e.g., Dawkins v. Union Hosp. Dist., 408 S.C. 171, 758 S.E.2d 501 (2014). Otherwise, expert testimony is generally not necessary to sustain a negligence cause of action, even against a licensed professional.

The Court of Appeals did not misapprehend or overlook these principles. In fact, they are expressly acknowledged in the Opinion. Where the Court's analysis went awry, however, is with respect to the Court's perception of its authority to examine the trial court's decision on summary judgment.

It has never been contended in this case—not in appellate proceedings, nor in proceedings below—that expert testimony is statutorily required in order to prosecute personal injury claims against either Respondent. Therefore, to the extent that expert testimony is required in order to sustain a personal injury action against either Respondent, that must arise because of the fact-specific complexity of the case. In other words, there is no black-letter rule that requires expert testimony to be proffered against general participants in the construction industry in order to sustain a legally cognizable personal injury action against them; that type of rule does not exist. And, as set out in Appellant's briefs to this Court, Appellant's personal injury claim against Respondents was not addressed merely to the sufficiency of pedestrian safety measures; his claim was based on the contention that there were no pedestrian safety measures, at all. It is these very circumstances which led Appellant to posit the rhetorical question: *Is expert testimony really necessary to establish the proposition that, at the busiest intersection in the college town of Clemson, some measures be deployed during construction to promote the safe passage of pedestrians?* This would seem to be the very type of information that is within

the common knowledge and experience of the ordinary person, such that expert testimony is unnecessary.

In fairness, the Court of Appeals did not squarely address this aspect of the trial court's error in the Opinion. Instead, the issue was skillfully avoided on issue-preservation grounds (which will be addressed in the following section). But this, too, was error.

When Respondents filed their motions for summary judgment, Appellant responded with a broad-based denial that summary judgment was appropriate, on both factual and legal grounds. After the trial court's order granting summary judgment was entered, Appellant filed a motion pursuant to Rule 59(e), SCRCP, which asserted both general and specific reasons—both factual and legal—as to why summary judgment had been improvidently granted.

The issue presented to the Court of Appeals in these proceedings, then, is whether it was appropriate for the trial court to grant summary judgment in the first place; that is to say, whether Respondents—as the parties moving for summary judgment in the underlying proceedings—had met their burden of demonstrating that the undisputed material facts compelled judgment as a matter of law in their favor. To that end, the Court of Appeals had (and presently has) the authority to examine that question. And, because there are essentially no material facts in dispute on this, the "expert issue," the focus of the Court's review in these appellate proceedings is on the narrow question of whether the lack of expert testimony on behalf of Appellant was fatal to each and every of Appellant's avenues of relief against Respondents.

The Court's consideration of this question is purely legal. Consequently, in these appellate proceedings, this Court's examination of the trial court's analysis should have

been reviewed according to the de novo standard, free from any particular deference. The trial court was either correct, or incorrect, that, as a matter of law, Appellant's claim against Respondents required expert testimony. If the trial court's decision on the "expert issue" was error—that at least some of Appellant's claim against either Respondent could survive summary judgment even without expert testimony—then the trial court's order granting summary judgment must be reversed, and the case must be remanded, certainly to the extent that any aspect of Appellant's claim against either Respondent may proceed without expert testimony.

Accordingly, the Court is respectfully requested to grant this petition for rehearing, so that it may squarely address the narrow legal question decided first at the trial court, and now in the Opinion, as to whether each and every aspect of Appellant's claim against either Respondent requires expert testimony to survive summary judgment.

II. THE OPINION MISAPPREHENDED, OR OVERLOOKED, THE CIRCUMSTANCES WHICH MILITATE IN FAVOR OF FINDING THAT THE "EXPERT ISSUE" HAS BEEN PRESERVED FOR APPELLATE REVIEW.

As explained in the preceding section, it is Appellant's position that he has broadly contested the propriety of granting summary judgment in Respondents' favor at all stages of these proceedings. Appellant has done so with due regard for the standard imposed by Rule 56, SCRCP, which requires the party moving for summary judgment to demonstrate that there are no material issues in dispute, and that, in light of the undisputed facts, the moving party is entitled to judgment as a matter of law in its favor.

The latter part of this standard is immediately relevant to these proceedings. When Respondents filed their motion for summary judgment, it became Respondents' burden to demonstrate that Respondents were entitled to judgment as a matter of law in their favor

on all claims presented and as to all theories of recovery alleged. Appellant denied that summary judgment was appropriate on both factual and legal bases. After the trial court entered summary judgment in Respondents' favor, Appellant filed a motion pursuant to Rule 59(e), which again broadly contested the factual and legal bases on which summary judgment was entered.

Appellant does not dispute that, with respect to the "expert issue," a great deal of argument in the proceedings below was dedicated to seeking leave to engage an expert so that the deficiency complained of by Respondents—and ultimately seized upon by the trial court—could be resolved. But Appellant does not concede that it failed to preserve the "expert issue" for appellate review.

For the reasons already addressed, the "expert issue" is inextricably intertwined with Respondents' motions for summary judgment and the proceedings that followed. Specifically, when Respondents filed their motion for summary judgment, arguing in part that summary judgment was appropriate because Appellant had not engaged an expert, Appellant broadly denied that Respondents had met their burden of demonstrating that the facts and law compel judgment as a matter of law in their favor. Later, in Appellant's motion pursuant to Rule 59(e), Appellant directly requested reconsideration of the portion of the trial court's order holding that Respondents "are entitled to judgment as a matter of law because [Appellant] has not presented any expert testimony that they deviated from a professional standard of care." (R. 266.) Certainly, Appellant then proceeded to discuss the challenges he faced with engaging an expert in the proceedings below. But he nonetheless sought reconsideration of the portion of the trial court's order holding that

expert testimony was necessary to sustain each and every avenue of relief against Respondents.

In light of these circumstances, Appellant would respectfully request the Court to re-examine whether the "expert issue" has been sufficiently preserved. In furtherance of this request, Appellant would direct the Court's attention to Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012), which addressed issue preservation in some detail. In the main body of the opinion, the Supreme Court observed that "it may be good practice for us to reach the merits of an issue when error preservation is doubtful, [but that] we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved." Id., 398 S.C. at 330, 730 S.E.2d at 285 (emphasis added).

This line, while perhaps dicta, was a direct response to a separate opinion given in the same case by then-Chief Justice Toal: "I believe that, where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation. When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw." Id., 398 S.C. at 333, 730 S.E.2d at 288.

Appellant would invite the Court to consider these principles when evaluating whether the "expert issue" has been preserved. As discussed previously, Appellant has consistently denied that Respondents are entitled to any form of summary judgment, which includes entitlement to judgment as a matter of law based on the absence of expert

testimony. In that connection, Appellant would contend that the "expert issue" cannot be fairly characterized as "clearly unpreserved."

Moreover, Respondents have never suggested that Appellant has failed to preserve the "expert issue" for review. It is not because Respondents were unaware that this was a procedural option available to them. Section III(b) of Respondents' brief is entitled: "Appellant failed to raise the purportedly improper liability apportionment to the circuit court, and therefore this issue is not preserved for appellate review." This is the only issue preservation argument raised by Respondents. Their silence—particularly when they have spoken on other preservation objections—should be considered.

For these reasons, Appellant would respectfully request the Court to re-examine the portion of the Opinion which holds that Appellant did not sufficiently preserve arguments relating to the "expert issue" for appellate review.

CONCLUDING STATEMENT

For the reasons set out in this Petition, Appellant would respectfully request that the Court of Appeals withdraw its previously issued opinion in this matter, undertake a rehearing of all matters presented in Appellant's briefs, and provide such other and further relief as the Court deems just and proper.

SUGGESTION FOR REHEARING EN BANC

Pursuant to Rule 219(b), SCACR, Appellant respectfully suggests that the rehearing be entertained en banc.

[Signature Page Follows]

Respectfully submitted,

____

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PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): (1) Appellant's Petition for Rehearing, Memorandum in Support Thereof, and Suggestion for Rehearing En Banc

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Respectfully,

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